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NOTES

CRIMINAL PROCEDURE — NORTH CAROLINA'S NEW APPROACH TO RECANTED TESTIMONY — *State v. Britt*

INTRODUCTION

The American judicial system is founded on the principle that everyone is entitled to a day in court and that every American has a right to at least one fair trial.¹ However, some judges and scholars have different opinions regarding one's right to another day in court based on the assertion that a witness recanted testimony in a previous trial. The questions and criticisms surrounding the disputes between different rules grow as jurisdictions across the nation align themselves to one standard or another.² The North Carolina Supreme Court has appeared to carve a middle road between the standards which will create a more just and workable solution for trial judges who face the recanted testimony problem in this State.³

In recent years, courts have been troubled with how and under what circumstances recanted testimony can be a ground for a new trial.⁴ Courts have brought forward various views on how to best deal with the issue. Some courts are content with treating recanted testimony as a form of newly discovered evidence, while other courts have considered recanted testimony as a special ground for a new trial.⁵ In November of 1987, the North Carolina Supreme Court faced this issue, and in deciding *State v. Britt*, the justices held that recanted testimony will receive special treatment in

¹. U.S. Const. amend. VI.
⁵. *See supra* note 2.

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North Carolina.\(^6\)

_Britt_ placed North Carolina in a minority position by distinguishing recanted testimony as a special ground for a new trial.\(^7\) The court adopted a modified version of the three part test set forth in _Larrison v. United States_,\(^8\) providing North Carolina prisoners with a more feasible opportunity for post-conviction relief than they would have received under pre-_Britt_ standards. In addition, the court has provided North Carolina trial courts a more workable test that satisfies the critics of the _Larrison_ and pre-_Britt_ standard.

This Note will discuss how other jurisdictions have attempted to deal with recanted testimony and the criticisms directed toward these methods. This Note will further discuss why the modified version of the _Larrison_ rule, as adopted by the North Carolina Supreme Court, is immune from these same criticisms. With _Britt_, the court seems to have adopted _Larrison_’s positive principles without adding fuel to the conflict that decision created.

**THE CASE**

On May 7, 1984, Jerome Parker Britt was found guilty of first degree murder in North Hampton County Superior Court.\(^9\) The evidence showed that the defendant believed the victim to be having an affair with his estranged wife.\(^10\) Four witnesses testified that Britt entered Lowe’s Fish Market in Seaboard, North Carolina with a shotgun, announced to the victim that he planned to kill him, and shot him four or five times.\(^11\) A subsequent investigation confirmed the victim was armed.\(^12\)

After Britt’s conviction, Joe Louis Moody recanted his testimony and filed an affidavit which in substance corroborated the defendant’s assertion that he had acted in self-defense.\(^13\) The defendant sought a new trial pursuant to N.C.G.S. section 15A-

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6. 320 N.C. at 714, 360 S.E.2d at 665.
7. _Id._ (the _Britt_ court recognized that only four other states have adopted the _Larrison_ rule).
8. 24 F.2d 87 (7th Cir. 1928).
9. 320 N.C. at 706, 360 S.E.2d at 660.
10. _Id._
11. _Id._
12. _Id._
13. _Id._ at 711, 360 S.E.2d at 663 (Britt’s assertion was that he had entered the building unarmed and had returned for the gun after the victim began to draw his).
1415(b)(6) (1983), which permits a party to obtain a new trial if he shows: first, that the evidence could not have been discovered through due diligence before the trial; and second, that it is directly and materially related to the defendant's guilt or innocence. After hearing testimony from Moody and the investigating officer, the trial judge denied Britt's motion.

Britt appealed to the North Carolina Supreme Court asserting that the superior court's evidentiary holding should be overturned. The North Carolina Supreme Court examined the requirements for a new trial based on recanted testimony and affirmed the trial court.

Despite the fact that Britt's request for relief was not granted, the North Carolina Supreme Court's decision marked a considerable deviation from the usual practice of treating recanted testimony as a form of newly discovered evidence. After finding fault with the newly discovered evidence, the court looked toward the test set forth in Larrison which held that recanted testimony can be grounds for a new trial if three requirements are met: first, the court is reasonably well satisfied that the testimony given by a material witness is false; second, that without it the jury might have reached a different conclusion; and third, 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.

