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#### Recommended Citation

Sean O'Brien, *Strange Justice for Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent*, *St. Louis University Law Journal* 725 (2021).

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## STRANGE JUSTICE FOR VICTIMS OF THE MISSOURI PUBLIC DEFENDER FUNDING CRISIS: PUNISHING THE INNOCENT

SEAN D. O'BRIEN\*

### INTRODUCTION

I am grateful to have had one last opportunity to sit with Missouri Supreme Court Judge Richard Teitelman at the 2016 Richard J. Childress Memorial Lecture at Saint Louis University School of Law and listen to dedicated advocates address problems and issues arising from the ongoing crisis in Missouri indigent defense.<sup>1</sup>

After the lecture, Judge Teitelman shared a personal story with former Saint Louis University Law School Dean Michael Wolff, his former colleague on the Supreme Court. Judge Teitelman authored the opinion that exonerated and freed Joseph Amrine from death row based on newly discovered evidence of his innocence, and Dean (then Judge) Wolff wrote a compelling concurrence.<sup>2</sup> After his release from prison, Joe was invited to sit at the head table for the Legal Aid of Western Missouri Justice for All Luncheon with keynote speaker Sister Helen Prejean and dignitaries that included Judge Teitelman and his fellow Missouri Supreme Court Judge Ray Price. Judge Teitelman was overjoyed to meet Joe, and, as he did with everyone, asked Joe to call him “Rick.” After lunch, Judge Teitelman insisted that Joe pose for a picture with him and Judge Price, who had dissented in part from the decision granting Joe habeas corpus relief. Joe stood with a Supreme Court judge under each arm, and just before the shutter clicked, he said, “Wait ‘til the guys back on death row see this.” Judge Teitelman laughed as hard telling the story as he

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1. Presenters included ArchCity Defenders Co-Founder and Executive Director Thomas Harvey, Co-Founder and Director of Finance and Operations Michael-John Voss, and Staff Attorney and Skadden Fellow Blake Strode; Stephen Bright, President of the Southern Center for Human Rights; Missouri State Public Defender Michael Barrett; and the newly elected St. Louis City Circuit Attorney Kim Gardner. *Richard J. Childress Memorial Lecture 2016: Indigence and the Criminal Justice System*, St. Louis University School of Law (Oct. 7, 2016), <http://law.slu.edu/childresslecture2016> [<http://perma.cc/Z8UV-8AUZ>]. All had insightful views on the problems facing indigent defendants in Missouri.

2. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543–44 (Mo. 2003) (en banc).

did when it happened. Judge Teitelman's recognition of Joe Amrine's humanity on and off the bench exemplifies who he was as a jurist and as a human being. He treated everyone with dignity, respect, and good humor. He will be sorely missed. It is timely for this article to recall his significant contributions to the protection of innocent prisoners who have not been well served by Missouri's indigent defense system.

Judge Teitelman's decision that freed Joe Amrine is a good lens through which to view Missouri's chronic indigent defense crisis. Joe is one of thirty-eight innocent people in Missouri since 1989 to be wrongly convicted of serious crimes and later cleared by new evidence.<sup>3</sup> Collectively, these men and women have served nearly a thousand years of unjust incarceration in Missouri prisons. Not every Missouri miscarriage of justice reported on the National Registry of Exonerations was defended by a public defender, and not every wrongful conviction is caused by defense attorney error. The Registry identifies inadequate legal defense as the cause of nearly one in four of these cases. However, systemic deficiencies such as those found to exist in the Missouri Public Defender System are undoubtedly contributing factors in many cases.<sup>4</sup> After all, the Sixth Amendment "envisions counsel's playing a

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3. The National Registry of Exonerations is a joint project of the University of California Irvine Newkirk Center for Science and Society, University of Michigan Law School and Michigan State University College of Law that tracks cases of exonerations in the United States since 1989. To be included in the registry, a person must have been "convicted of a crime and later was either: (1) declared to be factually innocent by a government official or agency with the authority to make that declaration; or (2) relieved of all the consequences of the criminal conviction by a government official or body with the authority to take that action." *Glossary*, THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> [<http://perma.cc/GCY4-3V84>]. Missouri prisoners on the registry and the years they served include George Allen, Jr., thirty-two years; Joseph Amrine, seventeen years on death row; Antonio Beaver, seventeen years; James Bowman, fifteen years; Johnny Briscoe, twenty-three years; Richard Buchli II, ten years; Darryl Burton, twenty-four years; David Clay, Sr., nine years; Eric Clemmons, fourteen years on death row; Clarence Richard Dexter, Jr., eight years on death row; Donald Dixon, sixteen years; Gary Engle, twenty years; Lonnie Erby, seventeen years; Russell Faria, two years; Ryan Ferguson, ten years; Reginald Griffin, fifteen years; Jennifer Hall, four years; Paula Hall, four years; Dale Helmig, fifteen years; Larry Johnson, eighteen years; Joshua Kezer, fourteen years; Ernest Leap, fourteen years; Cornell McKay, two years; Robert Nelson, nineteen years; Ellen Reasonover, sixteen years; George Revelle, two years; Jon Keith Smith, thirteen years; Patricia Stallings, one year; Zackary Lee Stewart, two years; James Strughold, two years; Antoine Terry, two years; Steven Toney, fourteen years; Armand Villasana, one year; Theodore White, Jr., seven years; Johnny Lee Wilson, ten years; Anthony D. Woods, eighteen years; Mark Woodworth, nineteen years; and Kenneth York, six years. See THE NAT'L REGISTRY OF EXONERATIONS, <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx> [<http://perma.cc/GPG6-3MB9>] (filtered by jurisdiction).

4. See Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 857 (2010) (reviewing the history of the Missouri Public Defender System, which was created in 1973, ten full years after *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

role that is critical to the ability of the adversarial system to produce just results.”<sup>5</sup> It is impossible to know how many of the other miscarriages of justice caused by mistaken identification, false confessions, misleading forensic evidence, or official misconduct might have been prevented by a vigorous defense. But the innocence phenomenon, which saw a record number of exonerations in 2015,<sup>6</sup> provides an important backdrop to the examination of Missouri’s indigent defense funding crisis.

### I. INNOCENT VICTIMS OF THE MISSOURI PUBLIC DEFENDER CRISIS

Judges, journalists, scholars, and Missouri Bar presidents have written much about Missouri’s chronic indigent defense crisis, all urging more money, more lawyers, more training, more resources.<sup>7</sup> Few, however, consider what a system in crisis looks like from the client’s perspective. The most thorough assessment came from the late Robert Spangenberg, one of the foremost experts in the United States on indigent defense systems. In a study commissioned by the Missouri Bar, Spangenberg called the Missouri Public Defender System’s caseload crisis “one of the worst of its kind in the nation,” and said the system was “on the brink of collapse,” providing only “the illusion of a lawyer.”<sup>8</sup> New lawyers receive “little hands-on supervision,” and judges

mandated the appointment of counsel for all persons accused of felony offenses, and which has been chronically underfunded since its inception).

5. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

6. THE NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN 2015, at 3 (Feb. 3, 2016), [https://www.law.umich.edu/special/exoneration/Documents/Exonerations\\_in\\_2015.pdf](https://www.law.umich.edu/special/exoneration/Documents/Exonerations_in_2015.pdf) [<http://perma.cc/2Q5F-UYRJ>].

7. See Douglas A. Copeland, *The President’s Page: Missouri’s Public Defender System*, 62 J. MO. B. 10, 10–11 (2006); Laura Denvir Stith, *Chief Justice Delivers 2009 State of the Judiciary Address*, 65 J. MO. B. 62, 63–64 (2009); James McKay, *The Bar Speaks*, 62 J. MO. B. 162, 162 (2006); Bill McClellan, *Reasonover Win of Lawsuit Raises Some Old Questions*, ST. LOUIS POST-DISPATCH, Sept. 20, 2004, at B1; CATHLEEN BURNETT, JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES 63–99 (2002).

8. THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC’Y AT GEO. MASON U., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 64, 66 (2009), [www.nla-da.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20\(TSG\).pdf](http://www.nla-da.net/sites/default/files/2009%20Assessment%20of%20the%20Missouri%20State%20Public%20Defender%20System%20(TSG).pdf) [<http://perma.cc/ED6Y-2UJH>] [hereinafter SPANGENBERG ASSESSMENT]. The Spangenberg Assessment was criticized for not arriving at specific caseload and funding projections. Allison Retka, *Missouri State Public Defender System Study Criticized as Inadequate*, MO. LAW. MEDIA, Nov. 23, 2009. Spangenberg, on the other hand, cautioned that “the results only provide an accurate description of a system in crisis. Any reliance on these numbers, even as a baseline from which to develop appropriate caseload standards, would only serve to institutionalize an already crippled system.” SPANGENBERG ASSESSMENT at 41. The Spangenberg Group concluded that the Missouri Public Defender System is “the most poorly funded of all the state public defender systems in the country.” *Id.* at 33. Because the system is so underfunded, Spangenberg recommended adding substantial new resources and support staff

expressed concerns that high turnover results in new attorneys handling a significant caseload of serious cases for which they were simply not ready.<sup>9</sup> This produces “a crop of attorneys faced with crushing caseloads who ‘do not know what effective representation is’ due to a crippling lack of experience and supervision.”<sup>10</sup> Defenders described a system of triage in which some clients were neglected in order to adequately defend others.<sup>11</sup> Violations of performance and ethical standards were institutionalized; the practice of “meet ‘em and plead ‘em” was not only commonplace but expected.<sup>12</sup> In 2009, Missouri public defenders could only spend an average of 7.7 hours on each case, including death penalty cases.<sup>13</sup> To cope with staggering law school debt and low salaries, some defenders work second jobs delivering pizza, working retail, tending bar, or driving trucks.<sup>14</sup> It is doubtful that clients are consistently getting quality representation under these conditions.

## II. GUTTING THE ACTUAL INNOCENCE SAFETY NET: THE JOSEPH AMRINE CASE

Few would dispute the proposition that the execution or incarceration of an innocent person is the definitive failure of the criminal justice system. Certainly, it fails in other ways; defense attorney error and prosecutorial misconduct are serious problems that contribute to unfair sentences, erosion of constitutional rights, and public disrespect for the justice system.<sup>15</sup> While there is argument about the extent of these problems, no one would seriously suggest that innocence is irrelevant. In examining the Missouri defender system, conviction of the innocent is the canary in the coal mine. It happens all too often, but the judicial safety net is not what it should be in a jurisdiction with a chronically underfunded indigent defense system. Few prisoners have adequate resources to overcome daunting hurdles to proving their innocence.<sup>16</sup>

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before attempting to assess resource and workload issues necessary for adequate representation. *Id.* at 46, 52.

9. SPANGENBERG ASSESSMENT, *supra* note 8, at 6–7.

10. *Id.* at 30.

11. *Id.* at 8.

12. *Id.* at 23.

13. State *ex rel.* Mo. Pub. Def. Comm’n v. Pratte, 298 S.W.3d 870, 873 (Mo. 2009) (en banc).

14. SPANGENBERG ASSESSMENT, *supra* note 8, at 15.

15. See A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004), [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_bp\\_right\\_to\\_counsel\\_in\\_criminal\\_proceedings.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf) [<http://perma.cc/Q29H-ZK7Z>].

16. Successful exoneration efforts in Missouri invariably require the generosity of counsel who undertake massive pro bono effort to sift through mountains of documents and fund extensive investigation into the charges against the client. For prisoners seeking relief from unjust convictions, finding such a lawyer is like winning the lottery. Examples include Robert Ramsey

Joseph Amrine's experience illustrates Spangenberg's findings. In his wrongful conviction for the murder of Gary Barber in the Missouri Penitentiary in 1985, Amrine was defended by Cole County Public Defender Julian Ossman, whose incompetence in the defense of prisoners facing the death penalty has been written about by legal scholars.<sup>17</sup> Amrine is the second of Ossman's clients to be sentenced to death and then exonerated after many years on Missouri's death row.<sup>18</sup> In two other death penalty cases, courts found Ossman constitutionally ineffective, but those judgments were set aside because of procedural technicalities created by deficient representation on the part of public defenders in subsequent appeals, and those clients were put to death both because of and in spite of incompetent representation.<sup>19</sup> In yet another case, the issue of Ossman's deficient performance was procedurally barred by the inept performance of his public defenders appointed to represent

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and Michelle Puckett's tireless work that freed Mark Woodworth, *State ex rel. Woodworth v. Denney*, 396 S.W.3d 330, 332 (Mo. Ct. App. 2013); years of pro bono work by Cheryl Pilate on behalf of Daryl Burton, *Burton v. Dormire*, No. 06AC-CC00312 (Cole Cty., filed Aug. 18, 2008); the generosity of Kansas City mortgage banker James B. Nutter, Jr., who funded much of the author's expenses incurred in Joseph Amrine's exoneration, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543 (Mo. 2003) (en banc); and the work of Charles Weiss and his firm, Bryan Cave, that proved the innocence of Josh Kezer, *Kezer v. Dormire*, No. 08AC-CC00293 (Cole Cty., filed Feb. 17, 2009). These efforts are now supplemented by the support of the Cardozo Innocence Project, who worked with Bryan Cave in the exoneration of George Allen, *State ex rel. Koster v. Green*, 388 S.W.3d 603 (Mo. Ct. App. 2012), and the Midwest Innocence Project, operating in conjunction with the University of Missouri-Kansas City and University of Missouri Law School Wrongful Convictions Clinics to assist the author and Kansas City attorney Bronwyn Werner in the exoneration of Dale Helmig. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 227 (Mo. Ct. App. 2011), and to assist Illinois attorney Kathleen Zelner in the exoneration of Ryan Ferguson. *Ferguson v. Dormire*, 413 S.W.3d 40, 44 (Mo. Ct. App. 2013). The vast resources, generosity and dedication of these organizations, law firms, and attorneys is but a drop in the bucket in relationship to the need. The Midwest Innocence Project, with a staff of two lawyers, currently has over six hundred pending requests for assistance. See MIDWEST INNOCENCE PROJECT, [TheMIP.org/about](http://perma.cc/V9MU-WVDJ) [<http://perma.cc/V9MU-WVDJ>].

