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Coram Nobis and State v. Stinney: Why South Carolina Should Revitalized America's Legal Hail Mary

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CORAM NOBIS AND *STATE V. STINNEY*: WHY SOUTH CAROLINA SHOULD REVITALIZE AMERICA'S LEGAL "HAIL MARY"

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I. INTRODUCTION

"[F]rom time to time we are called to look back to examine our still-recent history and correct injustice where possible."[1]

Conversations regarding systemic racism and the role of the criminal justice system in South Carolina have been in the spotlight as a result of the

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1. Order Vacating Judgment at 27, South Carolina v. Stinney (S.C. Cir. Ct. Dec. 17, 2014) (on file with author) [hereinafter Order].

race-based murder of nine African-Americans in a Charleston church in 2015.[2] In the wake of the shooting, protestors from South Carolina and around the country pleaded for the removal of the Confederate flag flying outside the state's capitol building.[3] Less than a month after the shooting, the South Carolina Senate voted to take the flag down.[4] Removal of the Confederate flag was a clear indication of South Carolina's efforts towards addressing racial injustices. Despite this progress, the vestiges of racism and stigmatization remain in the criminal justice system, compelling states like South Carolina to address injustices and seek to correct them.

The stigma of a conviction lives on long after a defendant has died,[5] tarnishing both the defendant's and his family's livelihood. Such was the case with fourteen-year-old African-American George Stinney, Jr. after his execution in 1944.[6] Stinney was charged with murdering two Caucasian girls near his home in Alcolu, South Carolina.[7] The trial and sentencing were

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2. *See* Nick Corasaniti, Richard Perez-Pena, & Lizette Alvarez, *Church Massacre Suspect Held as Charleston Grieves*, N.Y. TIMES (Jun. 18, 2015), http://www.nytimes.com/2015/06/19/us/charleston-church-shooting.html (providing that "[t]he mass murder of nine people who gathered . . . for Bible study at a landmark black church has shaken a city whose history from slavery to the Civil War to the present is inseparable from the nation's anguished struggle with race").

3. Abby Phillip & Chico Harlan, *Hundreds March in Charleston, Columbia to take down Confederate flag*, WASH. POST (Jun. 20, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/06/20/hundreds-march-in-charleston-columbia-to-take-down-confederate-flag/.

4. Bill Chappell, *In Final Vote, South Carolina Senate Moves to Take Down Confederate Flag*, NPR (July 7, 2015), http://www.npr.org/sections/thetwo-way/2015/07/07/420825226/in-final-vote-south-carolina-senate-moves-to-take-down-confederate-flag.

5. *See* Carol S. Steiker & Jordan M. Steiker, *The Seduction of Innocence: The Attraction and Limitations of the Focus on Innocence in Capital Punishment Law and Advocacy*, 95 J. CRIM. L. & CRIMINOLOGY 587, 588 (2005) ("[T]hose who are innocent and sentenced to death suffer the additional devastation of being blamed for a terrible crime; their names, families, and entire lives are forever tainted by such ignominy, quite apart from the death of their bodies.").

6. Lindsey Bever, *It Took 10 Minutes to Convict 14-year-old George Stinney Jr. It Took 70 Years After his Execution to Exonerate Him*, WASH. POST (Dec. 18, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/12/18/the-rush-job-conviction-of-14-year-old-george-stinney-exonerated-70-years-after-execution/.

7. Brief of Defendant/Petitioner as Amicus Curiae at 9–14, State of South Carolina v. George Stinney, Jr., (Feb. 21, 2014) [hereinafter Defendant's Brief] (citing Stinney Trial Record, McLeod Notes; Stinney Hearing Stipulated Documents, Ruffner aff.; A.C. Bozard Statement; Stinney Filed Stipulations and Consent Order, ¶2). Because no formal case or trial transcript exists of the adjudication of Stinney in 1944, the recitation of the facts comes from the amicus brief.

conducted in only one day, in which the jury deliberated for only ten minutes.[8] Stinney was sentenced to death by execution.[9]

In February 2014, the Civil Rights and Restorative Justice Project submitted an amicus curiae brief petitioning for the writ of *corm nobis* to redress the grave miscarriages of justice against Stinney.[10] Later that year, South Carolina's Fourteenth Judicial Circuit Court issued an order granting *coram nobis* relief and vacating Stinney's conviction.[11] Stinney's brother, Charles, described how Stinney's conviction severely affected the whole family, as they believed that the conviction and execution could have happened to any one of the family members.[12] Following George Stinney's execution, the Stinney family left South Carolina and relocated to New York fearing for their safety.[13]

While the *Stinney* case was wrought with "extraordinary circumstances"[14] that "simply do not apply in most cases,"[15] it serves as a reminder that South Carolina needs to re-consider its procedural vehicles for post-conviction relief. The law in South Carolina, in general, provides criminal defendants with three post-conviction avenues, one of which the legislature codified a statute to serve as an exclusive post-conviction remedy.[16] These post-conviction vehicles, however, are not well-suited to

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8. Order at 3 (citing Stinney Stipulations, ¶¶ 9–14).
9. *Id.*
10. Defendant's Brief at 3.
11. Order at 28.
12. Defendant's Brief at 31 (citing SH Affidavit of Bishop Charles Stinney, ¶ 10).
13. *Id.*
14. Order at 27 (discussing an insufficient trial record that led to numerous Constitutional deprivations).
15. *Id.*
16. The Uniform Post-Conviction Procedures Act, S.C. CODE ANN. § 17-27-20 (2015). The Uniform Post-Conviction Procedure Act provides:

> Any person who has been convicted of, or sentenced for, a crime and who claims:
> (1) That the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this State;
> (2) That the court was without jurisdiction to impose sentence;
> (3) That the sentence exceeds the maximum authorized by law;
> (4) That there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;
> (5) That his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint; or
> (6) That the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy; may institute, without paying a filing fee, a proceeding under this chapter to secure relief. Provided, however, that

allow a court to reopen and correct its judgment upon discovery of new information not appearing in the record. Instead, *coram nobis* proceedings are the best, and often only, vehicle available in these cases. Thus, although *coram nobis* is an ancient writ with limited treatment in South Carolina,[17] its relevance as an available post-conviction remedy is exceedingly important in light of South Carolina's highly publicized background of racial tension in the criminal justice system.[18]