The court then created and adopted a modified version of the Larrison rule to be applied by future North Carolina courts in evaluating recanted testimony.

14. N.C. GEN. STAT. § 15A-1415(b)(6) (1983) (permits a defendant to make a motion for appropriate relief more than ten days after the entry of judgment if: "Evidence is available which was unknown or unavailable to the defendant at the time of the trial which could not with due diligence have been discovered or made available at that time, and which had a direct and material bearing upon the guilt or innocence of the defendant." The federal equivalent is FEDERAL RULE OF CRIMINAL PROCEDURE 33).

15. 320 N.C. at 711, 360 S.E.2d at 663.
16. Id. at 712, 360 S.E.2d at 663.
17. Id.
18. See infra note 48.
19. Larrison, 24 F.2d at 88.
BACKGROUND

Recanted testimony is testimony that has been withdrawn or repudiated formally and publicly. A witness must admit that his prior statements, made under oath, were false. Yet whether and under what circumstances the witness's recantation will serve as grounds for a new trial, is a matter of judicial debate.

Courts have granted few motions for new trials on the basis of recanted testimony. One reason might be that recantations have not always received the attention that they are now getting from the judicial system. Prior Larrison, most judges considered recanted testimony to be only a type of newly discovered evidence and treated incidents of perjury as they would any other ground for new trial.

To determine whether a defendant is entitled to a new trial based on newly discovered evidence, American courts have traditionally turned to the landmark case of Berry v. State. Essentially all jurisdictions have employed the Berry standard for reviewing newly discovered evidence or have adopted a modified version of it. To obtain a new trial under the Berry rule a defendant must show:

1. that the evidence has come to his knowledge since the trial;
2. that it was not owing to want of due diligence that it did not come sooner;
3. that it is so material that it would probably produce a different verdict if the new trial were granted;
4. that it is not cumulative only;
5. that the affidavit of the witness himself should be produced or its absence accounted for; and
6. a new trial will not be granted if the only object of the testimony is to impeach the character or credit of a witness.

Case law suggests that there are two barriers to these motions.

24. Id.
25. Id.
28. Berry, 10 Ga. at 527.
The first barrier is the strict scrutiny requirements incorporated within the six prong Berry test. The defendant cannot overcome this burden unless the circumstances of the testimony indicate that it had an obvious influence over the jury's decision. Few motions for new trial have been granted under the Berry rule.

The second barrier is the judicial distaste for perjury. The reluctance to grant new trials because a witness has recanted is well documented. When a witness repudiates he demonstrates a lack of trustworthiness and credibility. Some jurisdictions go as far as requiring the perjuring witness's death or conviction before they will grant a new trial. Courts which have not evaluated recantations under a Berry-type rule have consistently denied the defendant relief. This inherent judicial skepticism, when coupled with the court's interest and economy and finality, leads to the conclusion that the chances for a new trial are unlikely regardless of what rule the trial judge applies.

Larrison is clearly not a modification of the old rule, rather it is a step in another direction towards more flexibility and leniency. That court's reasoning was founded upon the belief that perjury is a subject that demands greater judicial attention than it is usually afforded. In reaching this conclusion, the Larrison court relied primarily on a decision it had rendered a year earlier, Martin v. United States.

In Martin, the Fifth Circuit assumed a judicial duty to grant a

29. Id.
30. See Grace v. Butterworth, 586 F.2d 878 (1st Cir. 1978) (held that a witness who could corroborate the defendant's alibi would only give cumulative testimony). See also United States v. Weidman, 572 F.2d 1199 (1978), cert. denied, 439 U.S. 821 (1979) (held that where the government refused to tell defendant that witnesses testifying against him were being granted immunity, such denial was not material enough to warrant a new trial).
31. See, e.g., United States v. Troche, 213 F.2d 401, 403 (2d Cir. 1954); Harrison v. United States, 7 F.2d 259, 262 (2d Cir. 1925) (holding that recantations are looked upon with "the utmost suspicion").
33. Gilliken v. Springle, 254 N.C. 240, 118 S.E.2d 611 (1961) (The Supreme Court of North Carolina held that this is the rule in civil actions); Powell v. Commonwealth, 133 Va. 741, 112 S.E. 657 (1922); Blake v. Rhode Island Co., 32 R.I. 213, 78 A. 834 (1911).
34. Grace, 586 F.2d 878 (1st Cir. 1978); Weidman, 572 F.2d 1199 (7th Cir. 1978), cert. denied, 439 U.S. 821 (1978).
35. Larrison, 24 F.2d at 82.
36. 17 F.2d 973 (5th Cir. 1927).
new trial on every occasion that a witness admits perjury or mistake as long as his testimony was material and not cumulative.\(^3\)

