

IN THE SUPREME COURT OF MISSOURI

No. 87445

STATE EX REL. HOWARD J. VERWEIRE,

Petitioner,

v.

**STEVEN MOORE, Superintendent,
Western Missouri Correctional Center,**

Respondent.

Petitioner's Statement, Brief and Argument

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iii
JURISDICTIONAL STATEMENT	1
STATEMENT OF FACTS	2
A. PROCEDURAL HISTORY	2
B. FACTUAL BACKGROUND AND SUMMARY OF ISSUES WARRANTING RELIEF	5
POINTS RELIED ON	11
ARGUMENT I	16
ARGUMENT II.	27
ARGUMENT III	33
ARGUMENT IV	38
CONCLUSION	40
CERTIFICATE OF COMPLIANCE AND SERVICE	41
APPENDIX	

TABLE OF AUTHORITIES

FEDERAL CASES	<u>Page #</u>
<i>Bousley v. United States</i> , 523 U.S. 614 (1998)	12, 31
<i>Boykin v. Alabama</i> , 395 U.S. 238 (1969)	30
<i>Breecheen v. Reynolds</i> , 41 F.3d 1343 (10th Cir. 1994)	29
<i>Henderson v. Morgan</i> , 426 U.S. 637 (1976)	31
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	17
<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	14, 35
<i>Ivy v. Caspari</i> , 173 F.3d 1136 (8th Cir. 1999)	12, 29, 31, 32
<i>Lewis v. Erickson</i> , 946 F.2d 131 (8th Cir. 1991)	27
<i>Murray v. Carrier</i> , 477 U.S. 478 (1986)	28
<i>Sanders v. Sullivan</i> , 863 F.2d 218 (2nd Cir. 1988)	27
<i>Schlup v. Delo</i> , 513 U.S. 298 (1995)	10, 11, 17, 18, 23, 24
<i>Schlup v. Delo</i> , 912 F.Supp. 448 (E.D. Mo. 1995)	24
<i>Smith v. O’Grady</i> , 312 U.S. 329 (1941)	31
<i>Smith v. Ratelle</i> , 323 F.3d 813 (9th Cir. 2003)	29
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	14, 34, 35
<i>Strickler v. Greene</i> , 527 U.S. 263 (1999)	29
<i>United States v. Denmon</i> , 483 F.2d 1093 (8th Cir. 1973)	15, 40
<i>United States v. Loughery</i> , 908 F.2d 1014 (D.C. Cir. 1990)	37

<i>United States v. Menasche</i> , 348 U.S. 528 (1955)	26
<i>United States v. Opsta</i> , 659 F.2d 848 (8th Cir. 1981)	15, 39
STATE CASES	
<i>Carmons v. State</i> , 26 S.W.3d 382 (Mo. App. W.D. 2000)	12, 30
<i>Clay v. Dormire</i> , 37 S.W.3d 214 (Mo. banc. 2000)	1, 9, 17, 23
<i>England v. State</i> , 85 S.W.3d 103 (Mo. App. W.D. 2002).	33
<i>Fretwell v. State</i> , 772 S.W.2d 334 (Ark. 1989)	14, 36
<i>Hall v. State</i> , 496 S.W.2d 300 (Mo. App. E.D. 1973)	14, 36, 37
<i>Hoskin v. State</i> , 863 S.W.2d 637 (Mo. App. E.D. 1993)	32
<i>In re J.R.N.</i> , 687 S.W. 2d 655 (Mo. App. S.D. 1985)	22
<i>Jones v. State</i> , 117 S.W.2d 209 (Mo. App. S.D. 2003)	12, 32, 33
<i>Milner v. State</i> , 968 S.W.2d 229 (Mo. App. S.D. 1998)	35
<i>Murdock v. State</i> , 426 S.E.2d 740 (S.C. 1992)	37
<i>State ex rel. Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. banc. 2003)	11, 17, 23, 25, 27
<i>State ex rel. Brown v. Gammon</i> , 947 S.W.2d 437 (Mo. App. W.D. 1997)	29
<i>State ex rel. Nixon v. Jaynes</i> , 63 S.W.3d 210, 214 (Mo. banc 2001)	9
<i>State ex rel. Simmons v. White</i> , 866 S.W.2d 443 (Mo. banc 1993)	15, 39
<i>State v. Griddine</i> , 75 S.W.3d 741 (Mo. App. W.D. 2000)	28
<i>State v. Mann</i> , 129 S.W.3d 462 (Mo. App. S.D. 2004).	20

<i>State v. McMilian</i> , 649 S.W.2d 467 (Mo. App. W.D. 1983)	26
<i>State v. Parkhurst</i> , 845 S.W.2d 31 (Mo. banc. 1992)	15, 39
<i>State v. Sears</i> , 86 Mo. 169 (1885)	20, 21
<i>State v. Taylor</i> , 1 S.W.3d 610 (Mo. App. W.D. 1999)	28
<i>State v. Unverzagt</i> , 721 S.W.2d 786 (Mo. App. S.D. 1986)	12, 20
<i>State v. Washington</i> , 491 So.2d 1337 (La. 1986)	37
<i>State v. Whalen</i> , 49 S.W.3d 181 (Mo. banc. 2001)	11, 19
<i>State v. White</i> , 798 S.W.2d 694 (Mo. banc. 1990)	22
<i>State v. Woolfolk</i> , 3 S.W.3d 823 (Mo. App. W.D. 1999)	16
<i>Trahan v. State</i> , 872 S.W.2d 156 (Mo. App. S.D. 1994)	35
<i>Verweire v. Moore</i> , 168 S.W.3d 518 (Mo. App. W.D. 2005)	5, 10, 22
<i>Wilson v. State</i> , 813 S.W.2d 833 (Mo. banc 1991)	25

FEDERAL STATUTES

28 U.S.C . § 2244(b)	21
28 U.S.C. § 2254	21
Supreme Court Rule 84.06(b)	41

STATE STATUTES

Mo. Const. Art. I, § 18(a)	14
Mo. Const. Art. I, §10	12

JURISDICTIONAL STATEMENT

This Court has jurisdiction to issue original writs of habeas corpus pursuant to Article I, Section 12 of the Constitution of the State of Missouri, Missouri Rule 91.01(b) and §532.020 *et. seq.* R.S.Mo. (2000). This petition is also properly before this Court pursuant to Rule 91.02(a) and 84.22(a), because petitioner filed the same habeas petition in the Circuit Court of DeKalb County and later in the Missouri Court of Appeals, Western District. Both of these courts denied relief. Because Mr. Verweire is innocent of the offense of assault in the first degree for which he is currently incarcerated, this Court has the power to review the merits of his case to remedy a manifest injustice, notwithstanding the fact that he failed to seek timely post-conviction relief under Missouri Rule 24.035. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000).