This Note focuses on reviving *coram nobis* as a viable post-conviction remedy, and proposes changing the evidentiary standard for granting such petitions. In assessing petitions for *coram nobis*, South Carolina should adopt a "reasonable probability" standard that errors of fact not apparent on the record would have changed the initial trial.[19] By adopting a "reasonable probability" standard, South Carolina practitioners will be able to make greater use of *coram nobis*, thus providing a holistic mechanism of post-conviction remedies for clients.[20] Part II provides a general discussion of different post-conviction remedies available in South Carolina, a brief historical perspective on *coram nobis*, and a discussion of how the writ differs from other post-conviction remedies.[21] Part III discusses South Carolina's resurrection of *coram nobis* in the case of *State v. Stinney*. Part IV provides an analysis of how other jurisdictions treat *coram nobis* and employ the reasonable probability standard. Lastly, Part V discusses the impracticality of employing any standard higher than "reasonable

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this section shall not be construed to permit collateral attack on the ground that the evidence was insufficient to support a conviction.

(A) This remedy is not a substitute for not does it affect any remedy incident to the proceedings in the trial court, or of direct review of the sentence or conviction. Except as otherwise provide in this chapter, it comprehends and takes the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them. *Id.*

17. As discussed *infra* Part III, South Carolina has only addressed substantive issues regarding the writ in one case.

18. *See, e.g.*, *Haley Moved to Tears Talking About Emanuel AME Shooting During State of the State*, WPDE (Jan. 20, 2016), http://wpde.com/news/local-and-state/gov-haley-moved-to-tears-talking-about-emanuel-ame-shooting-during-state-of-the-state (South Carolina Governor Haley addressing the 2015 Charleston shooting in her State address); Mark Berman, *South Carolina Police Officer in Walter Scott Shooting Indicted on Murder Charge*, WASH. POST (Jun. 8, 2015), https://www.washingtonpost.com/news/post-nation/wp/2015/06/08/police-officer-who-shot-walter-scott-indicted-for-murder/ (discussing a murder charge against a South Carolina police officer who shot an unarmed African-American male).

19. *See infra* Part II.

20. *See infra* Part III.

21. *See infra* Part IV.

probability" and considers policy reasons why South Carolina should follow other jurisdictions' lowered standard for *coram nobis* in cases in which the defendant presents evidence that would have altered the initial judgment.[22]

II. BACKGROUND

A. Brief History of South Carolina's Available Post-Conviction Relief Remedies

Broadly speaking, post-conviction remedies are intended to buffer against "unjust, unconstitutional, and erroneous confinements."[23] Post-conviction relief is often referred to as "collateral review," which is "[a]n attack on a judgment in a proceeding other than a direct appeal."[24] Avenues of collateral review stand apart from the process of direct review,[25] which includes remedies such as post-trial motions, and includes requests for relief based on constitutional violations,[26] habeas corpus review,[27] and review by writs of error such as *audita querela*,[28] or *coram nobis*.[29]

In South Carolina, there are three post-conviction remedies available: (1) the Uniform Post-Conviction Procedures Act (UPCPA); (2) state level habeas corpus; and (3) motions for a new trial based on after-discovered evidence.[30] The first post-conviction remedy available is the UPCPA, which provides that any person who has been convicted of or sentenced for committing a crime may initiate a post-conviction relief proceeding.[31] The purpose of post-conviction relief under South Carolina's UPCPA is to provide convicted persons with a method to address any unresolved or previously unmentioned questions of fact or law relevant to their

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22. *See infra* Part V.

23. John H. Blume, *An Introduction to Post-Conviction Remedies, Practice and Procedure in South Carolina*, 45 S.C. L. REV. 235, 236 (1994).

24. Wall v. Kholi, 562 U.S. 545, 552 (2011) (quoting Black's Law Dictionary 298 (9th ed. 2009)).

25. *Id.*

26. *Id.* (citing 28 U.S.C. § 2255 (2012)).

27. *Id.* (noting how the Court has used the terms "habeas corpus" and "collateral review" interchangeably).

28. *See* United States v. Gamboa, 608 F.3d 492, 494–95 (9th Cir. 2010) (denying the defendant's petition for the writ of *audita querela* because he should have requested post-conviction relief under 28 U.S.C. § 2255).

29. *Wall*, 562 U.S. at 552 (2011) (citing United States v. Morgan, 346 U.S. 502, 510–511 (1954)) (noting how the Court has described *coram nobis* as a means of collateral attack).

30. *See* Blume, *supra* note 23, at 238 (providing a general overview of the three post-conviction remedies available in South Carolina).

31. S.C. CODE ANN. § 17-27-20(A) (2015).

sentences.[32] Although the Act is intended to be exclusive, "tak[ing] the place of all other common law, statutory or other remedies heretofore available for challenging the validity of the conviction or sentence,"[33] some exceptions remain.[34]

The second post-conviction remedy available in South Carolina, state habeas corpus, provides prisoners a mechanism to test the legality of their present detention.[35] The only remedy that can be granted for habeas corpus is release from custody.[36] While the UPCPA was intended to supersede statutory remedies challenging the validity of a conviction or sentence such as habeas corpus, the writ is still used in South Carolina.[37] The most recent state habeas corpus case outlining the writ's scope is *Butler v. State*,[38] in which the Supreme Court of South Carolina opined that the writ will be granted only in circumstances where there was a "'violation, which, *in the setting* [of the violation], constitutes a denial of fundamental fairness shocking to the universal sense of justice.'"[39] After *Butler*, the South Carolina Supreme Court emphasized that habeas corpus is a way to correct fundamental miscarriages of justice after a prisoner has exhausted all other available remedies.[40]

The third post-conviction remedy in South Carolina, motion for a new trial based on after-discovered evidence, addresses situations in which

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32. *Id.*

33. S.C. CODE ANN. § 17-27-20(B) (2015); *see also* Blume, *supra* note 23, at 245.

34. For example, while the UPCPA supersedes and encompasses state-level habeas corpus provided by the statute, habeas corpus remains available when other remedies are inadequate or unavailable. *See* Gibson v. State, 329 S.C. 37, 41, 495 S.E.2d 426, 428 (1998) ("[H]abeas corpus continues to be available as a constitutional remedy provided a petitioner qualifies for this extraordinary relief and clears the procedural hurdles.").