The court felt that the only way to assure that perjured testimony did not adversely affect the defendant's right to a fair trial was to allow him a second chance to exonerate himself.\(^3\)

Larrison is a restatement of the principles set forth in Martin. The Larrison court, in dicta, created the three-part test which has led to the current debate. Ironically, neither Martin nor Larrison granted the defendant a new trial, both holding that the recantations were not believable.\(^9\)

Since its inception, Larrison has received mixed reviews. Presently the majority of federal circuits employ the Larrison standard\(^4\) while an overwhelming majority of state courts still rely on the traditional Berry standard.\(^4\) A few courts have rejected Larrison outright.\(^4\) The Fourth Circuit adopted the Larrison test in United States v. Wallace in 1976.\(^4\) The Britt court cited Wallace favorably in an attempt to justify their holding.\(^4\)

Britt has included North Carolina in the handful of states that now impose a more lenient standard.\(^4\) Although North Carolina

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\(^{37}\) Id. at 976.

\(^{38}\) Id.

\(^{39}\) Larrison, 24 F.2d at 89; Martin, 17 F.2d at 976.


\(^{43}\) United States v. Wallace, 528 F.2d 863 (4th Cir. 1976).

\(^{44}\) 320 N.C. at 714, 360 S.E.2d at 665.

\(^{45}\) Those states are Delaware in Blankenship v. State, 447 A.2d 428 (Del. 1982); Idaho in Lawrence, 112 Idaho App. 149, 730 P.2d 1069 (1986); Minnesota in Caldwell, 322 N.W.2d 574 (Minn. 1982); South Dakota in Pickering v. State, 260 N.W.2d 234 (S.D. 1977). These states apply Larrison. Illinois applies a standard different from Larrison or Berry. In People v. Bracey, 51 Ill. 2d 514, 283 N.E.2d 685 (1972), the Illinois Supreme Court held that the defendant must show perjured testimony was used. If he does the burden shifts to the state to prove it was harmless beyond a reasonable doubt.
has adopted a modified version rather than the pure form of the *Larrison* rule, its premise is still based on the notion that the burden on defendants who have been convicted through perjured testimony should not be as great as it has traditionally been.

A case-by-case analysis of past North Carolina decisions leaves some doubt as to what the previous North Carolina position was with respect to recanted testimony. In *State v. Ellers,* the court faced a situation where a key state witness had repudiated his testimony. In *Ellers* the court did not apply a newly discovered evidence standard but instead held that in this situation such a standard would not be applicable. However, in several subsequent decisions the court applied a North Carolina version of the *Berry* newly discovered evidence rule to determine whether the defendant was entitled to a new trial.

The North Carolina version of the *Berry* rule is even more demanding than the original. Under the North Carolina rule a defendant is faced with seven prerequisites:

1. that a witness or witnesses will give newly discovered evidence;
2. that such newly discovered evidence is probably true;
3. that it is competent, material, and relevant;
4. that due diligence was used and proper means were employed to procure the testimony at trial;
5. that the newly discovered evidence is not merely cumulative;
6. that it does not tend only to contradict a former witness or to impeach or discredit him;
7. that it is of such a nature as to show that in another trial a different result will probably be reached and that the right will prevail.

Structurally, the North Carolina version of *Berry* differs from the original only through the additional requirement that the evidence being offered probably be true. This extra requirement is significant in that it rests in the trial judge more discretion than the traditional *Berry* rule. By vesting the trial judge with more

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47. *Id.* at 45, 65 S.E.2d at 505.
personal discretion, the North Carolina version of the Berry rule has invaded the jury's domain by making the court the sole judge of new testimony's credibility in instances where a witness has recanted.