17. See WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES 186–87 (2006) [hereinafter WHITE, DEFENSE ATTORNEYS] (discussing in detail Ossman's deficient defense of Ricky Zeitvogel who was executed in Missouri on December 11, 1996); DEATH PENALTY INFORMATION CENTER, SEARCHABLE EXECUTION DATABASE, <http://www.deathpenaltyinfo.org/views-executions> [<http://perma.cc/DKS2-WMYX>] [hereinafter DPIC DATABASE].

18. See *Clemmons v. Delo*, 124 F.3d 944, 956 (8th Cir. 1997) (granting Eric Clemmons a new trial because of Ossman's deficient performance, and acquitting him). See THE NAT'L REGISTRY OF EXONERATIONS, ERIC CLEMMONS, <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3110> [<http://perma.cc/U3NB-UMDN>].

19. *Nave v. Delo*, 62 F.3d 1024, 1039 (8th Cir. 1995); *Bolder v. Armontrout*, 921 F.2d 1359, 1360, 1365 (8th Cir. 1990). Emmet Nave was executed on July 31, 1996; Martsay Bolder was executed on Jan. 27, 1993. DPIC DATABASE, *supra* note 17.

him on his post-conviction motion.<sup>20</sup> Amrine himself came perilously close to execution because of similar neglect by Ossman and public defenders who represented him in subsequent state post-conviction proceedings.

One of the obstacles facing people in Joe Amrine's situation is the lack of teeth in the *Strickland v. Washington*<sup>21</sup> standard for proving that trial counsel was constitutionally ineffective. The late Professor Welsh S. White noted that under *Strickland*, it has become "increasingly clear that defense attorneys' representation of capital defendants was sometimes shockingly inadequate."<sup>22</sup> The American Bar Association found that *Strickland* failed to protect against widespread problems with legal services for indigent defendants, even in death penalty cases.<sup>23</sup> Professor White criticized *Strickland* for permitting courts to affirm unjust convictions and sentences based on trial counsel's weak claims of "trial strategy," and for allowing subjective determinations that the prisoner has not met his burden of proving that he was prejudiced by trial counsel's deficient performance.<sup>24</sup> Another major obstacle to enforcing the right to competent counsel is the lack of effective post-conviction counsel to investigate and develop claims of ineffective assistance of trial counsel.<sup>25</sup> So Joe Amrine's burden of proving that Ossman's performance was constitutionally deficient was formidable, notwithstanding Ossman's abysmal track record.

Ossman's conduct of Amrine's defense is consistent in every way with Spangenberg's description of a system in crisis. What little investigation he conducted was untimely; Ossman interviewed defense witnesses for the first time in the hallway during the trial with the jury waiting in the box.<sup>26</sup> He did

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20. *Zeitvogel v. Delo*, 84 F.3d 276, 278, 281 (8th Cir. 1996) (refusing habeas corpus review because "the blame for Zeitvogel's procedural default falls squarely on Zeitvogel's postconviction counsel").

21. 466 U.S. 668, 688 (1984).

22. WHITE, DEFENSE ATTORNEYS, *supra* note 17, at 3. Professor White found cases in which trial counsel who were in the parking lot while the key prosecution witness was on the stand, who referred to an African-American client as "nigger," or who stipulated to all of the elements of first degree murder plus two aggravating circumstances were constitutionally adequate under *Strickland*. *Id.*

23. See Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 13, 16 (1990)

24. WHITE, DEFENSE ATTORNEYS, *supra* note 17, at 17–19.

25. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *Cullen v. Pinholster*, 563 U.S. 170, 174, 185 (2011); *cf.*, *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012).

26. When defense witness Brian Strothers came to court, Ossman asked the trial court to wait while he told Strothers why he was subpoenaed to the courthouse. Ossman admitted, "I've never talked to this guy before." Transcript of Record at 627, *Amrine v. Ossman*, No. 08AC-CC00340, at 627 (Cole Cty., Nov. 5, 2012).

not object to Amrine being displayed to the jury in shackles and leg irons.<sup>27</sup> Ossman did not object when State's witness Terry Russell blurted out, falsely, that he had passed a polygraph test.<sup>28</sup> He failed to cross-examine jailhouse informants about glaring inconsistencies in their stories.<sup>29</sup> He did nothing to prepare for the penalty phase of trial; Joe Amrine's mother first learned of the trial when she read about her son's death sentence in the newspaper. Although the federal court "agree[d] with the district court that Amrine's counsel did not fulfill his obligation to investigate adequately," consistent with Professor White's criticism of *Strickland*, the court concluded, "Nevertheless, Amrine has not shown that he was prejudiced by his attorney's deficient performance."<sup>30</sup> Amrine's claim of ineffective assistance of counsel was denied because he could not establish, to the court's satisfaction, "a reasonable probability that, absent [the counsel's unprofessional] errors, the factfinder would have had a reasonable doubt respecting guilt."<sup>31</sup> In hindsight, it can be said with certainty that *Strickland* failed to protect an innocent person from a concededly incompetent lawyer. The *Strickland* standard has offered indigent defendants little protection at all against Ossman's serial incompetence.

As Amrine's appeals were moving through the court system, the jailhouse informants who testified against him recanted their testimony one by one. The first recantation by Randy Ferguson was rejected because the other two, Terry Russell and Jerry Poe, stood by their stories.<sup>32</sup> Russell's subsequent recantation was also rejected as not credible, and Poe's trial testimony stood unimpeached.<sup>33</sup> During Amrine's appeal from the denial of his federal habeas petition, Poe was finally located, and he admitted that his trial testimony

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27. *Amrine v. Bowersox*, 128 F.3d 1222, 1225 (8th Cir. 1997) [hereinafter *Amrine I*]. *Cf. Deck v. Missouri*, 544 U.S. 622, 633 (2005).

28. *Amrine v. State*, 785 S.W.2d 531, 536 (Mo. 1990) (en banc).

29. State's witness, Jerry Poe, told investigators that he saw Amrine sneak up behind Gary Barber, stab him in the back, and run away with the knife in his hand. *Amrine v. Bowersox*, 238 F.3d 1023, 1030 (8th Cir. 2001) [hereinafter *Amrine II*]. State's witness Randy Ferguson testified that Amrine and Barber were walking side-by-side, talking to one another, when Amrine pulled a knife from his waistband and stabbed Barber, leaving the knife in Barber's back as he ran away. *Id.* The jury heard only Ferguson's version of events. *Id.*

30. *Id.* at 1031.

31. *Id.* at 1030 (quoting *Strickland v. Washington*, 466 U.S. 668 (1984)).

32. *State v. Amrine*, 741 S.W.2d 665, 675 (Mo. 1987) (en banc).