35. *Id.* (citing McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965)).

36. Gibson v. State, 329 S.C. 37, 40, 495 S.E.2d 426, 427 (1998) (citing McCall v. State, 247 S.C. 15, 145 S.E.2d 419 (1965)).

37. *See, e.g.*, Butler v. State, 302 S.C. 466, 467, 397 S.E.2d 87, 87 (1990) (granting the petitioner's writ for habeas corpus); Crowe v. Leeke, 273 S.C. 763, 764, 259 S.E.2d 614, 615 (1979) (providing that while the "appellant's petition contained . . . allegations which were properly cognizable under the Uniform Post-Conviction Procedures Act," the court found the issues on appeal were "in the nature of [a] Habeas corpus proceeding").

38. Butler v. State, 302 S.C. 466, 468, 397 S.E.2d 87, 88 (1990).

39. *Id.* (quoting State v. Miller, 84 A.2d 459, 463 (1951)) (emphasis in original).

40. *See* State v. Torrence, 305 S.C. 45, 69, 406 S.E.2d 315, 328 (1991) (Toal, J., concurring) ("[A]n imprisoned individual may obtain a writ of habeas corpus from this Court after exhausting all other sources of relief," if he can satisfy the *Butler* standard); Drayton v. Evatt, 312 S.C. 4, 9, 430 S.E.2d 517, 520 n. 2 ("This is not to say that a defendant who has exhausted his opportunities for review on direct appeal and post-conviction relief is completely without a remedy" because he can still seek a writ of habeas corpus under some circumstances), *cert. denied*, 114 S. Ct. 607 (1993)).

evidence now available was not known at the time of trial.[41] In order for a motion for a new trial to be granted, the after-discovered evidence must reflect the defendant's innocence or, in capital cases, the defendant's moral culpability.[42] To warrant a new trial, a defendant must prove that the newly discovered evidence: (1) [would] probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial by the exercise of due diligence; (4) is material to the issue; and (5) is not merely cumulative or impeaching.[43]

B. Coram Nobis: *The Legal "Hail Mary."*

"A Hail Mary in American football is a long forward pass made in desperation at the end of a game, with only a small chance of success. The writ of coram nobis is its criminal-law equivalent."[44]

Coram nobis is an historic common-law writ that allows criminal defendants to request relief from judgment on the premise that their convictions were "fundamentally flawed."[45] Black's Law Dictionary defines the writ as a form of post-conviction relief "directed to a court for review of its own judgment and predicated on alleged errors of fact."[46] Further, some scholars view the writ as a procedural vehicle to re-open criminal cases when new proof has emerged establishing egregious government misconduct.[47]

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41. Blume, *supra* note 23, at 264.

42. *Id.*

43. State v. Clamp, 225 S.C. 89, 94, 80 S.E.2d 918, 920 (1954) (quoting State v. Strickland, 201 S.C. 170, 170, 22 S.E.2d 417, 418 (1942)).

44. United States v. George, No. 11-1815 (1st Cir. Apr. 18, 2012).

45. 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) (citing Andrew J. Schatkin, *Criminal Procedure*, 46 SYRACUSE L. REV. 405, 482 n.485 (1995)).

46. *Coram Nobis*, Black's Law Dictionary (10th ed. 2014).

47. *See, e.g.*, Eric K. Yamamoto & Ashley Kaiao Obrey, *Reframing Redress: A "Social Healing through Justice" Approach to United States-Native Hawaiian and Japan-Ainu Reconciliation Initiatives*, 16 ASIAN AM. L.J. 5, 13–15 n. 43 (2009) (citing Korematsu Petition for Writ of Error Coram Nobis, filed with the U.S. District Court for the Northern District of California, January 19, 1983 (No. CR-2763W)) (discussing the aftermath of the United States Supreme Court's decision in Korematsu v. United States, 323 U.S. 214 (1944), in which the defendant/petitioner requested that the federal district court vacate the forty-year old conviction on the grounds that newly uncovered evidence regarding declassified government documents warranted coram nobis relief).

The writ of *coram nobis* was developed in England during the sixteenth century.[48] American courts began to use *coram nobis* as early as the beginning of the nineteenth century.[49] During its early use in America, the writ was used in both civil and criminal cases[50] as a means to "correct errors of fact that could not have been ascertained through ordinary diligence at the time of the trial and that, in all probability, would have affected [the trial's] outcome."[51] While the writ's suggested purpose focused on new factual presentations of evidence, some early uses in American courts presented situations in which cases were reconsidered on grounds other than newly discovered facts.[52] For example, the court in *Chambers v. State* held that the lower court's denial of *coram nobis* was in error and set aside guilty pleas based on evidence that the pleas were entered as a result of "threats, intimidations, and beatings while in prison."[53]

Despite *coram nobis*' liberal application in early cases, both state and federal courts began to expand statutory remedies available for post-conviction relief, which in turn limited the availability and purpose of the writ.[54] For example, Rule 60 of the Federal Rules of Civil Procedure, and South Carolina's parallel rule, abolished the writ for use in civil cases.[55]

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48. *See, e.g.*, Piar, *supra* note 45, at 506 (citing Sanders v. State, 85 Ind. 318 (1882); John S. Gillig, *Kentucky Post-Conviction Remedies and the Judicial Development of Kentucky Rule of Criminal Procedure 11.42*, 83 KY. L.J. 265, 319–30 (1994-95); Morgan Prickett, *The Writ of Error Coram Nobis in California*, 30 SANTA CLARA L. REV. 1, 3–14 (1990); Abraham L. Freedman, *The Writ of Error Coram Nobis*, 3 TEMP L. Q. 365, 367–70 (1929); Albert F. Neumann, Comment, *Criminal Law–Writ of Error Coram Nobis*, 11 WIS. L. REV. 248 (1936); Larry W. Yackle, POST-CONVICTION REMEDIES § 37 (1981)).