In *State v. Nickerson*, the last case prior to *Britt* to deal with recanted testimony, the North Carolina Supreme Court shadowed the *Britt* decision. The court awarded the recantation issue in its decision but did make a quasi-commitment to the issue's uniqueness. The court cited *Ellers* as precedent and recognized that the rules governing recanted testimony and newly discovered evidence are not the same. Thus, *Nickerson* became an important step towards rationalizing the *Britt* court's decision.

*Britt* is not the first attempt by a state or federal court to modify *Larrison*. The Supreme Court of Vermont in *State v. Robillard* adopted the *Larrison* rule but employed a "probability" rather than a "might" standard for evaluating the effect of the perjury on the jury. In *United States v. Willis*, a Pennsylvania district court created a version even more liberal than *Larrison* itself. That court held that the judge should not only consider the new testimony's effect on the jury's verdict but should also consider the impact it has on the recanting witness' credibility.

*Robillard* and *Willis* demonstrate that it is not a novel idea to modify the *Larrison* rule. The *Britt* court did not break new ground, however, it did enter uncharted waters. Time will determine the decision's validity.

**Analysis**

The *Britt* court acted on its own initiative by adopting a modified *Larrison* rule through a *sua sponte* holding. In doing so, the court used *Larrison*'s liberal principles as the basis for a more realistic and workable alternative. In its decision, the *Britt* court elimi-
nated the *Larrison* test's third prong that requires the defense be taken by surprise.\(^{59}\) Furthermore, the court re-structured the first two prongs of the *Larrison* test to reach a compromise capable of satisfying critics of both *Larrison* and *Berry*. Under the new *Britt* rule, a defendant may obtain a new trial if:

1. The court is reasonably well satisfied that the testimony given by a material witness is false, and
2. There is a reasonable possibility that, had the false testimony not been admitted, a different result would have been reached at trial.\(^{60}\)

The court used very little analysis to justify its holding. Other than drawing a distinction between recanted testimony and newly discovered evidence, the only indicia given by the court to support its reasoning was that it saw *Larrison* as the better rule.\(^{61}\) The court did cite numerous precedents that expressed the judicial positions behind both the *Berry* and *Larrison* rules.\(^{62}\) In doing so the court implied that its decision was based on both rules' usual criticisms.

The problems presented can be most easily illustrated by drawing an imaginary scale. On one side of the scale rests recanted testimony's dubious character. The need for finality,\(^{63}\) judicial economy,\(^{64}\) and the possibilities of collusion and coercion\(^{65}\) should be included. Courts, that feel this is the heavier side, apply the *Berry* rule in principle.

On the scale's other side sits a defendant's right to a fair trial and perjury's negative impact. In the words of the Supreme Court in their holding in *Mesarosh v. United States*,\(^{66}\) "the Court must see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest possible opportunity."\(^{67}\) Courts which feel the greater weight lies

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60. *Id.*
61. *Id.* at 714, 360 S.E.2d at 665.
62. *See supra* notes 4 and 40 and accompanying cases.
64. *Id.*
67. *Id.* at 14.
with this reasoning apply the Larrison standard’s principles.

Unfortunately, the judicial system has yet to produce a rule capable of balancing both sets of interests. The Britt rule may possibly satisfy that need. However, the rule must first prove that it can survive the criticisms that have been addressed toward the original Larrison standard.

A. Criticism of Larrison

The most common complaint by Larrison critics is that it is a theory that is too liberal. The general feeling is that the “might” standard employed by that rule would require reversal in virtually every case. However, courts have declined to apply the ordinary meaning of the word “might.” “Might” has been regarded as “more than an outside chance” and “more than a faint possibility” but “less than a probability.” These interpretations illustrate Larrison’s viability. Courts that apply the Larrison rule do not automatically grant new trials under all circumstances. Rather, the rule has afforded most defendants little more success than they would have received without it.

Proponents have been quick to point out that few motions by defendants for a new trial under the Larrison standards have been successful. A majority of courts that have evaluated recanted testimony under both standards have reached similar decisions by holding that a typical case fails under either rule.