33. *Amrine v. Bowersox*, 128 F.3d 1222, 1226 (8th Cir. 1997) (en banc). Shortly after his testimony against Amrine, Russell was released from prison and was returned to prison a few months later on a conviction for murder. *Id.* at 1224 n.6. Amrine's new evidence implicated Russell in Barber's murder. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003) (en banc). Judge Wolff observed that Russell was never a good witness for either side. "The question is: which time were these three witnesses lying? When they testified against Amrine, or when they recanted? . . . What we do know is that all three witnesses—upon whom Amrine's conviction and sentence of death solely depend—are liars." *Id.* at 550 (Wolff, J., concurring).



implicating Amrine was false. Amrine's case was remanded for a hearing on Amrine's claim of actual innocence.<sup>34</sup>

### III. INNOCENCE AS A GATEWAY THROUGH PROCEDURAL TECHNICALITIES

Courts have historically constrained the litigation of innocence to the trial of the case, heeding Justice Rehnquist's philosophy that the trial is the main event:

To the greatest extent possible all issues which bear on this charge should be determined [at trial]: the accused is in the courtroom, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens.<sup>35</sup>

Consistent with that philosophy, state and federal courts have limited the post-conviction litigation of innocence to narrow circumstances. The problem in Missouri, of course, is that society's resources have *not* been concentrated at the time and place of trial, at least not as far as the defendant is concerned.

Tensions between federal and state sovereignty have spawned a complex, arcane system of procedural technicalities that enable courts to avoid deciding a prisoner's imperfectly litigated constitutional claims. However, the Supreme Court made clear in 1963 that procedural bars must give way when "the ends of justice" require it.<sup>36</sup> Thirty-two years later, the Court used a Missouri case alleging ineffective assistance of appointed counsel to find the "ends of justice" test satisfied by a colorable claim of actual innocence. In *Schlup v. Delo*, trial counsel assigned by the public defender to defend Schlup did not speak to multiple witnesses known to have seen a murder.<sup>37</sup> However, as in *Amrine*, post-conviction counsel did not perform the investigation that trial counsel had failed to do, so Lloyd Schlup's claim of ineffective assistance of counsel arrived in federal court procedurally encumbered and without facts to support it. The Eighth Circuit Court of Appeals rejected Schlup's habeas corpus petition, effectively "tell[ing] Lloyd Schlup in regard to his conviction: You may indeed be innocent, but you are not innocent enough early enough."<sup>38</sup>

The Supreme Court granted certiorari and reversed the Eighth Circuit's judgment denying habeas corpus review to Lloyd Schlup, creating what is now known as the "gateway" claim of actual innocence: even if a prisoner's constitutional claims are procedurally barred, if "it is more likely than not that no reasonable juror would have convicted him in the light of the new

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34. *Amrine I*, 128 F.3d at 1230.

35. *Wainwright v. Sykes*, 433 U.S. 72, 90 (1977).

36. *Sanders v. United States*, 373 U.S. 1, 15 (1963).

37. *Schlup v. Delo*, 513 U.S. 298, 307 (1995).

38. *Schlup v. Delo*, 11 F.3d 738, 754 (Heaney, J., dissenting).

evidence,” then the federal court “cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.”<sup>39</sup> Schlup’s case was remanded and resolved in a two-step process consistent with the Court’s ruling: First, Eastern District of Missouri Presiding Judge Jean Hamilton, after a hearing, determined that Schlup’s new evidence showed a reasonable probability that no reasonable juror would find him guilty.<sup>40</sup> However, the inquiry could not end there; that finding only permitted Judge Hamilton to determine whether Schlup’s trial was free of harmful constitutional error. At a second hearing, Judge Hamilton found that Schlup’s appointed counsel was ineffective for failing to interview known eyewitnesses to the crime, and issued the writ of habeas corpus.<sup>41</sup> This illustrates the operation of Schlup’s innocence gateway to habeas corpus relief, which, has led to the release of other Missouri prisoners who were convicted, in spite of innocence, after unconstitutional trials.<sup>42</sup> The *Schlup* doctrine is grounded in the principle that habeas corpus is an equitable remedy, and “the ultimate equity on the prisoner’s side [is] a sufficient showing of actual innocence.”<sup>43</sup>

A safety net for innocent prisoners is indisputably necessary in a state with a chronically underfunded public defender system. Unfortunately, the safety net is full of holes. Proof of a reasonable probability of innocence is a high threshold, reserved for “highly unusual case[s].”<sup>44</sup> Even if the prisoner can meet the innocence threshold, the toothless *Strickland* standard still stands in the way. One would think that a person who was convicted in spite of innocence could show that he or she had an unfair trial, but that is not always the case. The low threshold for adequate performance and the high threshold for showing prejudice has obstructed the release of prisoners like Amrine who could prove their innocence. For example, the Eighth Circuit Court of Appeals found that Daryl Burton was probably innocent, but under *Strickland*’s subjective standard the court felt compelled to find that he had a fair trial. The court wrote, “Burton’s habeas petition troubles us because his legal claims do

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39. *Schlup*, 513 U.S. at 316, 327.

40. *Schlup v. Delo*, 912 F. Supp. 448, 455 (E.D. Mo. 1995).

41. *Schlup v. Bowersox*, No. 4:92CV443 JCH, 1996 U.S. Dist. LEXIS 8887, at \*45 (E.D. Mo. May 2, 1996).

42. See, e.g., *Reasonover v. Washington*, 60 F. Supp. 2d 937, 981 (E.D. Mo. 1999); *Kezer v. Dormire*, No. 08AC-CC00293, at \*44–45 (Cole Cty., filed Feb. 17, 2009); *Burton v. Dormire*, No. 06AC-CC00312, at \*42 (Cole Cty., filed Aug. 18, 2008).

43. *Withrow v. Williams*, 507 U.S. 680, 700 (1993) (O’Connor, J., concurring in part and dissenting in part).

44. *Schlup*, 513 U.S. at 341–42.

not provide him an adequate foundation upon which to present his considerable claims of factual innocence.”<sup>45</sup>

The Eighth Circuit in subsequent decisions has rendered *Schlup* incapable of reaching a claim of ineffective assistance of counsel. In *Amrine I*, the court put a gloss on *Schlup*'s innocence gateway that requires the prisoner to come forward with “new” evidence, and “[t]he evidence is new only if it was not available at trial and *could not have been discovered earlier through the exercise of due diligence*.”<sup>46</sup> The court drew the “due diligence” requirement from earlier decisions addressing substantive claims based only on free-standing claims of newly discovered evidence.<sup>47</sup> In Ellen Reasonover's case, Judge Jean Hamilton provided a hypothetical to explain the absurdity of *Amrine*'s rule:

A habeas petitioner presents a claim of ineffective assistance of counsel which is procedurally barred. The petitioner is unable to establish cause and prejudice. The petitioner presents compelling evidence of actual innocence, but all the evidence was available at the time of trial and could have been discovered in the exercise of due diligence. Further, petitioner presents evidence that the available evidence was not utilized because of trial counsel's lack of diligence.

Under the Eighth Circuit's definition of new evidence, the petitioner's *Schlup* claim must fail, notwithstanding the compelling evidence of actual innocence. Under *Amrine*, the evidence presented by the petitioner is not “new,” and therefore may not be considered by the habeas court. The petitioner's claim would be procedurally barred, and the habeas court would be precluded from ruling on the petitioner's ineffective assistance of counsel claim.