STATEMENT OF FACTS

A. Procedural History

Petitioner Howard J. Verweire was charged in the Circuit Court of Taney County, Missouri, by way of information in 99CR786036 in two counts arising from the undisputed fact that he exhibited and concealed a .25 caliber handgun in Rockaway Beach, Missouri, on October 9, 1999. Count I of the information charged petitioner with the Class B felony of assault in the first degree, alleging that “the defendant attempted to cause serious physical injury to a male juvenile by grabbing him by the throat while holding a .25 caliber handgun to his chest and head and then pushing him . . .” (See Exh. 1 to hab. pet.; App. 1). Count II charged petitioner with the Class D felony of unlawful use of a weapon, a charge arising from the fact that the aforementioned handgun was found concealed on petitioner’s person when he was arrested a short time later. (*Id.*)

Petitioner retained attorneys Eric Eighmy of Branson, Missouri, and Dale Wiley of Crane, Missouri, to represent him on these charges. On June 29, 2000, the date the case was set for trial, petitioner, on the advice of counsel, entered a plea of guilty to both charges without the benefit of a plea bargain before the Honorable James L. Eiffert, Presiding Judge of the Circuit Court of Taney County. (App. 4-24). Sentencing was deferred upon the completion of a pre-sentence investigation. (*Id.* at

23).

On August 17, 2000, Judge Eiffert sentenced petitioner to concurrent terms of imprisonment of ten years on Count I and five years on Count II. (See Exh. 6; App. 46-48). On February 21, 2001, Judge Eiffert ordered petitioner's release under Missouri's 120-day callback statute, suspended the remainder of petitioner's sentences, and placed petitioner on five years probation.

After petitioner admitted to violating his probation, Judge Eiffert revoked petitioner's probation on April 19, 2001, and executed the remainder of petitioner's sentences. Petitioner is currently serving this sentence in the custody of Steven Moore, Superintendent of the Western Missouri Correctional Center in Cameron, Missouri.

Pursuant to Rules 91.01(a) and 84.22(a), petitioner filed a habeas petition in the Circuit Court of DeKalb County on November 25, 2003. On April 8, 2004, Circuit Judge Warren L. McElwain denied relief in a one-paragraph order. (See Exh. 7; App. 49).

On April 13, 2004, petitioner filed a petition for a writ of habeas corpus pursuant to Rule 91 in the Missouri Court of Appeals Western District. *Verweire v. Moore*, WD64038. After ordering the state of Missouri to show cause, the court appointed Circuit Judge James L. Eiffert, as a special master, to hear evidence relating

to petitioner's claim of actual innocence. Judge Eiffert was the same judge who heard and accepted petitioner's guilty plea and sentenced him to prison.

Petitioner immediately moved to disqualify Judge Eiffert from acting as the special master in this case, arguing that he had a conflict of interest because, in essence, if the master found that petitioner was actually innocent, it would reflect poorly on his competence and integrity as a judge because he sent an innocent man to prison for ten years for a crime he did not commit. (See Exh. 8; App. 50-55). In this motion, petitioner argued that, apart from the ethical issues, that Judge Eiffert was not qualified to be the special master under Rule 68.03(b) which states, in pertinent part: "No person shall be appointed a master who . . . is interested in the outcome of the action." (*Id.*) The Court of Appeals denied petitioner's motion to disqualify Judge Eiffert without explanation on August 10, 2004.

An evidentiary hearing was held before the master in Ozark, Missouri on November 17, 2004. (See Exh. 9; App. 55-75). Petitioner was the only witness to testify at this hearing. (*Id.*) However, five police reports were introduced as exhibits at this hearing. Petitioner's hearing Exhibit 1 was the statement given to the police by Alex Crompton. Exhibit 2 was the statement given to the police by Summer Miller. Petitioner's Exhibit 3 was the police statement of Kelly Roerick. Petitioner's Exhibit 4 was the report of the arresting officer, chronicling petitioner's statements

that he made at the time of his arrest. Respondent's Exhibit A was the statement given to police by David Jones. (These hearing exhibits were attached as Exhibit 10 to the habeas petition). (App. 76-88).

On December 20, 2004, after receiving proposed reports from both parties, Judge Eiffert signed off on the proposed findings prepared by the Attorney General, concluding that petitioner is guilty of assault in the first degree. (See Exh. 11; App. 89-95). Thereafter, petitioner filed exceptions to the master's report and requested briefing and oral argument. (See Exh. 12; App. 95-104). After holding oral argument, the Court of Appeals affirmed the special master's findings and denied habeas relief on April 19, 2005. *Verweire v. Moore*, 168 S.W.3d 518 (Mo. App. W.D. 2005). This Court, thereafter, denied petitioner's application for transfer on August 30, 2005. *Verweire v. Moore*, No. 86894.

B. Factual Background and Summary of Issues Warranting Relief

The basic facts that gave rise to these charges have never been in serious dispute. On October 9, 1999, petitioner, while intoxicated, pulled a loaded gun on a young man named Alex Crompton at a video arcade in Rockaway Beach, Missouri. In his statement to police, Alex Crompton described what happened as follows:

I was at the arcade talking to all my friends, when Kelly said that a guy was staring at her for about 15 to 20 minutes through the window. He

was about 5'10", short dark hair, sunburned, camo pants, and a green t-shirt. Raymond got in the way of his view, and he said, "You're blocking my view." Then I turned and said, "She is 14 years old." Then he mumbled something, then I said it again, he said, "Fuck you," and then I said the same to him. He walked into the arcade and I said something I don't remember, then he pulled the gun on me, walked up and grabbed my neck, and jabbed the gun in my side, then jabbed in my cheek, and I don't remember what he said or did. We both left. I went to the Jolly Roger and told Bruce Erickson what happened, then called the cops. The gun was a small silver semi-auto with a black clip.

(App. 3).

After the police were called, petitioner was arrested a short distance away in Rockaway Beach. Upon his arrest, the police found the aforementioned handgun, which was fully loaded, in petitioner's pocket. (App. 81-87). As noted earlier, based upon these facts, the prosecuting attorney of Taney County charged petitioner with the Class B felony of assault in the first degree and the Class D felony of carrying a concealed weapon.¹ The assault charge at issue in this petition alleged that the

¹ Petitioner is not challenging his carrying a concealed weapon conviction and five-year sentence, which he has already served, in this petition.

aforementioned facts were sufficient to prove that petitioner attempted to cause serious physical injury to the victim. See §565.050 R.S.Mo. (1994). (App. 1).