Most judges deny motions for new trials on their decision that


69. Id.

70. Kyle, 297 F.2d at 512.

71. Wallace, 528 F.2d at 866 n. 4 (4th Cir. 1976).

72. Kyle, 297 F.2d at 512.


74. E.g., Gabriel, 597 F.2d 95 (7th Cir. 1979) (new evidence offered tended only to impeach witness’ credibility), cert. denied, 444 U.S. 858 (1979); United States v. Robinson, 585 F.2d 274 (7th Cir. 1978) (defendant did not use diligence in discovering evidence), cert. denied, 441 U.S. 947 (1979).

75. Id.

76. E.g., United States v. Hamilton, 559 F.2d 1370 (5th Cir. 1977) (court held neither standard was met); United States v. Mackin, 561 F.2d 958 (D.C. Cir. 1977) (recantation did not warrant new trial under either standard) cert. denied, 434 U.S. 959 (1977).
the recantation is not believable. Thus, most cases are resolved before the testimony is evaluated for its effect on the jury. If a judge is not "reasonably well satisfied" that the first testimony was false he need not go any further.

Clearly the trial judge is vested with considerable discretion. He, not the jury, determines which of the recanting witnesses's statements are believable. Witnesses are not alien to the temptation to recant. Collusion, corroboration, and fraud upon the court are important concerns. Even the belief that the defendant has undergone a moral conversion has induced a witness to repudiate.

The veracity or falsity of recantations are a matter of judicial opinion. If the trial judge places credibility with the witness's subsequent statement, he must consider the lie's impact on the jury. It is here that Larrison's "might" language comes into play. The trial judge must ask himself whether the perjured testimony was influential enough to convince the jury that the defendant was guilty. This is a question that is easily answered if the recanting witness's testimony was obtained through prosecutorial misconduct. The United States Supreme Court has consistently held that prosecutorial misconduct, and even prosecutorial negligence, are a violation of the Constitutional guarantees of due process.

The answer is seldom this clear. However, the trial judge can solve his dilemma by simply relying on the burdens of persuasion placed upon the prosecution in a criminal trial. The state must always prove guilt beyond a reasonable doubt.

In United States v. Krasny and United States v. Stofsky, the Second and Ninth Circuits expressed the usual criticism that

77. See supra note 31.
78. See, e.g., United States v. Radney, 484 F. Supp. 1032 (D.C. Ala. 1980); United States v. Bujese, 371 F.2d 120 (3rd Cir. 1967) (both courts found subsequent recantation to be unbelievable).
79. Larrison, 24 F.2d at 87.
80. See supra note 65.
81. Lindsey v. United States, 368 F.2d 633 (5th Cir. 1966).
82. Larrison, 24 F.2d at 88 (if the recantation is believed, the test must be applied to evaluate the impact of the perjury).
83. Both Berry and Larrison vest discretion for considering motions for new trial in the trial judge.
85. W. LAFAVE, CRIMINAL LAW 2 Ed., § 1.4(a), at 17 (1986).
Larrison's "might" standard would require reversal in every case. What these courts and other critics have failed to note is that in the criminal arena the required burden of proof is substantial enough to provide the trial judge with adequate guidelines of what would alter the jury's verdict. If the false testimony was of sufficient substance to support the decision that the defendant is guilty beyond a reasonable doubt then the case warrants a new trial. If not, then the verdict should stand. Testimony that was merely corroborative, cumulative, or remotely circumstantial may be disregarded under the Larrison standard if the remaining evidence was capable of sustaining the burden of proof.

The degree of certainty required by Larrison, the "might" standard, should not be bothersome to judges when viewed in this manner. Case law demonstrates that the fears expressed by the Larrison critics have not come to pass. Larrison's principles have only been given lip service allowing it no opportunity for it to prove itself the better rule.

B. Comparison of Larrison and Berry

The principles behind Larrison and Berry vary greatly in theory. If literally applied, the Berry rule would allow a new trial in only the most severe situations while the Larrison rule would make the possibility of a new trial much more likely. Current case law tends to suggest that these are more illusory than real since new trials are seldom granted on recanted testimony grounds regardless of the standard applied. The reason may be that Larrison and Berry are more similar than either rule's proponents are willing to admit.