In contrast, under *Schlup*, the evidence presented by the petitioner is “new” because it was “not presented at trial.” Assuming that the new evidence is reliable and sufficient to sustain the petitioner's burden under *Schlup*, the habeas court must consider the merits of the petitioner's ineffective assistance

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45. *Burton v. Dormire*, 295 F.3d 839, 849 (8th Cir. 2002). The court “express[ed] the hope that the state of Missouri may provide a forum (either judicial or executive) in which to consider the mounting evidence that Burton's conviction was procured by perjured or flawed eyewitness testimony.” *Id.* Burton was ultimately freed, but only after the Eighth Circuit's timid ruling cost an innocent man an additional six years of his life. *Burton v. Dormire*, No. 06AC-CC00312, at \*42–43 (Cole Cty., filed Aug. 18, 2008). Ironically, Burton was found innocent and released by Cole County Circuit Judge Richard Callahan, the same man who had prosecuted Lloyd Schlup. *Id.*

46. *Amrine I*, 128 F.3d at 1230 (emphasis added).

47. *Id.* (citing *Bannister*, 100 F.3d at 610, 618 (8th Cir. 1996) and *Smith v. Armontrout*, 888 F.2d 530, 542 (8th Cir. 1989)).

of counsel claim because failure to do so would result in a “fundamental miscarriage of justice.”<sup>48</sup>

Judge Hamilton noted that in *Schlup* itself, the Supreme Court characterized witness testimony as “‘new statements,’ even though the information in those statements was available at the time of trial and could have been discovered in the exercise of due diligence.”<sup>49</sup> Thus, the outcome in *Schlup* itself would have been different if the Eighth Circuit standard was correct. Because the Court clearly intended actual innocence to prevent legal technicalities from obstructing remedies for constitutional violations that render a conviction unworthy of confidence, no other circuit in the country follows the Eighth Circuit’s *Amrine* standard.<sup>50</sup>

Judge Hamilton’s warning has come to fruition in subsequent cases in which the Eighth Circuit has allowed trial counsel’s ineffectiveness to defeat a gateway innocence claim where actual innocence is asserted to reach a procedurally barred claim of ineffective assistance of counsel. Ricky Kidd alleged that his Missouri public defender was ineffective for failing to investigate and present evidence that he was innocent; public defenders assigned to represent him on appeal and post-conviction did not investigate Mr. Kidd’s innocence, and abandoned Mr. Kidd’s ineffective assistance of counsel claim. The only path to prove that Missouri violated Kidd’s constitutional right to counsel was through *Schlup*’s innocence gateway—a door that the Eighth Circuit firmly slammed shut in Kidd’s face.<sup>51</sup>

Kidd was charged with the homicides of George Bryant and Oscar Bridges that occurred in broad daylight and was witnessed by neighbors who saw three men get in a new, white Oldsmobile and flee the scene.<sup>52</sup> The police investigation produced air fare, hotel and car rental records showing that three

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48. *Reasonover v. Washington*, 60 F. Supp. 2d 937, 949–50 n.8 (E.D. Mo. 1999) (internal citations omitted). Ellen Reasonover was freed after sixteen years of wrongful imprisonment because she invoked the *Schlup* gateway to reach a defaulted claim that the Missouri concealed exonerating evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). See *Ellen Reasonover*, THE NATIONAL REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3564> [<https://perma.cc/YL8P-YVY9>].

49. *Reasonover*, 60 F. Supp. 2d at 948–49. Fortunately for Ellen Reasonover, “[t]he evidence which was available, but not presented at trial, . . . strengthens, but is not essential to, Petitioner’s successful showing of actual innocence.” *Id.*, at 950.

50. *Gomez v. Jaimet*, 350 F.3d 673, 679–80 (7th Cir. 2003) (“[I]t would defy reason to block review of actual innocence based on what could later amount to the counsel’s constitutionally defective representation.”); *Houck v. Stickman*, 625 F.3d 88, 94 (3rd Cir. 2010) (“the rule that *Amrine* sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for *Schlup* purposes”). See also *Griffin v. Johnson*, 350 F.3d 956, 961–62 (9th Cir. 2003).

51. *Kidd v. Norman*, 651 F.3d 947, 947–48 (8th Cir. 2011).

52. *Id.* at 948, 951.

men, Marcus Merrill, Gary Goodspeed, Sr., and Gary Goodspeed, Jr., all related to one another, flew from Atlanta to Kansas City a few days before the murder, rented a car matching the description of the getaway car, rendezvoused at the Adam's Mark Hotel the morning of the crime, and returned to Atlanta a few days later.<sup>53</sup> All three gave statements placing themselves in one another's company, with no third party alibi, at the time of the offense.<sup>54</sup> None mentioned Ricky Kidd.<sup>55</sup> No documentary or physical evidence implicated Kidd in the crime, and his shoes were excluded as the source of a bloody footprint on the victims' kitchen floor.<sup>56</sup> The only evidence against Kidd at trial was Richard Harris, who portrayed himself as a neighbor who happened to walk past the house as the homicide was taking place.<sup>57</sup> Harris identified Kidd as the shooter and Gary Goodspeed, Jr., as an accomplice.<sup>58</sup> Curiously, Goodspeed was never charged.

The Spangenberg assessment noted that one of the many detrimental effects of the public defender funding crisis is that "[w]ork on some cases would not begin until the trial date was near."<sup>59</sup> The failure of Kidd's alibi defense reveals why and how procrastination in the defense preparation harms public defender clients. When questioned separately eight days after the crime, Kidd and his girlfriend said that they were together all day on February 6, 1996.<sup>60</sup> They drove downtown to collect Kidd's car keys from his sister at her employer's, and then went to the Sheriff's Department to register a handgun.<sup>61</sup> Police obtained the gun permit application, which was dated February 6, 1996.<sup>62</sup> Kidd was released pending further investigation, and was charged three months later. Kidd's public defender did not preserve video footage from the employer's surveillance cameras, and waited over a year to talk to alibi witnesses.<sup>63</sup> Nor did she attempt to interview the deputy who placed her badge number on Kidd's gun permit application.<sup>64</sup> Consequently, the unimpeachable, irrefutable portions of Kidd's alibi were lost to time.

The public defender's procrastination exposed Kidd's alibi witnesses to avoidable attack: Kidd's sister could not remember a year later whether she

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53. *Id.* at 951.

54. *Id.*

55. *Id.*

56. Exhibits in Support of Petition for Writ of Habeas Corpus at 650, *In re Kidd v. Conlee*, No. 1516-CV05073 (Jackson Cty., Mar. 6, 2015).

57. *Kidd*, 651 F.3d at 948.

58. *Id.*

59. SPANGENBERG ASSESSMENT, *supra* note 8, at 8.

60. *Kidd*, 651 F.3d at 948.

61. *Id.*

62. *Id.*

63. *Id.* at 951.

