IN THE MISSOURI SUPREME COURT

No. 84656

STATE ex rel.
JOSEPH AMRINE,

Petitioner,

v.

AL LUEBBERS,

Respondent.

PETITIONER'S REPLY BRIEF

SEAN D. O'BRIEN, #30116
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ARGUMENT I.

THE DOCTRINE OF COLLATERAL ESTOPPEL DOES NOT PRECLUDE RELIEF FOR A PRISONER WHO IS ACTUALLY INNOCENT.

Mr. Amrine's case has followed a long and frustrating procedural path in which evidence of his innocence has surfaced in bits and pieces, until finally, virtually nothing remains of the state's case, and the only reliable, enduring evidence points unequivocally to his innocence. Respondent's first line of defense to petitioner's actual innocence claim is the assertion that this Court's review of the merits of this claim is barred by the doctrine of collateral estoppel in light of the fact that petitioner's gateway claim of actual innocence was rejected during his prior federal habeas corpus proceeding. (Resp. br. at 10-12). This argument should be rejected because the doctrines of collateral estoppel and res judicata do not apply in habeas corpus proceedings, and because prior decisions in Mr. Amrine's case were based upon incomplete information and involved a restricted scope of review.

First and foremost, respondent's argument conveniently ignores the settled rule that the doctrines of res judicata and collateral estoppel do not apply to habeas corpus proceedings. The United States Supreme Court has long "regard[ed] the rule as well established" that "the doctrine of res judicata did not extend to decisions on habeas

corpus refusing to discharge the prisoner." Salinger v. Loisel, 265 U.S. 224, 230 (1924); also see Preiser v. Rodriguez, 411 U.S. 475, 497 (1973). The Supreme Court eloquently explained the following rationale for this well-settled rule:

> Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If "government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment," access to the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ.

Sanders v. United States, 373 U.S. 1, 8 (1963) (citation omitted).

This Court has also repeatedly held that rules of res judicata do not apply to habeas corpus proceedings filed pursuant to Rule 91 and the state constitution. See e.g., In re Breck, 158 S.W. 843, 849 (Mo. 1913).[1] It is therefore well-settled in this state that "conventional notions of res judicata and collateral estoppel do not apply to federal habeas corpus proceedings." Thompson v. State, 569 S.W.2d 380, 383 (Mo. App. S.D. 1978). In Thompson, the court rejected the state's argument, virtually

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[1]An exception to this rule exists if, in a prior habeas action, relief is granted to the prisoner. See e.g., Ex parte Messina, 128 S.W.2d 1082, 1085 (Mo. App. W.D. 1939).

identical to respondent's argument in this case, that an adverse decision in a prisoner's prior federal habeas action collaterally estopped him from raising the same or similar issues in a subsequent state post-conviction action. Id. The sole case relied upon by respondent for his collateral estoppel argument, In re Carey, No. SC84189 (Mo. banc, December 4, 2002), does not even involve habeas corpus proceedings. Respondent's collateral estoppel argument should, therefore, be rejected.

Even assuming for the sake of argument that collateral estoppel principles generally apply to this case, that doctrine does not preclude this Court from reaching the merits of petitioner's free-standing claim of actual innocence. As this Court has repeatedly stated:

> Before giving preclusive effect to a prior adjudication under collateral estoppel principles, the court must consider four factors: (1) whether the issue decided in the prior adjudication was identical to the issue presented in the present action; (2) whether the prior adjudication resulted in a judgment on the merits; (3) whether the party against whom estoppel is asserted was a party or was in privity with the party to the prior adjudication; and (4) whether the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior suit.

James v. Paul, 49 S.W.3d 678, 683 (Mo. banc 2001).

It is clear that collateral estoppel principles would not bar relief in petitioner's case because previous decisions in this case involved incomplete evidence, restricted standards of review or both. Therefore, the legal and factual issues were different, and petitioner never had a full and fair opportunity to prove his innocence before a court which would consider all of the evidence. In addition, Mr. Amrine never advanced a free-standing claim of actual innocence in his federal habeas corpus petition. Instead, the only innocence issue litigated before the federal courts was a "gateway" innocence claim under Schlup v. Delo, 513 U.S. 298 (1995). See Amrine v. Bowersox, 128 F.3d 1222, 1227 (8th Cir. en banc 1997). Respondent's argument ignores the fact that neither the federal courts nor the state post-conviction motion court, in prior actions, considered all the evidence of innocence under the appropriate standard of review. Id. at 1228.

In essence, as respondent's point relied on indicates, his argument is that collateral estoppel applies because petitioner previously litigated a similar claim of innocence using the same witnesses. (Resp. br. 9). A similar collateral estoppel argument has been rejected by the Western District Court of Appeals in State v. Polley, 2 S.W.3d 887, 893-94 (Mo. App. W.D. 1999). In Polley, a case involving unfair practices under the Merchandising Practices Act, the court emphatically rejected

the appellant's collateral estoppel argument because the issues litigated in the prior action, although they were similar, were not identical. Id. In reaching this conclusion, the court noted: "[t]he fact that the same witnesses were used by the state in proving both cases does not automatically invoke collateral estoppel." Id. at 894.