Retained counsel waived petitioner's preliminary hearing, apparently did little or no investigation, waived petitioner's right to a jury trial, never discussed any defenses with petitioner and advised petitioner to plead guilty to the charges without the benefit of a plea bargain on the morning petitioner's bench trial was to commence. (App. 4-21). At petitioner's guilty plea hearing, the only factual basis set forth by petitioner is contained in his written "petition to enter a plea of guilty." In this written guilty plea petition, petitioner wrote: "I pointed a gun at Alex Crompton and pushed him." (See Exh. 4; App. 38). In open court, Assistant Prosecutor James Justus provided the only other factual basis for the plea:

Your Honor, the evidence would be that on or about the 9th day of October of 1999, over at the Play Station Arcade on Highway 176 in Rockaway Beach, Taney County, Missouri, the defendant, Mr. Verweire, was there. He had with him a small caliber handgun. It was a .25 caliber handgun. There were several young people around the area. He came up to the juvenile who was Alex Crompton at the Play Station, and at that time there had been a few words. He reached and grabbed him in the neck, pointed this handgun into his side, and then hit him on the chest

and head area. At that point, there were some other people that yelled. Mr. Verweire left the area. The police caught him shortly thereafter, and at that time he had the handgun fully concealed in his pocket as he was attempting to elude them and get away from the area. This gun was, as I said, fully loaded. It had six in the magazine and one in the barrel.

(App. 17-18).

Despite the lack of a factual basis for an assault in the first degree conviction, the court accepted the plea and subsequently sentenced petitioner to ten years on assault in the first degree to run concurrent with the five-year sentence he received for carrying a concealed weapon. (App. 25-36; 46-48). After violating his probation after receiving a 120-day callback, Mr. Verweire is currently serving this sentence at the Western Missouri Correctional Center in Cameron, Missouri.

Petitioner was advised by his attorney, Eric Eighmy, not to file a motion for post-conviction relief under Missouri's Rule 24.035. Mr. Verweire also did not file a post-conviction relief motion because it would have jeopardized his prospects for obtaining a 120-day callback from the sentencing judge. (See Exh. 5; App. 46-48).

Despite Mr. Verweire's failure to pursue post-conviction relief under Rule 24.035, there is no procedural impediment to this Court's review of the merits of this petition for two reasons. First and foremost, the aforementioned facts indicate that

Mr. Verweire is innocent of the crime of assault in the first degree for which he is currently serving a ten-year sentence. Apart from being an independent ground for habeas relief, it is well settled that if a prisoner can show that he is actually innocent, that this fact overcomes any procedural bar to a Missouri court's consideration of a prisoner's Rule 91 habeas corpus action. *See e.g., Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000). Second, cause and prejudice is established because Mr. Verweire's failure to file a timely 24.035 motion was the result of the advice of his counsel and petitioner's desire not to jeopardize his prospects for a 120-day callback probation. *Id., see also State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001).

Apart from the aforementioned issues that overcome any procedural impediment to this Court's review of this case, the present petition raised four substantive grounds for state habeas relief: (1) a "freestanding" claim of actual innocence; (2) a claim that there was no factual basis for petitioner's plea of guilty and, as a result, his plea of guilty to the crime of assault in the first degree was not knowingly and voluntarily entered as required by the Fourteenth Amendment and Missouri Rule 24.02(e); (3) a claim of ineffective assistance of counsel resulting from counsel's advice to petitioner to plead guilty to the crime of assault in the first degree, without the benefit of a plea bargain, a charge that the state could not possibly prove

based upon the uncontroverted evidence outlined above; and (4) that the information was deficient because it omitted a material element of the offense by failing to allege that petitioner “knowingly” attempted to cause serious physical injury to the victim.²

Apart from the merits of the aforementioned four substantive claims for relief presented in this habeas action, the central issue presented by this petition is whether petitioner can establish his actual innocence of assault in the first degree under the “gateway” innocence test of *Schlup v. Delo*, 513 U.S. 298 (1995). As petitioner noted in the habeas petition, this court’s intervention is necessary because the Court of Appeals, in its published opinion, conflated and confused the *Schlup* test with a sufficiency of the evidence test. *Verweire v. Moore, supra*. 168 S.W.3d at 519.

Because both the Circuit Court and the Court of Appeals erroneously denied habeas relief to petitioner, this Court is petitioner’s last hope to secure habeas relief based upon his unquestionable innocence in order to correct the obvious injustice that results from a citizen being incarcerated for a crime he did not commit. Further facts will be set forth, as necessary, in the Argument section of this brief.

² These four substantive claims for relief were also presented in the prior petitions filed in the Circuit Court and before the Court of Appeals.

POINTS RELIED ON

I.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND TEN YEAR SENTENCE FOR THE CRIME OF ASSAULT IN THE FIRST DEGREE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THAT OFFENSE, WHICH OVERCOMES ANY PROCEDURAL IMPEDIMENT TO REVIEW OF HIS OTHER CONSTITUTIONAL CLAIMS ADVANCED IN HIS PETITION AND ALSO PROVIDES AN INDEPENDENT BASIS FOR HABEAS RELIEF BECAUSE PETITIONER'S CONTINUED INCARCERATION FOR A CRIME THAT HE DID NOT COMMIT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

State ex rel. Amrine v. Roper, 102 S.W.3d 541 (Mo. banc. 2003)

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

State v. Whalen, 49 S.W.3d 181 (Mo. banc. 2001)

State v. Unverzagt, 721 S.W.2d 786 (Mo. App. S.D. 1986)

U.S. Const. Am. VIII and XIV

Mo. Const. Art. I, §10

II.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE THE RECORD OF PETITIONER'S GUILTY PLEA INDICATES THAT THERE WAS NO FACTUAL BASIS FOR A PLEA OF GUILTY TO THE OFFENSE OF ASSAULT IN THE FIRST DEGREE AND, AS A RESULT, THE PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED IN VIOLATION OF MISSOURI SUPREME COURT RULE 24.02(e) AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Bousley v. United States, 523 U.S. 614 (1998)

Jones v. State, 117 S.W.2d 209 (Mo. App. S.D. 2003)

Ivy v. Caspari, 173 F.3d 1136 (8th Cir. 1999)

Carmons v. State, 26 S.W.3d 382 (Mo. App. W.D. 2000)

U.S. Const. Am. XIV

Mo. S.Ct. Rule 24.02(e)

III.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS ASSAULT IN THE FIRST DEGREE CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 18(a) OF THE CONSTITUTION OF THE STATE OF MISSOURI BECAUSE PETITIONER'S COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION INTO EITHER THE LAW OR THE FACTS OF THE CASE, FAILED TO RESEARCH AND UNDERSTAND THE RELEVANT LAW, ADVISED PETITIONER TO PLEAD GUILTY WITHOUT THE BENEFIT OF A PLEA BARGAIN, AND ADVISED PETITIONER TO WAIVE HIS PRELIMINARY HEARING AND PLEAD GUILTY TO THE CRIME OF ASSAULT IN THE FIRST DEGREE THAT HE DID NOT COMMIT AND THAT THE STATE LACKED SUFFICIENT

EVIDENCE TO PROVE. HAD COUNSEL PERFORMED COMPETENTLY, PETITIONER WOULD NOT HAVE PLEADED GUILTY AND WOULD HAVE EXERCISED HIS RIGHT TO TRIAL.