64. *Id.*

took the bus home from work that day, or her brother gave her a ride.<sup>65</sup> Another witness who was not interviewed for a year was questioned how she could possibly remember the date a year later.<sup>66</sup> Frustrated that his lawyer was not preserving his alibi, Kidd called witnesses himself from the county jail, and those witnesses were challenged for colluding with Kidd.<sup>67</sup> The prosecutor claimed the sheriff's gun permit could have been received by mail.<sup>68</sup> The case is a compelling demonstration of the inability of an overburdened public defender system to develop and present a truthful defense. Even if Kidd's family and his sister's coworkers were telling the truth, their credibility could not withstand the attacks occasioned by the public defender's delay. In essence, Missouri prosecutions may be alibi-proof if the defendant is represented by an overburdened public defender.

Kidd's habeas counsel developed significant evidence to support a claim of actual innocence as a gateway to Kidd's claim of ineffective assistance of trial counsel that was procedurally barred when his post-conviction lawyers did no investigation. The testimony of the deputy who processed Kidd's gun permit "confirmed Kidd's application was received the same day as the shootings."<sup>69</sup> He also developed substantial evidence impeaching Richard Harris, the only witness who tied Kidd to the crime:

This evidence includes Harris's drug connections to Bryant, his use of marijuana at the time of the shootings, the inconsistencies between Harris's description of the shooter's appearance (the shooter "had a head of hair" and "wasn't bald-headed at the time") and Kidd's appearance (it is undisputed Kidd's head was shaved completely bald at the time of the shootings), and the inconsistencies between Harris's description of the shootings and other eyewitnesses who did not see Harris outside Bryant's home at the time.<sup>70</sup>

Habeas counsel also established that "Harris frequently used drugs with Bryant, and Harris was upset with Bryant because Bryant wanted to kill Harris's best friend."<sup>71</sup> Habeas counsel produced another witness, Eugene Williams, who "place[d] Merrill and the two Goodspeeds together the morning of the shootings."<sup>72</sup> The Court further noted that "Williams also connect[ed] Merrill and the Goodspeeds to the weapons used in the murders, and knew the three men were going to rob someone that morning."<sup>73</sup> Finally, Marcus Merrill

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65. Transcript on Appeal at 1148, *State v. Kidd*, No. CR96-2137 (Jackson Cty., filed Dec. 2 1997) (on file with the author).

66. *Id.* at 1169–70.

67. *Id.* at 1182.

68. *Id.* at 1164–65.

69. *Kidd*, 651 F.3d at 951.

70. *Id.*

71. *Id.* at 950.

72. *Id.* at 951.

73. *Id.*

testified that he committed the robbery along with the Goodspeeds, and Kidd was not involved in the crime at all.<sup>74</sup>

Even though new evidence proved that the state's main witness was unbelievable, that Kidd's alibi was truthful, and established the identity of the real killers, Kidd could not satisfy the Eighth Circuit's impossible interpretation of the *Schlup* standard. The court acknowledged that "*Amrine* has been criticized when the procedurally defaulted claim which a petitioner hopes to resurrect under *Schlup* is an ineffective-assistance-of-counsel claim against trial counsel for not discovering and presenting the exculpatory evidence that proves the petitioner's innocence."<sup>75</sup> Nevertheless, the court held that "the district court correctly interpreted *Amrine* as requiring Kidd to come forward not only with new reliable evidence which was not presented at trial, but to come forward with new reliable evidence which was not available at trial through the exercise of due diligence."<sup>76</sup> As long as *Amrine*'s holding persists, federal habeas corpus offers no protection to innocent public defender clients who are convicted because of incompetent defense.

#### IV. IS INNOCENCE AN ADEQUATE REASON TO RELEASE A PRISONER?

Exonerations based on DNA evidence provide a rich pool of reliable data about causes of wrongful convictions. To no one's surprise, the type of evidence that correlates most strongly with the conviction of innocent defendants is eyewitness identification testimony.<sup>77</sup> What should a court do if a conviction is grounded on an honest but mistaken eyewitness identification that is credited by a jury at a trial that is otherwise "fair?" Is there a remedy for that prisoner? That issue is on its way to the Missouri Supreme Court in the case of Rodney Lincoln.<sup>78</sup> First, a little history.

As Lloyd Schlup's habeas corpus petition was percolating through the federal system, Leonel Herrera was attempting to use lingering doubts about

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74. *Kidd*, 651 F.3d at 949. Merrill's testimony was discounted by the court because of Merrill's hope that cooperation with the prosecution could reduce his life sentence. *Id.* at 950.

75. *Id.* at 952.

76. *Id.* at 953. The flaw in the Eighth Circuit's *Amrine* actual innocence standard should have been clear in *Amrine* itself, where the Missouri Supreme Court found that the evidence which the Eighth Circuit refused to consider "met [*Amrine*'s] burden of providing clear and convincing evidence of actual innocence that undermines our confidence in the correctness of the judgment." *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 548 (Mo. 2003) (en banc).

77. According to the Innocence Project, "Eyewitness misidentification is the greatest contributing factor to wrongful convictions proven by DNA testing, playing a role in more than 70% of convictions overturned through DNA testing nationwide." *Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/causes/eyewitness-misidentification/> [<http://perma.cc/NDH5-V2H2>].

78. *In re Lincoln v. Cassidy*, WD79854, 2016 WL 5888944, at \*2 (Mo. Ct. App. Oct. 11, 2016).

his guilt to prevent his impending execution in Texas. Unlike Schlup, all of Herrera's constitutional issues had been ruled against him; innocence was all he had left. Herrera was scheduled to be executed February 19, 1992,<sup>79</sup> and Schlup was scheduled to be executed in March 1992.<sup>80</sup> Schlup's stay of execution came from the lower courts to sort out his gateway claim of innocence, and Herrera's stay came after the Supreme Court granted certiorari to decide whether it violated the Eighth Amendment to execute an innocent person.<sup>81</sup> Herrera's claim of innocence was not as strong as Schlup's, but it was nevertheless plausible.<sup>82</sup> Since the rejection of Herrera's claims of ineffective assistance of counsel and other trial error had already been rejected, the viability of his innocence claim was the sole remaining issue.

The Court did not look kindly upon Herrera's innocence evidence, but did not close the door on a sufficiently meritorious innocence claim in the future. No single rationale carried a majority of the Court. Justice Blackmun, joined by Justices Stevens and Souter, would have remanded the case for a hearing on whether Herrera could "show that he probably is innocent."<sup>83</sup> Justice White would grant relief in such cases if the prisoner's evidence shows that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."<sup>84</sup> Justice Rehnquist, joined by Justices Scalia and Thomas, disagreed, asserting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."<sup>85</sup>

Somewhere in the middle of this three-to-one-to-three division, Justice O'Connor, joined by Justice Kennedy, acknowledged that "the execution of a legally and factually innocent person would be a constitutionally intolerable event[;]" however, Herrera was "not innocent, in any sense of the word."<sup>86</sup> Therefore, she concluded:

[T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence.

79. *Herrera v. Collins*, 954 F.2d 1029, 1030 (5th Cir. 1992).

80. Sean O'Brien, *Mothers and Sons: The Lloyd Schlup Story*, 77 UMKC L. REV. 1021, 1031–32 (2009).

81. See *Schlup v. Delo*, 513 U.S. 298 (1995); *Herrera v. Collins*, 506 U.S. 390 (1993).

82. Herrera's innocence evidence included an affidavit of an attorney that Herrera's brother Raul, who died in 1984, had admitted that he, not Leonel Herrera, was the killer. Also, Raul Herrera's cell mate submitted an affidavit that Raul Herrera had confessed to him as well. *Herrera*, 506 U.S. at 396.