Regardless of whether the trial judge determines that the jury "might" have reached a different conclusion or that a new jury would "probably" reach a different conclusion, that decision is solely his. On appeal, the standard of review of the trial judge's decision not to grant a new trial will be abuse of discretion. There is little chance of success under either rule since appellate courts seldom overrule a decision based on abuse of a trial judge's discretion.

88. Krasny, 607 F.2d at 843; Stofsky, 527 F.2d at 245.
89. See supra note 74.
90. See supra note 78.
91. See supra note 84.
92. Krasny, 607 F.2d at 840.
Larrison and Berry further concur by requiring that the new testimony be material. If the requirement of materiality is not demonstrated there is no need to consider whether knowledge of the falsity by the factfinder 'might' or 'probably' would have resulted in a different verdict. If a witness's testimony was not material it probably had little effect on the first jury's decision and would probably have little effect on a jury's decision in a new trial.

A third similarity is Berry's "due diligence" requirement and Larrison's surprise requirement. Under either standard, the new testimony that is now being offered must have been unavailable to the defendant at trial. It is not the court's policy to allow the defendant "a second bite at the apple."

The distinctions between the standards are more obvious and dramatic, despite these similarities. Collectively, the differences illustrate the notion that Berry is strict in theory while Larrison is much more lenient. Past application of both rules has not favored this reasoning.

Even at first glance, the rigidity of the Berry rule is apparent. The newly discovered evidence test's six steps are filtering mechanisms that serve as impediments to most new trial motions. In each instance the defendant is put in the difficult position of having to overcome a substantial burden of proof. In addition, there is the strong judicial disfavor for granting new trials because a witness has recanted. These factors leave the defendant with little or no chance of securing a new trial.

The Larrison standard is an effort to encourage judges to allocate more consideration to recanted testimony. Larrison's effect is to place recanted testimony in a separate and distinct sphere while lessening the burden of proof the defendant must meet to obtain a new trial. The result is that the Larrison principles differ with those set forth in Berry in three ways.

First, there is a difference regarding the degree of certainty

93. The Larrison standard requires that the recanting witness be a material witness. Berry requires the new testimony to be material enough to change the verdict.
95. Id.
96. Lawrence, 112 Idaho App. at ___, 730 P.2d n.2 at 1072.
97. See supra notes 30 and 74 and accompanying text.
98. See supra note 31 and accompanying text.
99. Martin, 17 F.2d at 976.
100. Larrison, 24 F.2d at 88.
the trial judge must satisfy in order to grant a new trial.\textsuperscript{101} \textit{Larrison} asks the judge to determine whether the false testimony "might" have influenced the jury in its decision of guilt.\textsuperscript{102} The standard of certainty is more encompassing than the "probability" requirement of \textit{Berry}. A defendant will obviously have to present more conclusive and persuasive evidence that his right to a fair trial was violated in order to get a new trial under the \textit{Berry} rule. Since the burden on the defendant in a court applying the \textit{Larrison} rule is less, the trial judge has less opportunity to exercise discretion in his decision.

The second contrast revolves around the place in time where the false testimony must be evaluated.\textsuperscript{103} The \textit{Larrison} rule considers the appropriate time to be in the past. A trial judge must retrospectively scrutinize the jury's decision in the original trial and determine whether they might have rendered the same verdict without the perjury.\textsuperscript{104}

\textit{Berry}, on the other hand, looks toward the possible new trial and considers what the verdict probably would be without the false testimony.\textsuperscript{105} The trial judge must predict how another future jury would react. He is forced to make presumptions that the previous trial's tainted portions would not have an equally adverse impact if a new trial were granted.

\textit{Larrison}'s advantage is apparent. The trial judge is faced only with considering what has already occurred.\textsuperscript{106} He is not forced to evaluate future probabilities. A new trial should be granted if the jury "might" have reached a different conclusion without the false testimony.\textsuperscript{107}

The third distinction between \textit{Berry} and \textit{Larrison} relates directly to this time element.\textsuperscript{108} The \textit{Larrison} rule takes the perjured testimony away from the jury and then asks the question of whether they would have reached the same verdict in its ab-

\begin{itemize}
  \item \textsuperscript{102}. Id.
  \item \textsuperscript{103}. Id.
  \item \textsuperscript{104}. \textit{Larrison}, 24 F.2d at 88.
  \item \textsuperscript{105}. \textit{Berry}, 10 Ga. at 527.
  \item \textsuperscript{106}. \textit{Larrison}, 24 F.2d at 88.
  \item \textsuperscript{107}. Id. at 87.
\end{itemize}
sence.\textsuperscript{109} \textit{Berry}, by looking towards the next trial, would place the prior testimony as well as the later recantation before the court.\textsuperscript{110} The jury would be presented with the opportunity to assess the credibility of the witness knowing that he has fabricated his statement on one of the two occasions. This certainly must enter into the trial judge’s prediction of what the verdict would be at the next trial.