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

Hall v. State, 496 S.W.2d 300 (Mo. App. E.D. 1973)

Fretwell v. State, 772 S.W.2d 334 (Ark. 1989)

Hill v. Lockhart, 474 U.S. 52 (1985)

U.S. Const. Am. VI and XIV

Mo. Const. Art. I, § 18 (a)

IV.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS FIRST DEGREE ASSAULT CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HIS CONVICTION WAS OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE CHARGING DOCUMENT OMITTED A MATERIAL AND ESSENTIAL ELEMENT OF THE OFFENSE IN THAT IT DID NOT ALLEGE THAT PETITIONER KNOWINGLY ATTEMPTED TO CAUSE SERIOUS

PHYSICAL INJURY TO THE VICTIM, WHICH WAS A NECESSARY ELEMENT UNDER MISSOURI LAW TO ESTABLISH A PERSON'S GUILT OF THE CRIME OF ASSAULT IN THE FIRST DEGREE, WHICH DEPRIVED THE TRIAL COURT OF JURISDICTION BY NOT CHARGING AN OFFENSE AND ALSO RESULTED IN PETITIONER'S CONVICTION WITHOUT REQUIRING PROOF OF ALL OF THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

State v. Parkhurst, 845 S.W.2d 31 (Mo. banc. 1992)

State ex rel. Simmons v. White, 866 S.W.2d 443 (Mo. banc 1993)

United States v. Opsta, 659 F.2d 848 (8th Cir. 1981)

United State v. Denmon, 483 F.2d 1093 (8th Cir. 1973)

U.S. Const. Am. XIV

§565.050.1 R.S. Mo. (2000)

ARGUMENT I.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND TEN YEAR SENTENCE FOR THE CRIME OF ASSAULT IN THE FIRST DEGREE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THAT OFFENSE, WHICH OVERCOMES ANY PROCEDURAL IMPEDIMENT TO REVIEW OF HIS OTHER CONSTITUTIONAL CLAIMS ADVANCED IN HIS PETITION AND ALSO PROVIDES AN INDEPENDENT BASIS FOR HABEAS RELIEF BECAUSE PETITIONER'S CONTINUED INCARCERATION FOR A CRIME THAT HE DID NOT COMMIT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

Since petitioner has alleged that his conviction for the Class B felony of assault in the first degree and his ten year sentence are unconstitutional because he has presented a persuasive case of actual innocence, this point presents a question of law which this Court must review *de novo*. See e.g. *State v. Woolfolk*, 3 S.W.3d 823, 828

(Mo. App. W.D. 1999).

This case presents the rare situation in which a criminal defendant was advised to plead guilty [by his incompetent lawyers] to a crime that he did not commit. Although both the courts of this state and the federal courts have long grappled over the appropriate procedural remedy for innocent prisoners in Mr. Verweire's situation, there can be no serious dispute that Missouri law gives courts the inherent power to correct a fundamental miscarriage of justice, regardless of the procedural status of the case. Because it is clear that no reasonable juror would (or even could) find Mr. Verweire guilty of the crime of assault in the first degree based upon all of the evidence surrounding his confrontation with Alex Crompton, this Court should exercise its inherent power to grant relief from his conviction and sentence.

The probability that Mr. Verweire is innocent has dual significance in this case. First, both state and federal law require a court to grant a new trial to a prisoner who presents a truly persuasive case for his innocence. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc. 2003); *Herrera v. Collins*, 506 U.S. 390 (1993). Second, a prisoner who makes a colorable claim of innocence is entitled under both state and federal law to have a court review the constitutionality of his conviction, regardless of any issue relating to procedural default or timeliness of his claim. *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc. 2000); *Schlup v. Delo*, 513 U.S. 298 (1995). Both

aspects of judicial consideration of innocence claims rest upon the recognition that “[t]he quintessential miscarriage of justice is the [incarceration] of a person who is entirely innocent.” *Id.* at 324-325.

Under this point, petitioner will first address his claim that he can meet the “gateway” innocence standard to overcome any procedural impediment to *de novo* review of the merits of his other constitutional grounds for relief advanced in this petition. Second, although it may not be necessary for this Court to address this issue if it finds that petitioner can meet the gateway innocence test, petitioner has presented clear and convincing evidence of his innocence sufficient to provide an independent ground for habeas relief under this Court’s decision in *Amrine*.

A. PETITIONER CAN MEET THE GATEWAY INNOCENCE TEST TO OVERCOME THE PROCEDURAL BAR ARISING FROM HIS FAILURE TO PURSUE A TIMELY MOTION UNDER RULE 24.035 WHICH WILL PERMIT THIS COURT TO REVIEW THE MERITS AND GRANT HABEAS RELIEF ON HIS OTHER CLAIMS ADVANCED IN HIS PETITION.

To meet the gateway innocence standard, a habeas petitioner must show that he is probably innocent. To meet this test, the petitioner must show that “it is more likely than not that no reasonable juror would have convicted him...” *Schlup v. Delo*, 513

U.S. at 527. The evidence in this case unquestionably meets the *Schlup* test because no reasonable juror could find beyond a reasonable doubt that petitioner knowingly attempted to cause serious physical injury to Alex Crompton.

The evidence supporting this charge, brought to light through the police investigation, the purported factual basis for the guilty plea, and the hearing before the Special Master, establishes only that petitioner exhibited a weapon in a threatening manner against the victim. While this evidence would undoubtedly be sufficient to support an exhibiting a deadly weapon charge or perhaps an assault in the third degree charge, it is clearly insufficient to support a conviction for the Class B felony of assault in the first degree because there was absolutely no evidence that petitioner committed any act constituting an “attempt to cause serious physical injury to the victim.” See §565.050.1 R.S. Mo. (2000).