83. *Id.* at 442 (Blackmun, J., dissenting).

84. *Id.* at 429 (White, J., concurring) (quoting *Jackson v. Virginia*, 443 U.S. 307, 324 (1979)).

85. *Id.* at 400.

86. *Id.* at 419 (O'Connor, J., concurring).



That difficult question remains open. If the Constitution's guarantees of fair procedure and the safeguards of clemency and pardon fulfill their historical mission, it may never require resolution at all.<sup>87</sup>

The State of Texas executed Leonel Herrera on May 12, 1993.<sup>88</sup>

Missouri's dysfunctional defender system provides the perfect soup for the scenario that Justice O'Connor described: the Constitution's guarantees of fair procedure and safeguards of clemency and pardon do not fulfill their historical mission. *Amrine* was the first post-Herrera test of Missouri courts' power to correct the conviction of an innocent person. After the federal courts refused to consider the bulk of the evidence supporting his innocence and rejected his *Schlup* gateway claim of actual innocence, Joe Amrine petitioned the Missouri Supreme Court for habeas corpus relief, asserting a free-standing claim of actual innocence. Predictably, the State "asserted in its brief, and in oral argument, that Mr. Amrine had no right to additional review, whatever the nature of his current claims and whatever the strength of the evidence supporting them."<sup>89</sup> At the oral argument of Amrine's case, Missouri Supreme Court Chief Justice Laura Denvir Stith asked counsel for the State, "Are you suggesting, . . . even if we find that Mr. Amrine is actually innocent, he should be executed?"<sup>90</sup> The Assistant Attorney General answered, "That's correct, your honor."<sup>91</sup> Judge Stith later wrote that even though commentators were shocked at this answer,

I was not. That was the only answer he could give in light of the legal position taken by the State of Missouri in opposing Mr. Amrine's petition for writ of habeas corpus. If a state high court has no authority to review a claim of actual innocence, then it follows that it is powerless to prevent the prisoner's execution.<sup>92</sup>

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87. *Herrera*, 506 U.S. at 427. After *Herrera*, the Court stayed the execution of Troy Davis and ordered a hearing on his innocence claim. *In re Davis*, 557 U.S. 952 (2009). Davis was executed, amid great controversy, after a federal judge concluded that Davis' evidence was not sufficiently persuasive. *In re Davis*, No. CV409-130, 2010 WL 3385081, at \*1 (S.D. Ga. Aug. 24, 2010). See Kim Severson, *Davis Is Executed in Georgia*, N.Y. TIMES (Sept. 21, 2011), <http://www.nytimes.com/2011/09/22/us/final-pleas-and-vigils-in-troy-davis-execution.html> [<http://perma.cc/WW76-Y6WD>]. The Court continues to assume, for the sake of argument, that a prisoner who received a fair trial could nevertheless obtain habeas corpus relief under an "extraordinarily high" standard if evidence establishes that he is "unquestionably" innocent. *Schlup v. Delo*, 513 U.S. 298, 315-17 (1995). See also *House v. Bell*, 547 U.S. 518, 555 (2006) ("House's showing falls short of the threshold implied in *Herrera*").

88. *Leonel Herrera*, THE DEATH PENALTY INFORMATION CENTER, <https://deathpenaltyinfo.org/leonel-herrera> [<http://perma.cc/GZ5U-6S9S>].

89. Laura Denvir Stith, *A Contrast of State and Federal Court Authority To Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 421 (2004).

90. *Id.*

91. *Id.*

92. *Id.* at 421-22.

The Missouri Attorney's General argument in *Amrine* was grounded in Rehnquist's concurring opinion in *Herrera*. Noting that much of *Herrera*'s reasoning was driven by the federalism concerns that limit the jurisdiction of federal courts, the Missouri Supreme Court in an opinion authored by the late Honorable Rick Teitelman, declined to follow *Herrera* in determining the reach of Missouri's habeas corpus remedy:

In other words, as *Herrera* recognized, even if a federal court were found not to have jurisdiction to review a state conviction and sentence in the absence of a federal constitutional issue, this would not deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted. The issue now before this Court, then, is whether, in the words of *Herrera*, Missouri has left a "state avenue open to process such a claim." This Court finds that it has done so. Having recognized the prospect of an intolerable wrong, the state has provided a remedy.<sup>93</sup>

The court noted that the federal courts' *Schlup* analysis "did not consider *Amrine*'s other evidence, including the recantations of Russell and Ferguson, because that evidence was not new," and that "[t]his Court is the first forum in which all of the existing evidence of innocence will be considered."<sup>94</sup>

On the same body of evidence that had been presented to, but ignored by, the federal courts, the Missouri Supreme Court held that *Amrine* "has met his burden of providing clear and convincing evidence of actual innocence that undermines our confidence in the correctness of the judgment," and therefore was entitled to habeas corpus relief.<sup>95</sup> In so holding, the court noted that it is not "required to impose as high a standard as would a federal court in reviewing a freestanding claim of actual innocence, for, as discussed, this Court is not affected by the federalism concerns that limit the federal courts' jurisdiction to consider non-constitutional claims of actual innocence."<sup>96</sup> Given the systemic deficiencies in Missouri's public defender system, and the Missouri Attorney's General apparent indifference to executing or incarcerating the innocent, the narrow protection that *Amrine* provides to prisoners who are clearly actually innocent is essential—even if the trial is declared to have been "fair."<sup>97</sup>

Yet Missouri continues to struggle with innocence claims. Recently, an intermediate appellate court declined to apply *Amrine* to a habeas petitioner challenging a life sentence. Rodney Lincoln was convicted of a grisly crime—

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93. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546–47 (Mo. 2003) (en banc) (internal citations omitted).

94. *Id.* at 545.

95. *Id.* at 548.

96. *Id.*

97. After reading the opinion in his own case, *Amrine* himself asked the author, "How can they say I had a fair trial if I got convicted when I was innocent?"

the April 1982 murder of JoAnn Tate and the brutal stabbing of her two daughters, then ages four and seven—based on the identification of the seven-year-old, corroborated only by a microscopic hair comparison “matching” Lincoln to a hair found at the scene of the crime.<sup>98</sup> In 2014, after DNA proved that the hair did not come from Mr. Lincoln, the Eastern District Court of Appeals nevertheless denied Lincoln’s DNA motion for release because the child “never wavered” in her identification of Lincoln.<sup>99</sup>

Lincoln subsequently brought a habeas corpus petition supported by evidence neutralizing all of the state’s evidence. The child witness, now in her forties, spontaneously reported to the prosecuting attorney that she was mistaken in her identification of Mr. Lincoln, and explained how she was manipulated by an exceedingly suggestive identification process.<sup>100</sup> Coupled with the DNA exclusion, her recantation makes Lincoln’s case factually indistinguishable from *Amrine*’s, “in which no credible evidence remains from the first trial to support the conviction.”<sup>101</sup> The only evidence from Lincoln’s trial that still stands today is his alibi defense, supported by his family and his employer, that he left home after a good night’s sleep and arrived at work at the usual time that morning.