49. *See, e.g.*, Strode v. Stafford Justices, 23 F. Cas. 236, 236 (C.C.D. Va. 1810) (*superseded* by statute as stated in United States v. Kerner, 895 F.2d 1159, 1990)); Piar, *supra* note 45, at 507.

50. *See* Michelle L. Curley, *The Common Law Writ of Error Coram Nobis Remains Available as a Civil Procedure to Challenge Collaterally a Criminal Judgment*, 59 MD. L. REV. 767, 776 (2000) (providing that the writ has been available to defendants in Maryland in both criminal and civil cases for over 200 years).

51. *Id.* at 771.

52. *See, e.g.*, Hogan v. Court of General Sessions, 296 N.Y. 1, 9, 68 N.E.2d 849, 852–53 (1946) (acknowledging that the writ may be used to vacate the court's own judgment in a case in which the defendant was not advised of his right to counsel).

53. Chambers v. State, 158 So. 153, 158 (Fla. 1934).

54. Piar, *supra* note 45, at 508 (citing United States v. Mandel, 853 F. Supp. 177 (D. Md. 1994)).

55. Fed. R. Civ. P. 60(e), adopted in 1946, provides in pertinent part: "The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela." South Carolina Rule of Civil Procedure 60(b) provides that "[w]rits of coram nobis . . .are abolished."

Nonetheless, although the writ is unavailable in civil proceedings, it is still available in criminal cases.[56]

C. *How* Coram Nobis *Differs from Other Post-Conviction Remedies in South Carolina*

While South Carolina's UPCPA appears to provide persons with a comprehensive mechanism for post-conviction relief, the Act differs from *coram nobis* in regards to who may initiate a proceeding.[57] Unlike the UPCPA in which the person who was convicted or sentenced of a crime is the only person who may bring a post-conviction proceeding under the Act, *coram nobis* gives third-party litigants standing to assert the constitutional rights of another.[58] For example, *coram nobis* allows a family member of a wrongly convicted person who is now deceased or otherwise unable to raise a claim to seek redress for the constitutional violations against the decedent.[59] Thus, the procedural hurdles the UPCPA places upon an applicant do not encumber the writ of *coram nobis*; this availability of third-party standing permits a litigant to redress constitutional deprivations of a convicted person who is unable to assert his own constitutional rights before a court.[60]

Further, *coram nobis* and the UPCPA differ regarding subsequent applications for obtaining post-conviction relief. The South Carolina UPCPA places a significant limitation on inmates who make successive applications. A successive application, generally, may not contain issues (1) that were presented in the original application; (2) that were fully adjudicated in the first appeal or were knowingly and voluntarily waived; or (3) that were not raised at all, unless the applicant can provide a sufficient reason why the issue was not previously raised.[61] Thus, it appears that the

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56. *See* Bereano v. United States, 706 F.3d 568, 576 n.8 (4th Cir. 2013) ("Although the adoption of Federal Rule of Civil Procedure 60(b) in 1946 abolished the writ of coram nobis in civil cases, coram nobis remains available to challenge a criminal conviction."); United States v. Morgan, 346 US. 502, 505 n.4 (1954) (citing Kurtz v. Moffitt, 115 U.S. 487, 494 (1885)) (providing that coram nobis is "a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil Proceeding").

57. S.C. CODE ANN. § 17-27-20 (2015).

58. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991) (providing that "a litigant may raise a claim on behalf of a third party if the litigant can demonstrate that he or she has suffered a concrete, redressable injury, that he or she has a close relation with the third party, and that there exists some hindrance to the third party's ability to protect his or her own interests").

59. *Id.*

60. *Id.*

61. U.S.C. CODE ANN. § 17-27-90 (2016).

Act effectively provides applicants with only one chance at post-conviction relief.[62] In contrast, *coram nobis* allows a petitioner to take another bite of the post-conviction apple if there is newly discovered evidence that would have changed the outcome of the initial judgment.

Unlike *coram nobis*, the writ of habeas corpus only permits relief to a person who is presently in custody.[63] As one scholar notes, "[t]he major practical difference between habeas corpus and coram nobis in modern law is that habeas corpus will lie only where the petitioner is in custody, whereas coram nobis can be used even after a sentence has been served and a petitioner released."[64] Further, habeas corpus is used to attack the legality of sentencing and detention in violation of the Constitution,[65] whereas *coram nobis* is a collateral attack on a wrongful conviction due to facts unknown at trial.[66]

Moreover, *coram nobis* differs from a motion for a new trial based on after-discovered evidence. A motion for a new trial in South Carolina addresses claims based on presentations of evidence that were not known to exist at the time of trial.[67] Thus, it appears that *coram nobis* was a "precursor to the modern motion for a new trial," as both remedies seek a new trial.[68] However, a motion for a new trial is seen as a continuation of the original case, whereas *coram nobis* is an "independent civil action challenging the criminal conviction."[69]

III. THE CASE OF *STATE V. STINNEY* AND THE RESURRECTION OF *CORAM NOBIS* IN SOUTH CAROLINA

For a criminal defendant in South Carolina who seeks to challenge constitutional deprivations regarding his conviction or sentence, utilizing the UPCPA would afford the defendant a comprehensive method needed to

62. *See* Gamble v. State, 298 S.C. 176, 178, 379 S.E.2d 118, 119 (1989) (indicating that the UPCPA and court decisions are intended to provide petitioner with "one bite at the apple . . . ").

63. S.C. CODE ANN. § 17-17-10 (2015).

64. Piar, *supra* note 45, at 508 n. 39 (citing 28 U.S.C. §§ 2241, 2255 (2000)).

65. *See* Herrera v. Collins, 506 U.S. 390, 400 (1993) (habeas corpus "is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact").

66. *Id.* at 408.