As this Court has explained: “A person will be guilty of purposely causing or attempting to cause serious physical injury to another if the person consciously engages in conduct that causes such injury or it is his or her conscious object to cause such injury.” *State v. Whalen*, 49 S.W.3d 181, 187 (Mo. banc 2001). Another passage from the *Whalen* decision also demonstrates that there was insufficient evidence to prove an attempt to injure in this case because “an attempt to commit any crime requires a specific intent to commit that particular offense.” *Id.* at n.5 (quoting

R. PERKINS, *CRIMINAL LAW*, 573-74 (2d ed. 1969). It is beyond dispute that, in this case, the state's evidence and the factual basis of the plea consisted solely of the uncontroverted fact that petitioner pointed a weapon at the victim in a threatening manner.

There is absolutely no evidence to support any inference that petitioner acted with the specific purpose to injure the victim or committed any overt act, such as pulling the trigger, to support an inference of such intent. The prototypical fact pattern supporting a Class B felony charge of assault in the first degree involving a firearm under Missouri law involves a situation where a defendant points a gun at the victim and pulls the trigger and, either the gun does not fire or the bullet[s] miss their intended target. *See e.g., State v. Unverzagt*, 721 S.W.2d 786, 787-88 (Mo. App. S.D. 1986); *State v. Mann*, 129 S.W.3d 462, 465-467 (Mo. App. S.D. 2004) (upholding conviction for assaulting a police officer under § 565.081.1 R.S. Mo. (2000), where defendant shot at and missed the officer). The absence of such evidence of intent to harm the victim in this case makes it clear that the state cannot prove beyond a reasonable doubt that petitioner is guilty of assault in the first degree.

More than a hundred years ago, this Court addressed a similar factual scenario in reviewing a felony assault conviction in *State v. Sears*, 86 Mo. 169 (1885). In that case, this Court reversed the defendant's felony assault conviction, finding that the

evidence was legally insufficient to support a finding of guilt based upon the uncontroverted fact that the defendant had pointed a loaded rifle at the victim and threatened to shoot him if he did not leave his land. *Id.* at 171-175. In reaching this conclusion, the Court noted:

Simply pointing a loaded rifle at one is not necessarily an assault, for that may be done in a threatening manner, with no intention to shoot or otherwise injure the party.

Id. at 173. As in *Sears*, the record in this case is devoid of any evidence that petitioner intended to carry out an actual assault upon Alex Crompton. As a result, petitioner's case presents a classic case of prosecutorial over-charging, which involves manifest injustice under definition of the term. This Court must intervene, not only to vindicate the rights of petitioner, but to avoid setting a dangerous and unwise precedent.³

As noted in the habeas petition, this Court's intervention is required to correct numerous factual and legal flaws in the published opinion of the Court of Appeals. The most glaring legal flaw involves the fact that the Court of Appeals applied the

³ This Court is petitioner's last hope in obtaining habeas relief on his compelling claim of innocence in light of the fact that the federal courts would be powerless to hear the case under 28 U.S.C. § 2254 because the statute of limitation has expired. See 28 U.S.C. § 2244(b).

wrong gateway innocence test, confusing and conflating the *Schlup* test with the more onerous test for sufficiency of the evidence and for challenging the factual basis for a guilty plea. 168 S.W.3d at 519. In this regard, the court of appeals stated: “This evidence *was enough* to establish that Verweire took a substantial step toward causing serious physical injury to Crompton.” *Id* (emphasis added). Immediately thereafter, the court cited two sufficiency of the evidence cases to support this conclusion: *State v. White*, 798 S.W.2d 694 (Mo. banc. 1990) and *In re J.R.N.*, 687 S.W. 2d 655 (Mo. App. S.D. 1985).⁴ *Id*. The Court of Appeals’ reasoning in this regard is clearly erroneous because the gateway innocence test is clearly distinct from and more

⁴ Neither *White* nor *J.R.N.* involve factual scenarios that are even remotely similar to the facts presented here. *White* involved a situation where the defendant actually cut the victim with a knife without causing serious physical injury. 798 S.W.2d at 697. *J.R.N.* involved a situation where the defendant was intercepted entering a hotel carrying a lug wrench and announced that he was there to assault the manager, with whom he apparently had a grudge against based upon prior dealings with him. In contrast, the facts here present a spontaneous encounter and argument between two strangers involving the exhibition of a handgun in a threatening manner.

favorable to the prisoner than a sufficiency of the evidence test.⁵ Under the *Schlup* test, which has been adopted by this Court in the context of Rule 91 cases, the reviewing court must review all of the evidence in the case as if it has been tried to a jury under a reasonable doubt standard, and consider whether, based upon all of the evidence, it is more likely than not that no reasonable juror would convict the petitioner. 513 U.S. at 328. In fact, the Supreme Court in *Schlup* explicitly rejected Missouri's argument that the gateway innocence test should be the equivalent of a sufficiency of the evidence test. *Id.* at 330. See also *Clay v. Dormire*, 37 S.W.3d at 217.

Had the proper test been applied, it is not a close question that petitioner probably would have been acquitted if the jury would have heard all of the relevant evidence. The only evidence presented by the state of Missouri to support any inference of the necessary intent to commit an assault was the vague statement given to police by witness David Jones. (App. 88). This cryptic statement of Jones in which he says that someone unnamed said something about blowing someone's head off is

⁵ Likewise, this Court's *Amrine* test for "free-standing" innocence claims is less onerous than a than a sufficiency of the evidence test in light of the Court's conclusion that *Amrine* could be legally re-tried because the prosecution's evidence was legally sufficient. 102 S.W.3d at 549.

certainly not sufficient by itself to establish guilt beyond a reasonable doubt in light of the fact that no other witnesses in the case, including the victim himself, attributed any such statement to petitioner. *Id.*, (see also App. 3; 76-87). In addition, Mr. Jones has recently given a sworn declaration clarifying what he actually saw and heard and has clearly indicated that the “blow your head off” statement was made by the arresting officer and was directed toward petitioner. (App. 105).

Petitioner’s contention that he can meet the *Schlup* test is further bolstered by the ultimate outcome in the *Schlup* case itself. After remand, District Judge Jean Hamilton found that Lloyd Schlup could meet the gateway test of innocence, notwithstanding the fact that there were two prison guard eyewitnesses who consistently testified for the prosecution that they saw Schlup committing the crime. 513 U.S. at 302; *Schlup v. Delo*, 912 F.Supp. 448 (E.D. Mo. 1995). Because it is clear that the Court of Appeals applied the wrong innocence test and more importantly reached a wrong and unjust result in this case, this Court’s intervention is necessary to “red-flag” and explicitly overrule the published Court of Appeals’ opinion in this case. If this erroneous Court of Appeals’ decision stands, not only will the injustice in this case go uncorrected, this precedent will also make it all but impossible for innocent prisoners to prevail under Rule 91 as this Court contemplated in *Clay* when it struck a proper balance between respecting the finality of convictions and correcting

manifest injustices involving innocent prisoners. There is no impediment to reviewing petitioner's underlying claims and ordering his release because he is unquestionably innocent under *Schlup* and *Clay*.

