

### **35.8 Innocence Inquiry Commission**

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### **35.8 Innocence Inquiry Commission**

#### **A. In General**

In 2006, the General Assembly added Article 92 to Chapter 15A, creating the North Carolina Innocence Inquiry Commission and establishing “an extraordinary procedure to investigate and determine credible claims of factual innocence.” G.S. 15A-1461. North Carolina is the first state in the nation to create this type of commission.

According to its [website](#), the Commission “is charged with providing an independent and balanced truth-seeking forum for credible post-conviction claims of innocence in North Carolina.” In essence, Article 92 authorizes the Commission to investigate claims of factual innocence and refer meritorious cases to a special three-judge panel appointed by the Chief Justice of the N.C. Supreme Court. G.S. 15A-1469(a). If, after an evidentiary hearing, the panel unanimously finds that the convicted person has proved by clear and convincing evidence that he or she is innocent of the charges, it is required to dismiss the charges. G.S. 15A-1469(h). Its decision is final and is not subject to any further review. G.S. 15A-1470(a); *see also* [About](#), NORTH CAROLINA INNOCENCE INQUIRY COMMISSION, (last visited April 23, 2020) (“A person exonerated through the Commission process is declared innocent and cannot be retried for the same crime.”). The Commission is to give priority to cases in which the convicted person is currently incarcerated solely for the crime for which he or she has filed a claim of innocence. G.S. 15A-1466(2).

#### **B. Structure of the Innocence Commission**

The North Carolina Innocence Inquiry Commission is an independent commission under the Administrative Office of the Courts. G.S. 15A-1462. It consists of eight voting members—a superior court judge, who serves as chair; a prosecutor; a victim advocate; a criminal defense attorney; a public member who is neither an attorney nor an employee of the Judicial Department; a sheriff currently holding office at the time of appointment; and two

members whose vocations are within the discretion of the Chief Justice of the N.C. Supreme Court. G.S. 15A-1463. The Chief Justice appoints five members as specified in the act, and the Chief Judge of the N.C. Court of Appeals appoints three members. *Id.* The Director of the Commission must be a North Carolina attorney, and he or she may hire staff with the approval of the Commission Chair. G.S. 15A-1465. For more details regarding the method of appointment of Commission members, their terms, and the duties of the director, see G.S. 15A-1463 through 15A-1465.

### **C. Meaning of “Claim of Factual Innocence”**

The Commission is authorized to consider “claims of factual innocence,” as defined in G.S. 15A-1460(1). To qualify, a claim must be

- on behalf of a living person
- convicted of a felony in the North Carolina trial courts
- asserting complete innocence for the felony for which the person was convicted and for any reduced level of criminal responsibility relating to the crime
- for which there is some credible, verifiable evidence of innocence
- that has not previously been presented at trial or considered at a hearing granted through post-conviction relief.

The last element of the definition requires that evidence supporting the claim be “new” in a limited sense. Thus, it requires that “some” evidence be submitted in support of the claim that was not previously presented, but all of the evidence need not meet this requirement. *See* John Rubin, [2006 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2007/03, at 10 (UNC School of Government, Jan. 2007); *see also* Superior Court Judge Calvin E. Murphy, [Innocence Inquiry Commission Update](#) 3 (N.C. Superior Court Judges’ Conference, June 2010) (“The ‘new evidence’ standard is merely a threshold that, once crossed, allows the panel to hear all relevant evidence of the Claimant’s actual innocence”). The definition does not require the claimant to have been unaware of the evidence or to have been unable to obtain the evidence at the time of trial; it only requires that the evidence not have been presented at a trial or at a hearing granted through post-conviction relief. Evidence is not considered to have been previously presented in post-conviction proceedings if it was presented in support of a post-conviction request for which a hearing was not granted. *See* John Rubin, [2006 Legislation Affecting Criminal Law and Procedure](#) at 10 (so interpreting last element of definition of claim of factual innocence, which provides that evidence must not have been “considered at a hearing granted through postconviction relief”).