67. Blume, *supra* note 23, at 264.

68. John H. Blume & Emily Paavola, *A Reintroduction: Survival Skills for Post-Conviction Practice in South Carolina*, 4 CHARLESTON L. REV. 223, 227 n. 14 (2010) (citing Larry W. Yackle, *Postconviction Remedies* § 4, at 7 (1981 & Supp. 1993)).

69. *Id.*

address such claims.[70] However, in circumstances in which the defendant is no longer able to bring the challenge himself, *coram nobis* steps in to allow third-party standing to challenge his conviction.[71] This third-party standing was employed in 2014 when the two siblings of George Stinney, Jr., who was convicted of murder and executed by electrocution, filed a petition for writ of *coram nobis* in South Carolina.[72] After the siblings retained counsel, the Civil Rights and Restorative Justice Project of the Northeastern University School of Law filed an amicus curiae brief in support of defendant George Stinney, Jr. seeking posthumous relief for his wrongful conviction and execution by the State of South Carolina.[73] As previously mentioned, George Stinney, Jr. was a fourteen-year-old African-American boy who was taken into police custody on March 25, 1944 on suspicion of murdering two girls in Alcolu, South Carolina.[74]

The facts of the case illuminate the manifest egregiousness exercised by the original court in conducting its investigation and trial of Stinney. On March 24, 1944, two young girls, ages 7 and 11, were out riding bikes in a field near Stinney's home.[75] The two girls never returned home.[76] The next day, a search party found the girls' bodies lying in a ditch.[77] Shortly after their bodies were found, the police arrested Stinney.[78] Within hours of his arrest, Stinney confessed to the murders.[79] One month after his arrest, Stinney was tried for the murder of one of the young girls.[80] While Stinney was in police custody from the time of his arrest to his trial and conviction,

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70. *See generally* S.C. CODE ANN. § 17-27-10 et seq. (2015).

71. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 629 (1991).

72. Order at 1.

73. Defendant's Brief at 2–3.

74. *Id.* at 9–12 (citing Stinney Trial Record, McLeod Notes; Stinney Hearing Stipulated Documents, Ruffner aff.; ST, A.C. Bozard Statement; Stinney Filed Stipulations and Consent Order, ¶ 2).

75. *Id.* at 10 (citing SH, Charles Stinney Affidavit, ¶¶ 4–5; Charles Stinney Dep., 5, 10–11, 30; Amie Stinney Aff., 1).

76. Order at 2.

77. Order at 2; Defendant's Brief at 11 (citing SH, Batson Affidavit, ¶ 4).

78. Order at 2.

79. *Id.* Interestingly, in her order vacating Stinney's conviction, Judge Mullen stated that "[w]hile law enforcement testified that a confession occurred, no written confession exists in the record today." *Id.*

80. Defendant's Brief at 9 (citing Stinney Stipulations, ¶ 11–12). For reasons unexplained in either the Defendant's Brief or the Order, Stinney was never tried for the murder of the other girl.

his parents were not able to visit him[81] and none of his relatives attended the trial.[82]

Although the solicitor's notes indicated that the murder weapon was a spike,[83] "[n]othing remains from documentary evidence indicating whether a murder weapon, bloody clothes or other demonstrative evidence were admitted at trial."[84] The jury deliberated for only ten minutes, after which the all-white jury found Stinney guilty of murder.[85] Both the trial and the sentencing were conducted in one day,[86] and, on that day, Stinney was sentenced to death by electrocution.[87] Stinney's attorney did not file an appeal, nor did he request a stay of execution.[88] On June 16, 1944, less than three months after his arrest,[89] Stinney was executed.[90]

Seventy years after Stinney's execution, the Civil Rights and Restorative Justice Project submitted an amicus curiae brief requesting "posthumous relief . . . to redress grave miscarriages of justice . . . [and] the constitutional protections . . . [to which] [Stinney] was entitled at the time of his trial, including the right to effective counsel, to a fairly selected jury, and not to incriminate himself."[91] In their brief, the petitioners requested that the Circuit Court grant the writ of *coram nobis*.[92] The petitioners argued that Stinney was denied fundamental due process[93] and deprived of his right to effective counsel,[94] thus warranting *coram nobis* relief.

On December 16, 2014, the presiding Circuit Court judge issued an order vacating Stinney's judgment, finding "fundamental, Constitutional violations of due process . . . ."[95] In her order, the judge acknowledged the

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81. *Id.* at 12 (citing SH, Francis Batson Aff.; SH, Charles Stinney Dep., 23–24; SH, Charles Stinney Aff., ¶¶ 7–8). We do not know if Stinney's parents simply were not able to visit him, or if they were not allowed to visit him during his time in police custody.

82. *Id.*

83. Order at 2.

84. *Id.*

85. *Id.* at 2–3.

86. *Id.* at 2.

87. *Id.* at 3.

88. *Id.* at 3; Defendant's Brief at 9 (citing Stinney Stipulations, ¶ 13).

89. Order at 3.

90. *Id.*

91. Defendant's Brief at 3.

92. *Id.* at 30.

93. *See id.* at 15 (arguing that no exculpatory witnesses were called at trial, even though such witnesses were available, and that Stinney's confession was wrongfully admitted).

94. *See id.* (arguing that Stinney's lawyer failed to preserve his right to appeal his conviction and sentence).

95. Order at 1.

limited availability of *coram nobis*,[96] calling it an "extraordinary remedy, designed to protect fundamental due process rights."[97] The court granted *coram nobis* relief,[98] finding that violation of Stinney's procedural due process rights "tainted his prosecution."[99] The court's reasons for granting *coram nobis* relief included a coerced confession by Stinney, a lack of effective assistance of counsel, failure to select an impartial jury, and execution of a minor.[100] Thus, *coram nobis* was an effective post-conviction remedy that both allowed the original court to redress its fundamental miscarriages of justice and provided the Stinney family with solace eradicating the stigma of his conviction.