B. PETITIONER CAN MEET THE “FREESTANDING” INNOCENCE TEST OF *AMRINE*.

It is well settled under Missouri law that claims of innocence are cognizable in a Rule 91 petition for a writ of habeas corpus. *Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991). More recently, this Court held that a habeas petitioner may assert a freestanding claim of actual innocence, independent of any constitutional violation, as a means to obtain release from prison. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003). Although *Amrine* was a death penalty case, it is also a “manifest injustice” for the same reason to allow a prisoner to remain incarcerated on a non-capital prison sentence if he is unquestionably innocent. *Id.* at 547-48. As in the *Amrine* case, there is “clear and convincing evidence” that Howard Verweire is innocent of the crime of assault in the first degree.

As petitioner noted in connection with his gateway innocence claim above, there is absolutely no evidence in the record to establish the essential element of the crime of assault in the first degree that petitioner had the purpose to cause serious physical injury to the victim. Instead, it is clear from the record that he committed the

lesser and distinct crime of exhibiting a deadly weapon in an angry and threatening manner. See §571.030.4 R.S. Mo. (2000). There is no published case in the state of Missouri where a criminal defendant has been found guilty of the Class B felony of assault in the first degree under facts even remotely similar to those presented here. Instead, it is clear that the factual scenario here presents a typical case to support charging a defendant with the Class D felony of exhibiting a deadly weapon. *See State v. McMilian*, 649 S.W.2d 467, 470-471 (Mo. App. W.D. 1983). If the published decision of the Court of Appeals' finding that the evidence here is sufficient to uphold petitioner's assault in the first degree conviction for merely exhibiting a weapon is not overturned, this precedent will usurp the will of the legislature by rendering the exhibiting a deadly weapon statute under §571.030.4 R.S. Mo. (2000) superfluous. *See United States v. Menasche*, 348 U.S. 528, 538-539 (1955). The Court of Appeals' decision will also give overzealous prosecutors a "green light" to overcharge exhibiting a weapon cases and, since first degree assault sentences fall under the 85% law of § 558.019 R.S. Mo. (2000), this practice will further burden the criminal justice system by exacerbating the existing problem of prison overcrowding.

Because it was a death penalty case, the stakes in *Amrine* were obviously higher than those presented here where Mr. Verweire must serve 85% of a ten year sentence for a crime that he did not commit. However, the legal principles involved apply with

equal force here. No one can seriously dispute that it is a manifest injustice⁶ for an innocent man to spend any time in prison for a crime he did not commit. As such, Mr. Verweire's continued incarceration for a crime he did not commit violates the Eighth and Fourteenth Amendments and he is entitled to habeas relief under both state and federal law. *Amrine*, at 546-547; *Lewis v. Erickson*, 946 F.2d 131, 1362 (8th Cir. 1991); *Sanders v. Sullivan*, 863 F.2d 218, 224-225 (2nd Cir. 1988).

Based upon all the evidence presented in this case, there is clear and convincing evidence that Mr. Verweire did not attempt to cause serious physical injury to Alex Crompton. As a result, he is clearly entitled to relief from his assault in the first degree conviction under the freestanding innocence test of *Amrine* because petitioner's continued incarceration is a manifest injustice.

ARGUMENT II.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT

⁶ This Court in *Amrine* also strongly suggested, *in dicta*, that "it is completely arbitrary to continue to incarcerate... an individual who is actually innocent," which would violate Art. I, §10 of the Missouri Constitution. 102 S.W.3d at 546, n.3.

COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE THE RECORD OF PETITIONER’S GUILTY PLEA INDICATES THAT THERE WAS NO FACTUAL BASIS FOR A PLEA OF GUILTY TO THE OFFENSE OF ASSAULT IN THE FIRST DEGREE AND, AS A RESULT, THE PLEA WAS NOT KNOWINGLY AND VOLUNTARILY ENTERED IN VIOLATION OF MISSOURI SUPREME COURT RULE 24.02(e) AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the unlikely event that this Court concludes that petitioner cannot meet the gateway innocence standard to allow merits review of this claim, there is also cause and prejudice to overcome any procedural bar arising from petitioner’s failure to file a timely Rule 24.035 motion for two interrelated reasons. First, petitioner’s trial counsel explicitly advised him not to file a post-conviction motion challenging his convictions. Under similar circumstances, the Missouri Court of Appeals has held that such advice by trial counsel creates an inherent conflict of interest which constitutes ineffective assistance of counsel.⁷ *See State v. Taylor*, 1 S.W.3d 610 (Mo.

⁷ A violation of a prisoner’s Sixth Amendment right to counsel has repeatedly been recognized as sufficient to establish cause and prejudice to overcome a procedural default. *See e. g. Murray v. Carrier*, 477 U.S. 478, 488 (1986).

App. W.D. 1999); *State v. Griddine*, 75 S.W.3d 741 (Mo. App. W.D. 2000). Second, the interplay between the time deadline for filing a post-conviction motion and petitioner's hope to receive 120 call-back from the sentencing court created a sufficient external factor to constitute cause and prejudice under prevailing caselaw. *See State ex rel. Brown v. Gammon*, 947 S.W.2d 437 (Mo. App. W.D. 1997). Petitioner has presented uncontradicted evidence that the reason he did not pursue a timely post-conviction motion was because he believed that if he did so, it would have jeopardized his chances for shock probation. (App. 44-45). This "Hobson's choice" provides a sufficient external factor to overcome any procedural bar to review under Rule 91. 947 S.W.2d at 440; *see also Breecheen v. Reynolds*, 41 F.3d 1343, 1364 (10th Cir. 1994); *Smith v. Ratelle*, 323 F.3d 813 (9th Cir. 2003). Prejudice to overcome this procedural default is established in light of the fact that the underlying claim for relief is meritorious. *See Ivy v. Caspari*, 173 F.3d 1136, 1141-1142 (8th Cir. 1999); *Strickler v. Greene*, 527 U.S. 263, 289-290 (1999).

As noted earlier, neither the on the record plea colloquy before the circuit court nor petitioner's written petition to enter a plea of guilty sets forth a factual basis of guilt for the offense of assault in the first degree. Both the in court proceeding and the written petition contain no reference to an essential element of the crime, that petitioner knowingly attempted to cause serious physical injury to Alex Crompton.

As a result, it is clear that petitioner's guilty plea must be set aside under both the state law and the federal constitutional requirement that guilty pleas be knowingly and intelligently entered.