### **D. Submission of Claim and Waiver of Rights**

Any court, State or local agency, or claimant’s counsel may refer a claim of innocence for any conviction to the Commission on behalf of a convicted person. A person convicted of homicide, robbery, any offense requiring registration, or any Class A through E felony may also directly make a claim of factual innocence. The Commission may informally screen and dismiss a case summarily or undertake a formal inquiry. G.S.

15A-1467(a). Before the Commission begins a formal inquiry, the convicted person must execute an agreement waiving his or her procedural safeguards and privileges and agreeing to provide full disclosure to the Commission on matters related to his or her claim of innocence. The waiver does not apply to matters unrelated to the claim. G.S. 15A-1467(b). However, evidence of criminal acts, professional misconduct, or other wrongdoing disclosed during the formal inquiry or later Commission proceedings are referred to the appropriate authority. Evidence favorable to the convicted person disclosed through the formal inquiry or later Commission proceedings also must be disclosed to the convicted person and his or her counsel. G.S. 15A-1468(d). If at any point during the inquiry, the convicted person refuses to comply with the Commission's requests or is otherwise deemed to be uncooperative, the Commission shall discontinue the inquiry. G.S. 15A-1467(g).

#### **E. Right to Counsel**

The convicted person has the right to advice of counsel before executing a waiver of rights and, if a formal inquiry is conducted, throughout the formal inquiry. If the convicted person does not have counsel, the Commission Chair must determine whether the person is indigent and, if appropriate, enter an order for the appointment of counsel. G.S. 15A-1467(b); *see also* G.S. 15A-1469(e) (indigent person has right to appointed counsel in proceedings before three-judge panel and may request specific attorney with knowledge of the case).

For a discussion of appointed counsel's role, see memoranda prepared by the Office of Indigent Defense Services (IDS) and the North Carolina Center on Actual Innocence (a different organization than the Innocence Commission), a part of a collection of materials compiled by IDS. *See [Innocence Inquiry Proceedings Manual](#)*, located on the IDS website.

#### **F. Notice to Victims and Co-Defendants**

If the Commission proceeds with a formal inquiry, the Director must use due diligence to notify the victim in the case and explain the process. The victim has the right to present his or her views and concerns throughout the Commission's investigation. G.S. 15A-1467(c). The victim also has the right to notice of any proceedings before the full Commission, discussed below, and to attend Commission proceedings subject to limitations imposed by the Commission. G.S. 15A-1468(b); *see also* G.S. 15A-1469(f) (victim receives notice of hearing before three-judge panel).

If a formal inquiry is granted, the Commission must also use due diligence to notify any co-defendant of the claim and inform him or her that if he or she also wishes to file a claim, the claim must be filed within sixty days of the notice or it may be barred. G.S. 15A-1467(c1). However, notice need not be given to a co-defendant if the executive director shows good cause and the Commission Chair approves. *Id.*

## G. Access to Evidence

The Commission has the power to issue process to compel the attendance of witnesses and production of evidence, administer oaths, and petition the superior court of Wake County or of the original jurisdiction for enforcement of process or other relief. G.S. 15A-1467(d), (e). In addition, all state discovery and disclosure statutes in effect at the time of the inquiry are enforceable as if the convicted person were being tried for the charge being investigated by the Commission. G.S. 15A-1467(f).

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**Practice note:** In 2009, the General Assembly added an immunity provision for witnesses who provide information in proceedings before the Commission. *See* G.S. 15A-1468(a1). Counsel representing a witness in Commission proceedings should be aware that the immunity afforded by this provision is limited and may not fully protect a witness from criminal prosecution for information he or she provides. Counsel should so advise the witness and, if the Commission directs the witness to provide information that could be self-incriminating, should take appropriate steps to protect the witness. *See* John Rubin, [2009 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 39–40 (UNC School of Government, Dec. 2009) (discussing alternatives that counsel for a witness may take to ensure that the witness has adequate immunity from future prosecution).