IV. A COMPARISON OF HOW OTHER JURISDICTIONS AND SOUTH CAROLINA TREAT *CORAM NOBIS*

A. Bringing Coram Nobis *Back—Fourth Circuit Practice*

In 2012 and 1988, respectively, the Fourth Circuit Court of Appeals granted petitions for *coram nobis* in *United States v. Akinsade* and *United States v. Mandel*.[101] The grant of *coram nobis* petitions might suggest that the Fourth Circuit is willing to use the writ to remedy serious miscarriages of justice. While the courts in *Akinsade* and *Mandel* granted the writ, the justices in *Mandel* had starkly different opinions regarding the application of facts to the specific case.[102] Yet, both the majority and the dissent had a similar view about the importance of *coram nobis* and its larger impact on society.[103] Judge Widener for the majority stated, "[w]ithout *coram nobis* relief, the petitioners, who contested their guilt at each stage of the

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96. *See id.* at 5 (noting how the writ "was and is a limited remedy" and is only available when no other post-conviction remedy is available to the defendant).

97. *Id.* at 7.

98. *Id.* at 28.

99. *Id.*

100. *Id.* at 18–27.

101. *See* United States v. Akinsade, 686 F.3d 248, 256 (4th Cir. 2012) (noting that the defendant's ineffective assistance of counsel was a "fundamental error necessitating *coram nobis* relief"); United States v. Mandel, 862 F.2d 1067, 1075 (4th Cir. 1988) (noting how defendants had "no other remedy available than . . . *coram nobis*" and how it "is required in order to achieve justice"). *But see* Bereano v. United States, 706 F.3d 568, 579 (4th Cir. 2013) (holding that although the district court's erroneous jury instruction regarding mail fraud was a constitutional error, the error was harmless and not an error of the most fundamental character so as to warrant granting the writ).

102. *Mandel*, 862 F.2d at 1079 (Hall, J. dissenting) (noting that his "sense of justice [did] not compel [him] to set aside [the] convictions").

103. *Id.* at 1075, 1077 (Hall, J., dissenting).

proceeding, would face the remainder of their lives as criminals . . . ."[104] In his dissenting opinion, Justice Hall noted how "[c]oram nobis petitions that attempt to overturn convictions in which the petitioner has fully and exhaustively litigated his position should be granted only in the most egregious cases, where circumstances make clear that justice cannot tolerate letting the conviction stand."[105] Such "egregious cases" would seem to be situations in which a defendant has been deprived fundamental protections like due process.[106] Despite the justices' disagreement regarding the application of the law to the facts of the case at-hand, Justices Widener and Hall's central understanding of the purpose of *coram nobis* in our criminal justice system reinforce its worth as an available post-conviction remedy. Thus, the Fourth Circuit has made it clear that *coram nobis* remains a viable post-conviction remedy for defendants who have experienced serious miscarriages of justice.[107]

Mandel and *Akinsade* suggest that the Fourth Circuit is willing to, at a minimum, seriously consider petitions for *coram nobis* in certain circumstances.[108] More than merely indicating openness to considering the writ, the Circuit prescribed its governing standard for when petitions will be granted. As the Circuit instructed, four elements must be met in order for a defendant to obtain *coram nobis* relief:[109]

(1) A more usual remedy is not available;

(2) Valid reasons exist for not attacking the conviction earlier;

(3) Adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and

(4) The error is of the most fundamental character.[110]

In *Akinsade*, the petitioner was a Nigerian immigrant who gained lawful permanent resident status.[111] While working as a bank teller, the petitioner cashed checks for acquaintances and deposited a portion of the proceeds from those checks into his own account.[112] The petitioner eventually reported the transactions to his supervisor, who contacted the FBI.[113] The petitioner was later charged with embezzlement by a bank employee.[114] He

104. *Id.* at 1075.
105. *Id.* at 1077 (Hall, J., dissenting).
106. *Id.* at 1075.
107. *Id.* at 1074; United States v. Akinsade, 686 F.3d 248, 252 (4th Cir. 2012).
108. *Mandel*, 862 F.2d at 1077 (Hall, J., dissenting).
109. *Id.*
110. *Id.* (citing Hirabayashi v. United States, 828 F.2d 591, 604 (9th Cir.1987)).
111. *Akinsade*, 686 F.3d at 250.
112. *Id.*
113. *Id.*
114. *Id.*

asked his attorney on at least two different occasions about the potential immigration consequences of pleading guilty.[115] His attorney advised him that he could not be deported on the basis of a single offense.[116] Relying on his attorney's advice that the embezzlement offense would not subject him to deportation, he pled guilty and served his sentence.[117] Almost nine years after his conviction, however, immigration authorities arrested him and charged him with removability as an aggravated felon based off his previous embezzlement conviction.[118] Thereafter, the petitioner filed a writ of error for *coram nobis* alleging a violation of his Sixth Amendment rights as a result of his attorney's bad advice.[119] The district court denied the petition, finding that although his attorney's misrepresentation amounted to constitutionally deficient counsel, the petitioner had not demonstrated that he had suffered a fundamental error necessitating *coram nobis* relief.[120]

On appeal, the Fourth Circuit disagreed with the district court and held that the petitioner met all four requirements warranting *coram nobis* relief.[121] The court found that the petitioner easily satisfied the first three requirements,[122] subsequently focusing the majority of its analysis on whether his attorney's wrongful advice satisfied the fourth element as an error of the most fundamental character.[123] The court prescribed that in order for the petitioner to show prejudice, he must demonstrate that but-for his attorney's error, there was a "reasonable probability" that he would not have pled guilty and would have insisted on going to trial.[124] The court stated that it could not definitively conclude that "'a reasonable defendant in [the] [petitioner's] shoes, having asked for, received, and relied upon encouraging

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 251.

119. *Id.*

120. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 687 (1984)) (discussing how the petitioner was not prejudiced under the second prong of *Strickland*, which requires a showing that counsel's errors prejudiced the petitioner's defense.)

121. *Id.* at 252.

122. *See id.* ("First, Akinsade cannot seek relief under the typical remedies for a direct or collateral attack of a federal judgment and sentence because he is no longer in custody. Second, valid reasons exist for Akinsade not attacking the conviction earlier. Until physically detained by immigration authorities in 2009, Akinsade had no reason to challenge the conviction as his attorney's advice, up to that point in time, appeared accurate. With respect to the third coram nobis requirement, the risk of deportation is an adverse consequence of conviction sufficient to create a case or controversy as required by Article III of the Constitution.").