Rule 24.02(e) of the Missouri Rules of Criminal Procedure states: "The court shall not enter a judgment upon a guilty plea unless it determines that there is a factual basis for the plea." The Due Process Clause of the Fourteenth Amendment also requires the court to undertake a factual inquiry to determine if a guilty plea is voluntarily and intelligently entered by a criminal defendant. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969). The trial court is further charged with the duty to ensure that a criminal defendant who pleads guilty has a fair understanding of the nature of the charge and the consequences of the plea. *Id.*

Rule 24.02(e)'s factual basis requirement makes it necessary that the defendant express "an awareness of the nature and elements of the charge to which he or she pleads guilty." *Carmons v. State*, 26 S.W.3d 382, 384 (Mo. App. W.D. 2000). As noted earlier, both the written factual basis in the guilty plea petition and the factual basis recited by the prosecutor omits a key element necessary to provide a factual basis for the Class B felony of assault in the first degree: evidence that petitioner committed some act demonstrating the intent to injure the victim or that petitioner had the purpose to cause serious physical injury to the victim. In light of these

uncontroverted facts, petitioner's plea of guilty cannot withstand scrutiny under Rule 24.02(e) or the Due Process Clause of the Fourteenth Amendment.

The constitutional aspect of this claim is controlled by the Supreme Court case of *Henderson v. Morgan*, 426 U.S. 637 (1976). In that case, the Court held that a defendant's guilty plea to a murder charge was not voluntarily entered and thus violated due process because it was not explained to the defendant, nor did the defendant admit in the plea hearing that he possessed the necessary intent to kill. *Id.* at 645-47. The principles of *Henderson* were more recently reaffirmed by the United States Supreme Court in *Bousley v. United States*, 523 U.S. 614 (1998). In *Bousley*, the Court reaffirmed the principles of *Henderson* in holding that a guilty plea is invalid under the Due Process Clause if the record establishes that neither counsel, the court, nor the defendant understood one of the essential elements of the crime. *Id.* at 618-19.

In this respect, the facts surrounding petitioner's guilty plea are remarkably similar to those confronted by the Eighth Circuit in *Ivy v. Caspari*, 173 F.3d 1136 (8th Cir. 1990). In that case, the Eighth Circuit found that Missouri prisoner Jason Ivy's guilty plea to second degree murder was not knowingly and voluntarily entered in violation of the Fourteenth Amendment because he "did not receive real notice of the true nature of the charge against him." *Id.* at 1142, citing *Smith v. O'Grady*, 312 U.S.

329, 334 (1941). The Eighth Circuit reached this result because the plea colloquy indicated that Mr. Ivy did not have the requisite intent to commit the crime to which he pled guilty. 173 F.3d at 1142-1143. In this case, like *Ivy*, it is clear that Mr. Verweire did not understand the elements of the crime of assault in the first degree when he entered his guilty plea. Furthermore, neither the written petition to enter a plea of guilty nor the factual basis supplied in open court by the prosecutor made any mention of the necessary element that petitioner attempted to cause serious physical injury to Alex Crompton. As a result, as in *Ivy*, it is clear that Mr. Verweire's plea of guilty was not knowingly and voluntarily entered, and thus his conviction was secured in violation of the Fourteenth Amendment to the Constitution.

Similarly, Rule 24.02(e) precludes the trial court from accepting a guilty plea if the facts in the record do not establish the commission of the crime charged. *See e.g., Hoskin v. State*, 863 S.W.2d 637, 639 (Mo. App. E.D. 1993). In a more recent case, the Southern District Court of Appeals held that a defendant's guilty plea to assault in the second degree did not comply with 24.02(e) because the guilty plea colloquy did not state the particular facts to demonstrate that the defendant committed all of the elements of the offense. *Jones v. State*, 117 S.W.3d 209 (Mo. App. S.D. 2003). Instead, the guilty plea colloquy in *Jones* merely involved the judge reading to the defendant the charging document which alleged that the defendant knowingly

caused physical injury to the victim by means of a dangerous instrument. *Id.* at 211. In *Jones*, this factual basis was deficient because there was no explanation as to what the dangerous instrument was or the extent of the injuries caused to the victim. *Id.* at 212-13; see also *England v. State*, 85 S.W.3d 103, 109-110 (Mo. App. W.D. 2002) (finding no factual basis for plea to assault in the first degree for shooting into a house because no evidence was adduced that defendant had specific intent to kill).

The factual basis here is clearly deficient under the constitutional and state law standards set forth above because there is absolutely no factual basis to support a finding that petitioner committed any act evidencing an attempt to cause serious physical injury to the victim. As a result, habeas relief is warranted.

ARGUMENT III.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS ASSAULT IN THE FIRST DEGREE CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF HIS RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 18(a) OF THE CONSTITUTION OF THE STATE OF

MISSOURI BECAUSE PETITIONER'S COUNSEL FAILED TO CONDUCT A REASONABLE INVESTIGATION INTO EITHER THE LAW OR THE FACTS OF THE CASE, FAILED TO RESEARCH AND UNDERSTAND THE RELEVANT LAW, ADVISED PETITIONER TO PLEAD GUILTY WITHOUT THE BENEFIT OF A PLEA BARGAIN, AND ADVISED PETITIONER TO WAIVE HIS PRELIMINARY HEARING AND PLEAD GUILTY TO THE CRIME OF ASSAULT IN THE FIRST DEGREE THAT HE DID NOT COMMIT AND THAT THE STATE LACKED SUFFICIENT EVIDENCE TO PROVE. HAD COUNSEL PERFORMED COMPETENTLY, PETITIONER WOULD NOT HAVE PLEADED GUILTY AND WOULD HAVE EXERCISED HIS RIGHT TO TRIAL.

Before addressing the merits of this claim it should be noted that, apart from being reviewable under the gateway innocence test, this claim is also reviewable on its merits notwithstanding any procedural default arising from petitioner's failure to pursue a timely post-conviction motion, because cause and prejudice can be established for the same reasons advanced under Argument II, *infra*. As a result, this Court is free to review the merits of this ineffectiveness claim *de novo*, as if this Court was in the same posture as a state post-conviction motion court.