Unfortunately for Lincoln, the court of appeals disavowed its power to release innocent people. The court interpreted *Amrine* as recognizing “a freestanding claim of actual innocence in cases *where the death penalty has been imposed* because the prospect of executing an innocent person, in the face of clear and convincing evidence of innocence, is a manifest injustice.”<sup>102</sup> Oddly, the court did not see incarceration for life for a crime one did not commit as a manifest injustice. “Until the Supreme Court announces that a freestanding claim of actual innocence is a recognized basis for securing habeas relief because *either* the continued incarceration *or* eventual execution of an actually innocent person violates principles of due process, we have no authority to presume that Missouri’s habeas jurisprudence permits such a claim in a non-death penalty case.”<sup>103</sup> In other words, clear and convincing evidence

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98. *Lincoln v. State*, 457 S.W.3d 800, 801 (Mo. Ct. App. 2014).

99. *Id.* at 803–04. Evidence withheld by the prosecution established that this assumption was false. See text *infra* at notes 104–05.

100. *In re Lincoln v. Cassady*, WD79854, 2016 WL 5888944, at \*2 (Mo. Ct. App. Oct. 11, 2016). The victim-witness has sided with Lincoln in his legal efforts to win release. Jennifer Mann, *Victim Recants ID That Put Man in Prison for Mother’s Murder in St. Louis in 1982*, ST. LOUIS POST-DISPATCH (Dec. 1, 2015), [http://www.stltoday.com/news/local/crime-and-courts/victim-recants-id-that-put-man-in-prison-for-mother/article\\_503a9500-b913-5a2f-b655-ff822f62f917.html](http://www.stltoday.com/news/local/crime-and-courts/victim-recants-id-that-put-man-in-prison-for-mother/article_503a9500-b913-5a2f-b655-ff822f62f917.html) [<http://perma.cc/9F4U-5YGF>].

101. *Amrine*, 102 S.W.3d at 548.

102. *In re Lincoln*, WL5888944 at \*6 (emphasis added).

103. *Id.* at \*8 (emphasis in original).

of innocence is not a legally adequate ground for habeas corpus relief in Missouri, according to the court of appeals.

In addition to his free-standing claim of innocence, Lincoln raised a claim based on the prosecutor's concealment of evidence that the child had fearfully pointed to other men, including the prosecutor, and called them the "bad man," which is how she referred to her attacker.<sup>104</sup> The prosecutor also failed to disclose that the child had participated in multiple rehearsals of her testimony, during which she was coached on where the "bad man" would be seated, and to remember to refer to the "bad man" as Rodney Lincoln.<sup>105</sup> As in the case of *Strickland* ineffective assistance of counsel claims, a petitioner must prove that concealed evidence is material to the outcome of the trial, a standard which is essentially the same as *Strickland's* prejudice prong.<sup>106</sup> Just as Professor White warned, the malleable and subjective outcome-oriented standard enabled the court of appeals to conclude that even though the concealed evidence "would have provided [Lincoln] with even more ammunition to support the line of questioning in fact undertaken at trial, we are not persuaded that [Lincoln] did not receive a fair trial in the absence of this supplemental impeachment material."<sup>107</sup> Thus, Rodney Lincoln joins Daryl Burton in meeting *Schlup's* actual innocence standard, and yet enduring continued incarcerated because, based on *Strickland's* subjective outcome-based standard, his trial was "fair." Apparently there is no equity for innocent Missouri prisoners who are not sentenced to death, no matter how compelling their evidence is.

As this article is being written, Lincoln and the victim-witness in his case are asking the Missouri Supreme Court to accept transfer of the case, and to extend *Amrine's* holding to prisoners condemned to die in prison of natural causes.<sup>108</sup> The question remains whether Missouri Courts have the power to correct a manifest injustice when it becomes apparent. To a lay person, the term "manifest injustice," the cornerstone of Missouri habeas corpus jurisprudence, should make this a simple question to resolve. It is difficult to

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104. *Id.* at \*4. Exhibit 39, Affidavit of Quin C. O'Brien at 1, *In re Lincoln*, 2016 WL 5888944 (on file with the author).

105. *In re Lincoln*, WD79854 at \*4; Exhibit 9, Rachel King Interim Recording at 10, 13, *In re Lincoln*, WL 5888944 (on file with the author); Exhibit 10, Affidavit of David L. Miller at ¶¶ 18–19, *In re Lincoln*, 2016 WL 5888944 (on file with the author); Exhibit 39, Affidavit of Quin C. O'Brien at 2, *In re Lincoln*, 2016 WL 5888944 (on file with the author).

106. *Brady v. Maryland* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. 83, 87 (1963). The Court has since decided that the standard for "materiality" under *Brady* is identical *Strickland's* prejudice prong. *United States v. Bagley*, 473 U.S. 667, 682–83 (1985).

107. *In re Lincoln*, WD79854 at \*4.

108. Motion for Transfer at 9, 12, *State ex rel. Lincoln v. Cassady*, SC96083 (Mo. Dec. 7, 2016) (pending).

imagine a free society in which it is not considered a manifest injustice to imprison an innocent person.

#### CONCLUSION

Mistakes do happen. Joe Amrine survived his representation by the public defender system, but only after enduring seventeen years of hell on death row. He owes his freedom today to a mountain of effort by volunteer lawyers, law students, and the generosity of a Kansas City mortgage broker who generously paid tens of thousands of dollars of litigation expenses for Amrine's exoneration. All of this effort would have been for naught but for the vision and humanity of Judge Rick Teitelman. I met with Joe Amrine to share the news of the good judge's passing. Joe shook his head slowly, his eyes moistened and he said, "They said he was supposed to be blind, but he saw more than a lot of judges. And he sure saw me. He *saw* me." Hopefully Judge Teitelman's important contribution to Missouri habeas corpus jurisprudence in the *Amrine* case will continue to protect glaring miscarriages of justice such as Amrine's, Kidd's and Lincoln's.

Where to go from here? I have previously proposed a solution for public defender funding that seems to have worked well in the federal system: adopt a mandatory system of parity in which prosecutor and defender caseloads, resources and salaries are funded equally in proportion to one another.<sup>109</sup> Moderate criminal sanctions so that the destruction of a client's life is not always the inevitable consequence of error by appointed counsel.<sup>110</sup> Restore a role for private counsel in the delivery of indigent defense services as an essential safety valve for excessive defender workloads.<sup>111</sup> Implement the American Bar Association's recommendations for managing a system in crisis, including recommendations to relax procedural technicalities.<sup>112</sup> And preserve Rick Teitelman's vision of justice that gives Missouri courts the power and duty to correct manifest injustices, including the imprisonment of innocent people.

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109. O'Brien, *supra* note 4, at 874–77.

110. *Id.* at 877–78.

111. *Id.* at 881–83.

112. A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *Eight Guidelines of Public Defense Related to Excessive Workloads* (August 2009), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf) [<http://perma.cc/4SC9-UKL5>].