123. *Id.*

124. *Id.* at 253 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

advice' about the risks of deportation, 'would have pled guilty anyway had he known' that his attorney was mistaken.'"[125] Although the court could not be certain that the petitioner would have pled differently, the court nevertheless found that the petitioner had presented sufficient evidence to establish a reasonable probability that he would have pled differently and insisted on going to trial absent his attorney's error.[126] Thus, the Fourth Circuit found that the petitioner had suffered a fundamental error warranting *coram nobis* relief.[127]

B. Case Law from Other Jurisdictions and the Reasonable Probability Standard

At least two jurisdictions have adopted the "reasonable probability" standard instead of the preponderance of the evidence or another heightened standard for *coram nobis* petitions.[128] In Arkansas, for example, a petitioner seeking *coram nobis* relief need only show a "reasonable probability" that the judgment would not have been rendered.[129] In Mississippi, the state supreme court has emphasized that the standard for granting *coram nobis* relief should be lowered, especially in capital cases, from a probability standard to a "reasonable probability" standard.[130] In *Smith v. State*, which involved newly discovered evidence of recanted witness testimony,[131] the Mississippi Supreme Court explained the necessity for a lower standard in capital cases:

> Here we are dealing with the ultimate final judgment—death. There is no margin for error. Similar to our holdings that normally

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125. *Id.* at 256 (quoting U.S. v. Gajendragadkar, No. 97-7267, 1998 WL 352866, at *2 (Apr. 7, 1998)).

126. *See id.* ("[Petitioner's] counsel asserted that if [petitioner] had gone to trial, he would have argued that the amount of loss was $8,000. His counsel noted that [petitioner] was ordered to pay restitution in the amount of $8,000, which he had paid in full, and further that [petitioner] would have disputed his involvement with a third check that placed him over the $10,000 amount.").

127. *Id.*

128. Dansby v. State, 37 S.W.3d 599, 601 (2001); Williams v. State, 722 So. 2d 447, 450 (Miss. 1998); Smith v. State, 492 So. 2d 260, 264–65 (Miss. 1986).

129. *Dansby*, 37 S.W.3d at 601 (applying the reasonable probability standard where there was an issue of material evidence withheld by the prosecutor).

130. *See Williams*, 722 So. 2d at 450 (citing *Smith*, 492 So. 2d at 264) (reiterating the reasonable probability standard).

131. *See Smith*, 492 So. 2d at 262 (discussing how the petitioner alleged new material facts that two witnesses had lied when they made their in-court identifications of the petitioner).

> harmless error becomes reversible error when the penalty is death, we hold that in death penalty cases there must only be a reasonable probability that a different result will be reached.[132]

South Carolina's neighbor, North Carolina, employs the "reasonable probability" standard in the analogous context of assessing motions for a new trial based on evidence that trial testimony has been perjured[133] and in cases in which there was a late-discovered flaw in the jury instructions.[134]

C. *How* Coram Nobis *Has Been Used, or Rather Not Used, in South Carolina*

The only South Carolina case to discuss the scope and application of the writ is the South Carolina Supreme Court's decision in *State v. Liles*.[135] In *State v. Liles*, the defendant petitioned for *coram nobis* alleging that he was not guilty of manslaughter despite his earlier guilty plea, and that his counsel was negligent and did not provide him effective legal representation.[136] Although the court dismissed the petition for *coram nobis*,[137] the opinion offers South Carolina's perspective regarding the purpose and function of the writ. The court provides:

> The principal function of the writ of *coram nobis* is to afford the Court an opportunity to correct its own record with reference to a vital fact not known when the judgment was rendered and which could not have been presented by a motion for a new trial, appeal or other existing statutory proceeding. It lies for an error of fact not apparent on the record, not attributable to the appellant's negligence, and which if known by the Court *would have prevented* rendition of the judgment. It does not lie for newly discovered evidence or

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132. *Id.* at 265.

133. *See* State v. Britt, 360 S.E.2d. 660, 665 (1987) (providing that a defendant may be granted a new trial based on recanted testimony if "there is a reasonable probability that, had the false testimony not been admitted, a different result would have been reached at trial").

134. *See* State v. Rose, 373 S.E.2d 426, 428–29 (1988) (finding that the defendant was entitled to a new trial based on the reasonable probability that had the jury instruction mistake not have occurred, a different result would have been reached at trial).

135. State v. Liles, 246 S.C. 59, 70, 142 S.E.2d 433, 440 (1965). A Westlaw search of cases in South Carolina using the term "coram nobis" yielded twenty-six results; however, *State v. Liles* was the only decision that discussed substantive issues and procedures regarding the writ.

136. *Id.* at 65, 142 S.E.2d at 434.

137. *Id.* at 76, 142 S.E.2d at 441.

> newly arising facts or facts adjudicated on the trial. It is not available where advantage could have been taken of the alleged error at the trial, as where the facts complained of were known before or at the trial, or where at the trial the accused or his attorneys knew of the existence of such facts but failed to present them.[138]

State v. Liles seems to align with the First Circuit's perspective, discussed above, regarding the writ as a legal "Hail Mary" in that *coram nobis* should only be used in situations in which all other post-conviction remedies are not available to the applicant.[139] Since *State v. Liles*, however, no other South Carolina court has had the opportunity to discuss *coram nobis* and its application in the state.[140] Despite the fact that South Carolina courts have not provided further guidance or examples of cases warranting the writ in fifty years, *State v. Liles* clearly prescribes the governing legal standard in South Carolina for warranting a *coram nobis* petition: the petitioner must establish that the error of fact "would have prevented" the judgment.[141]

V. ADOPTING THE REASONABLE PROBABILITY STANDARD IN SOUTH CAROLINA

As was made clear by the court in *State v. Liles*, if a petitioner can prove that an error of fact "would have" prevented the judgment, *coram nobis* relief is warranted.[142] Despite *Liles*' instruction to employ the "would have" standard, consideration of this heightened standard's unreasonable demands on petitioners strengthens why South Carolina should adopt a "reasonable probability" standard. Additionally, strong policy considerations regarding

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138. *Id.* at 73–74, 142 S.E.2d at 440 (emphasis added) (citing Dobie v. Commonwealth, 198 Va. 762, 96 S.E.2d 747 (1957)).