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## H. Commission Proceedings

G.S. 15A-1468 details the procedures before the Commission once the formal inquiry is completed. All relevant evidence from the inquiry must be presented to the full Commission in a public hearing. G.S. 15A-1468(a). After reviewing the evidence, the Commission votes on whether to refer the case to superior court for review by a three-judge panel. In cases in which the convicted person did not plead guilty, five or more Commission members must find sufficient evidence of innocence for the case to be referred for judicial review. In cases in which the convicted person pled guilty, all eight Commission members must find sufficient evidence of innocence. G.S. 15A-1468(c).

The Commission must issue an opinion, whether it finds sufficient or insufficient evidence of innocence. If a case is referred to a three-judge panel, all of the records in support of the Commission's conclusion, including a transcript of the hearing before the Commission, become public; if the case is not referred for judicial review, the files remain confidential except as the statute otherwise provides. G.S. 15A-1468(e).

At any point during the formal inquiry, the District Attorney and the convicted person or his or her counsel may bypass the eight-member panel by agreeing that there is sufficient evidence of factual innocence to merit review by a three-judge panel. G.S. 15A-1468(f).

## I. Review by Three-Judge Panel

If the Commission concludes, or the District Attorney and convicted person's counsel agree, that there is sufficient evidence of innocence to merit judicial review, the Chief

Justice appoints a three-judge panel to conduct an evidentiary hearing. The panel may not include any trial judge who has had substantial previous involvement in the case. G.S. 15A-1469(a).

Following an order setting a date for a hearing, the State has ninety days to file a response to the Commission's opinion finding sufficient evidence of factual innocence to merit judicial review. G.S. 15A-1469(b). The district attorney of the district of conviction, or his or her designee, represents the State at the hearing unless credible evidence of prosecutorial misconduct has been shown. In that case, a special prosecutor may be appointed. G.S. 15A-1469(a1), (c).

The panel may compel the testimony of any witness, including the convicted person. The convicted person has the right to be present but may not assert any privilege or prevent any witness from testifying. G.S. 15A-1469(d). If the three-judge panel unanimously finds by clear and convincing evidence that the convicted person is innocent of the charges, it enters a dismissal of the charges. If the vote is not unanimous, the panel denies relief. G.S. 15A-1469(h).

#### **J. Finality of Proceedings and Availability of Other Relief**

The decisions of the Commission and the three-judge panel are final and are not subject to review. G.S. 15A-1470(a). Submission of a claim to the Commission does not adversely affect the right to other post-conviction relief. G.S. 15A-1470(b); *see also* G.S. 15A-1411(d) (claim to Commission does not constitute motion for appropriate relief and does not affect right to relief under post-conviction statutes). G.S. 15A-1417(a)(3a) provides that a court may, in ruling on a motion for appropriate relief, refer a claim of factual innocence to the Commission; but, the statute does not permit the court to defer claims to the Commission based on other grounds for post-conviction relief, such as a constitutional violation.

#### **K. Additional Resources**

For additional information about Innocence Commission proceedings, see

- Website of the [North Carolina Innocence Inquiry Commission](#), which includes the Commission's governing statutes, rules, a case flowchart, and other resources.
- [Innocence Inquiry Proceedings Manual](#), which includes memoranda on counsel's responsibilities in Commission proceedings and other resources.
- John Rubin, [2006 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2007/03, at 10–11 (UNC School of Government, Jan. 2007) (summarizing the original legislation that created the Innocence Commission).
- John Rubin, [2009 Legislation Affecting Criminal Law and Procedure](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2009/09, at 39–40 (UNC School of Government, Dec. 2009) (summarizing amendments to the Innocence Commission statutes that create limited immunity for witnesses).
- Robert P. Mostellar, *N.C. Innocence Inquiry Commission's First Decade: Impressive Successes and Lessons Learned*, 94 N.C. L. REV. 1725 (2016) (discussing the origins and

key elements of the Innocence Commission, analyzing the first ten years of the Commission's existence, and examining seven cases handled by the Commission where innocence has been found).

- Warren D. Hynson, *North Carolina Innocence Inquiry Commission: An Institutional Remedy for Actual Innocence and Wrongful Convictions*, 38 N.C. Cent. L. Rev. 142 (2016) (discussing the creation and operation of the Commission, offering recommendations for improvement, and examining two cases handled by the Commission where the defendants were exonerated).