Precedent would suggest that \textit{Larrison} has failed in its ambition to create a more equitable rule.\textsuperscript{111} This has happened because the rule in practice differs from the rule in principle. It has been suggested that false testimony damaging enough to pass the \textit{Larrison} test would pass under \textit{Berry} as well.\textsuperscript{112} The \textit{Britt} decision may have presented North Carolina with the opportunity to reach a compromise between these two standards and what can be realistically accomplished.

\textbf{C. The Britt Decision}

The \textit{Britt} court has not only attempted to create a more acceptable version of \textit{Larrison} but has more importantly left those seeking a new trial with an alternative to the harsh test applied to newly discovered evidence. The \textit{Britt} rule should eliminate the \textit{Berry} hardship that existed in earlier cases.

The most obvious difference between \textit{Britt} and the \textit{Berry} newly discovered evidence rule is the degree of certainty which a trial judge must have with respect to the false testimony’s detrimental effect on the jury. On review, the trial judge now must find only that there was a “reasonable possibility” the jury would have come to a different conclusion.\textsuperscript{113} The new standard has the potential of fulfilling the \textit{Berry} test’s needs and \textit{Larrison}’s expectations. By imposing a “reasonable possibility” standard, judges are afforded sufficient latitude to make judgments based on a realistic picture of the circumstances. Furthermore, the \textit{Britt} requirements should eliminate the traditional complaint that the \textit{Berry} standard vests the trial judge with too much discretion.

The \textit{Britt} court also eliminated the \textit{Larrison} requirement that

\begin{itemize}
  \item \textsuperscript{109} \textit{Larrison}, 24 F.2d at 88.
  \item \textsuperscript{110} \textit{Berry}, 10 Ga. at 527.
  \item \textsuperscript{111} See supra note 76.
  \item \textsuperscript{112} Note, \textit{Criminal Procedure}, 67 MINN. L. REV. 1314 (1983).
  \item \textsuperscript{113} \textit{Britt}, 320 N.C. at 715, 360 S.E.2d at 665.
\end{itemize}
the defense be taken by surprise. In doing so the court did not qualify its reasons but did reflect the opinion that the surprise requirement should not be necessary in recanted testimony cases. This decision creates a better rule because the effect of perjury is repulsive to any attempt at a decision based on the facts.

Perjured testimony is unlike any other form of evidence because it is not only deceptive but highly influential on jurors who see and hear a witness make false statements under oath. Even though the defense may be able to prepare and meet the perjury at trial, it is obviously a difficult obstacle in the path of justice. The judicial system’s goal is to allow the jury to make their decision based on facts as actually perceived by the witnesses. This goal is defeated whenever false evidence is presented at trial. The Britt court’s decision to eliminate the surprise requirement is judicial recognition of the feeling that perjury is repugnant to any attempt at a fair and accurate result and should be rectified when discovered.

CONCLUSION

The Britt holding will allow a convicted defendant a new trial when a witness recants. The trial judge must be reasonably well satisfied that the testimony was false and there was a reasonable possibility that the jury would have reached a different conclusion without it. North Carolina has adopted a modified version rule applied by a minority of states but by a majority of federal circuits.

What remains to be seen is whether the courts of North Carolina will apply the new rule with the same sense of fair play that led to its creation. If they do not, then Britt does nothing more than camouflage harsh practice with lenient words. If they do, then criminal defendants who have been convicted on the basis of perjured testimony should find that the North Carolina Supreme Court has taken steps to insure that their right to a fair trial is well protected in this state.

Walter L. Jones

114. Id.
115. Id.
117. Id.
118. Britt, 320 N.C. at 715, 360 S.E.2d. at 665.