139. *Id.* at 73, 142 S.E.2d at 440.

140. For clarification, a search of cases discussing *coram nobis* decided by the District Court of South Carolina yielded fifteen cases: Grooms v. United States, No. CR 3:09-1174-CMC, 2013 WL 5771180, at *1 (D.S.C. Oct. 23, 2013); United States v. Cruel, No. 6:08-CR-00797-1-JMC, 2013 WL 5522885, at *1 (D.S.C. Oct. 4, 2013); Little v. United States, No. C.A.4:02-051, 2003 WL 23851176, at *2 (D.S.C. Aug. 20, 2003). However, the court applied federal law from the 4th Circuit Court of Appeals in these cases. Thus, South Carolina has not been presented with the opportunity to discuss the application and scope of *coram nobis* under state law principles since *State v. Liles*.

141. *See Liles*, 246 S.C. at 73–74, 142 S.E.2d at 440 (providing how *coram nobis* lies for errors "if known by the Court would have prevented rendition of the judgment").

142. *Id.*

the criminal justice system support a change to a "reasonable probability" standard. Adopting the "reasonable probability" standard in South Carolina would give practitioners a better grasp on appropriate situations in which the writ could be successful for criminal defendants.

First, the "would have" standard demands that a defendant prove, with certainty, that a different result, i.e., non-conviction, would have occurred had the error been apparent on the record. Such a standard places too heavy a burden on defendants appealing their alleged wrongful conviction and does not comport with the overarching intended purpose of *coram nobis* to correct injustices.[143] The hurdles a defendant faces, such as exhausting all other post-conviction remedies, in order to reach *coram nobis* are already high enough to eliminate frivolous claims. Thus, the standard for satisfying *coram nobis* should not be as cumbersome as the means in which it took a defendant to be able to employ the writ.

Second, the "would have" standard requires the defendant to prove that the evidence, a fact not apparent on the record, would have changed the original court's judgment if known at the time of trial. This high evidentiary standard raises issues of what evidence exists, if evidence still exists at all, that would provide a court with such certainty. As in *State v. Stinney*, in which the petitioners sought relief seventy years after the initial judgment,[144] most *coram nobis* petitions address decades-old convictions in which individuals who might have provided exculpatory evidence are no longer available.[145] Requiring defendants to provide evidence from which a court could determine with absolute certainty that the evidence would have altered the initial judgment frustrates the nature of the writ itself—to correct fundamental injustices rendered by the original court based on its own flawed record. Lowering the burden so that it requires a defendant to establish only with reasonable probability that the evidence, if known at trial, would have altered the judgment upholds the central purpose of the writ.

Moreover, strong policy considerations support changing the standard for *coram nobis* petitions to "reasonable probability." In criminal cases, it is essential that the state bears the burden of establishing guilt beyond a reasonable doubt, and that no reasonable doubt remain in regards to the

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143. *See* Herrera v. Collins, 506 U.S. 390, 408 (1993) (describing *coram nobis* as a collateral attack on a wrongful conviction).

144. *See infra* Part II.

145. *See* Defendant's Brief at 12 (citing SH, Charles Stinney Dep., 37) (providing that although two of Stinney's siblings could have provided "highly relevant, exculpatory evidence," no family members were interviewed by law enforcement at any time during the investigation and trial).

defendant's guilt.[146] In cases in which material evidence emerges after the time for normal appeals, such as direct appeals and habeas corpus, and such evidence raises questions about whether the state can meet its reasonable doubt burden, it does not make sense to ask a defendant to demonstrate that the new evidence warrants exoneration. This would, in effect, shift the "beyond a reasonable doubt" burden to the defendant, a concept entirely contradictory to our perceptions of impartiality in the criminal justice system.[147] Moreover, in cases in which the defendant is without fault with respect to the delay in the availability of evidence, a preponderance of the evidence or higher standard would leave the defendant worse off, as upon *coram nobis* review, the defendant would be responsible for the burdens of addressing doubts raised by the newly discovered evidence.[148] Therefore, the heightened "would have" standard frustrates the nature of *coram nobis* by requiring a defendant to jump through more hoops in addition to the myriad of ones he already went through to reach *coram nobis* as his final post-conviction relief option.

VI. CONCLUSION

George Stinney, Jr.'s case and its subsequent vacated conviction shed light on South Carolina's haunting past regarding the intersection of racial stigmas and the systemic failures of the criminal justice system. More prominent, however, is that Stinney's case reminds South Carolina practitioners that *coram nobis* can be a viable post-conviction remedy for clients in circumstances in which fundamental miscarriages of justice exist. So long as the defendant has exhausted all remedies under the UPCPA and other post-conviction avenues, practitioners should consider *coram nobis* as a means to redress wrongful convictions or sentences given to defendants. Because of the basic need to ensure that defendants are not wrongly incarcerated or executed like Stinney, and that their families do not suffer the stigma of such wrongful convictions, defense attorneys in South Carolina should make more use of *coram nobis* in cases in which newly discovered evidence would have altered the initial judgment. Further, lowering the standard to a "reasonable probability"[149] like other states would make clear

146. Stephen J. Mulroy, The Safety Net: Applying Coram Nobis Law to Prevent the Execution of the Innocent, 11 VA. J. SOC. POL'Y & L. 1, 23 (2003).

147. *Id.*

148. *Id.* at 23–24.

149. While this Note has mainly focused on adopting a "reasonable probability" standard with respect to capital cases, the issues discussed apply equally to non-capital cases. *Coram nobis* is a useful option for any criminal post-conviction case dealing with the emergence of

to defense attorneys that the evidentiary standard is not an overly demanding one. Adopting the "reasonable probability" standard would help South Carolina practitioners move forward, equipping them with another post-conviction remedy when faced with the "still-recent history"[150] of racialized injustice on the part of the state's criminal justice system.

exculpatory evidence, and the "reasonable probability" standard should apply in both capital and non-capital cases.

150. Order at 27.

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