In light of the foregoing claims and evidence that petitioner did not commit the

crime of assault in the first degree and that there was no factual basis for his plea of guilty to that charge, it is self-evident that his lawyers were ineffective in advising him to plead guilty to a charge that the state could not possibly prove if the case had proceeded to trial. This Court must analyze this claim under the familiar test of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A prisoner seeking post-conviction relief based on ineffective assistance of counsel must demonstrate that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would exercise under substantially similar circumstances and that he was thereby prejudiced. *Id.* See also *Milner v. State*, 968 S.W.2d 229, 230 (Mo. App. S.D. 1998). In the context of a guilty plea, *Strickland* prejudice is established if it can be demonstrated that there is a reasonable probability that, but for the errors or ineffectiveness of counsel, the defendant would not have pleaded guilty and would have insisted on a trial. *Trahan v. State*, 872 S.W.2d 156, 158 (Mo. App. S.D. 1994); *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

Strickland prejudice is undoubtedly established here in light of petitioner's uncontradicted statement that he would not have pleaded guilty if he had been correctly advised that the prosecution could not have proven that petitioner committed the offense of assault in the first degree. (See App. 44-45). In light of the facts set forth earlier in this petition, it is also not a close question that counsel's performance

was objectively deficient under *Strickland*.

Petitioner's attorneys failed to investigate relevant facts and law or thoroughly discuss the facts, the law or relevant defenses with their client. (App. 6-7). Most importantly, however, Mr. Eighmy and Mr. Wiley incompetently advised petitioner to waive his preliminary hearing and plead guilty without the benefit of a plea bargained sentence to an offense that the state lacked sufficient evidence to prove. (App. 4-24). A first-year law student should have recognized that the evidence in this case was devoid of any facts supporting the necessary element that petitioner committed some act evidencing an intent to cause serious physical injury to the victim.

There is no published Missouri case that is directly on point finding counsel ineffective for advising a defendant to plead guilty to a crime that he did not commit and that the state could not possibly prove. The closest Missouri authority on this issue is *Hall v. State*, 496 S.W.2d 300 (Mo. App. E.D. 1973). In that case, the court found counsel ineffective for allowing his client to plead guilty to a murder charge when he did not conduct any investigation that would have revealed a strong possibility that the defendant had acted in lawful self-defense. *Id.* at 304.

Despite the absence of direct Missouri authority, it is clear that counsel is ineffective in the situation, as here, where he advises a person to plead guilty to a

crime that he or she did not commit and that the prosecution could not prove. There is a wealth of authority from other jurisdictions for this proposition. For instance, in *Fretwell v. State*, 772 S.W.2d 334 (Ark. 1989), the Supreme Court of Arkansas found that a defendant's plea of guilty to a murder charge must be set aside because she received ineffective assistance of counsel because the uncontradicted facts revealed that the defendant's conduct was insufficient to make her an accomplice to a murder committed by her husband when she was not present. As in *Fretwell*, Eighmy's and Wiley's advice to Mr. Verweire to plead guilty was based upon lack of factual investigation coupled with an ignorance of the law. Like *Fretwell*, Mr. Verweire "pled guilty on the basis of [his] attorney's mistaken assumption and advice that [his] conduct – as described and related to the court at the plea hearing . . . was sufficient to convict [him] . . . when, in fact, it was not." *Id.* at 308-09.

There are numerous other cases from other state and federal jurisdictions that have found guilty plea counsel ineffective for advising defendants to plead guilty to crimes that they did not commit and that the state could not possibly prove. *See e.g.*, *Murdock v. State*, 426 S.E.2d 740 (S.C. 1992); *State v. Washington*, 491 So.2d 1337 (La. 1986); *United States v. Loughery*, 908 F.2d 1014 (D.C. Cir. 1990). Based upon this authority and the uncontradicted evidence in this case, there can be little doubt that it was objectively unreasonable under *Strickland* for Mr. Eighmy and Mr. Wiley

to advise Mr. Verweire to waive his preliminary hearing and plead guilty to assault in the first degree without a negotiated sentence, because there was no evidence to establish that Mr. Verweire committed that crime. Because Mr. Verweire would not have pled guilty had he been competently represented, this Court must grant habeas relief and vacate petitioner's assault conviction and sentence.

ARGUMENT IV.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS FIRST DEGREE ASSAULT CONVICTION AND TEN YEAR SENTENCE IMPOSED BY THE CIRCUIT COURT OF TANEY COUNTY ON AUGUST 17, 2000 BECAUSE HIS CONVICTION WAS OBTAINED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE CHARGING DOCUMENT OMITTED A MATERIAL AND ESSENTIAL ELEMENT OF THE OFFENSE IN THAT IT DID NOT ALLEGE THAT PETITIONER KNOWINGLY ATTEMPTED TO CAUSE SERIOUS PHYSICAL INJURY TO THE VICTIM, WHICH WAS A NECESSARY ELEMENT UNDER MISSOURI LAW TO ESTABLISH A PERSON'S GUILT OF A CRIME OF ASSAULT IN THE FIRST DEGREE, WHICH DEPRIVED THE TRIAL COURT OF JURISDICTION BY NOT CHARGING AN

OFFENSE AND ALSO RESULTED IN PETITIONER’S CONVICTION WITHOUT REQUIRING PROOF OF ALL OF THE ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

The statute that defines assault in the first degree under Missouri law requires, in addition to the *actus reas*, proof of either an attempt to kill or that the defendant knowingly caused or attempted to cause serious physical injury to the victim. Section 565.050.1 R.S.Mo. (1994). As noted earlier, the charging document in this case did not allege that petitioner acted “knowingly.” (See App. 1-2).⁸

Under Missouri law, defendant is entitled to relief if the omission of a necessary element of the charged offense or indictment or information results in prejudice to the accused. *State v. Parkhurst*, 845 S.W.2d 31, 35 (Mo. banc 1992). There can be little doubt that the defect in the information in this case was prejudicial to petitioner because this error permitted him to be found guilty and incarcerated for a crime which, as outlined above, he did not commit. It is also well settled under the law of other

⁸ In addition to the reasons advanced in the three prior Arguments, there is no procedural bar to merits review of this claim for another reason. Because a deficient charging document presents a jurisdictional issue, this claim is reviewable under an established exception to the normal procedural bar rule. *See e.g. State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc. 1993).

jurisdictions that the prosecution's failure to allege the required criminal intent in the charging document renders the indictment or information fatally defective and unconstitutional. *See e.g., United States v. Opsta*, 659 F.2d 848, 850 (8th Cir. 1981); *United States v. Denmon*, 483 F.2d 1093 (8th Cir. 1973). Had the information in this case contained all the required elements of the offense and placed petitioner, his counsel, and the court on notice of the necessary intent requirement, this plea of guilty would have never been consummated. Therefore, habeas relief is warranted.

CONCLUSION

WHEREFORE, for all the foregoing reasons, Mr. Verweire prays this Court to examine the evidence in this case and issue a writ of habeas corpus discharging him from his conviction for assault in the first degree and his ten year sentence and grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 8582 words, excluding the cover, table of contents, table of authorities, jurisdictional statement, this certification and the appendix, as determined by WordPerfect 8 software; and,
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and,
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 24th day of May, 2006, to:

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