With regard to the Schlup gateway issue, in addition to the arguments noted above, collateral estoppel principles should not apply because the prior federal court decisions were based upon a misreading of the Schlup standard. Those courts failed to consider all of the evidence of petitioner's innocence except for Jerry Poe's recantation, because the other evidence was not "new" as that term was erroneously defined by the Eighth Circuit Court of Appeals. The district court was forbidden to consider any evidence which, through the exercise of due diligence, could have been discovered "earlier," meaning earlier stages of post-conviction proceedings as well as at trial. Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc), cert. denied, 523 U.S. 1123 (1998). That restriction is contrary to Schlup, which requires a habeas court to make its determination concerning the petitioner's innocence "*in light of all the evidence*, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded *or to have become available only after the trial*." Schlup v. Delo, 513 U.S. at 327-28 (emphasis added). Missouri law, too, defines "new" evidence as evidence

which "has come to the knowledge of the defendant *since the trial*." State v. Williams, 652 S.W.2d 102, 114 (Mo. banc 1983). That only makes sense, because the Schlup standard "is intended to focus the inquiry on actual innocence." Schlup v. Delo, 513 U.S. at 327. By shifting the inquiry elsewhere and restricting the scope of evidence reviewed, the decision of the Eighth Circuit in this case thus applies a standard that is at odds with the truth-seeking purpose of the Schlup inquiry.

At least one court has criticized the Eighth Circuit's decision in this case as effectively nullifying Schlup's innocence gateway. Reasonover v. Washington, 60 F. Supp. 2d 937, 949, n. 8 (E.D. Mo. 1999). Other courts have held that the use of res judicata and collateral estoppel are inappropriate if the prior decision was based upon material mistakes of law or fact. See e.g., United States v. Sherman, 912 F.2d 907 (7th Cir. 1990). This Court should likewise reject the Eighth Circuit's restriction of the Schlup standard and consider the entire record, including the evidence that was before the jury and any evidence which has come to light since the trial.[2]

[2]It should be noted that this Court is not bound to follow any decision from the Eighth Circuit interpreting federal constitutional protections to be afforded to Missouri prisoners. See Lockhart v. Fretwell, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring).

Of course, the previous decisions of the federal court in this case can in no way preclude this Court's review of state law governing newly discovered evidence of innocence. On that point, respondent claims that State v. Mooney, 670 S.W.2d 510 (Mo. App. E.D. 1984), does not support petitioner's position. Specifically, respondent contends that "the Missouri Court of Appeals stated that their research revealed that the only remedy for newly discovered evidence of actual innocence presented out of time was executive clemency," and that "in support of this proposition, the Missouri Court of Appeals cited to this Court's decision in State v. Johnson, 286 S.W.2d 787 (Mo. 1956); State v. Sadowski, 256 S.W. 753 (Mo. 1923); and State v. Worley, 353 S.W.2d 589 (Mo. 1962)." (Resp. br. 13-14). A closer reading of the Mooney decision reveals that these are not the court's statements, but merely the court's recitation of the argument of the Attorney General on behalf of the state in that case. The Court of Appeals rejected those arguments, stating:

> We believe this case can be distinguished from Johnson, Sadowski, Worley and McKinney on the facts. Here the victim whose testimony was the only evidence to establish the crime of which appellant was convicted has allegedly recanted. If it is 'patently unjust' for a trial judge to refuse to grant a new trial in a case where the finding of guilt was based upon false testimony, is it any less just to deprive an appellant of

> an opportunity to present that issue to the trial court because he did not learn of the fact that the victim's testimony was false until after the time for filing a motion for new trial had expired?

670 S.W.2d at 515. Mr. Amrine's case similarly involves recanted testimony and substantial other evidence establishing that his conviction was based on false testimony.

The previous decisions in this case which are relied upon so heavily by respondent are reminiscent of the fable of the three blind men and the elephant. Not one single decision maker before now has had both the opportunity and the discretion to consider all of the evidence supporting Amrine's innocence. The jury didn't know that the inmates accusing Amrine had given grossly inconsistent descriptions of events prior to trial (See Petitioner's Argument III), and they were hopelessly misled about Officer Noble's observations. They also did not hear Kevin Dean's testimony that he saw Terry Russell stab Gary Barber in the back. The post-conviction court, while it heard Terry Russell and Randy Ferguson recant under oath, did not have the benefit of either Jerry Poe's recantation or John Noble's explanation of his reservations about the killer's identity. Like the jury, it too lacked the benefit of Kevin Dean's eyewitness account, and it did not have the benefit of Jerry Poe's or Randy Ferguson's prior inconsistent statements.

The federal district court was under a mandate by the Eighth Circuit Court of Appeals to restrict its review exclusively to Jerry Poe. Therefore, the court explicitly refused to consider the post-trial recantations of Terry Russell and Randall Ferguson because "the court does not consider their testimony to be 'new' for purposes of this limited remand." (Pet. Exh. 13, p. 4). Likewise, the federal court decided that the testimony of Officer Noble and Kevin Dean was not "'new' evidence" because it would have been available to a competent trial attorney. (Id. at pp. 4-5). This Court is the only entity with the unfettered power and opportunity to consider all of the evidence now available. Thus, even if the doctrine of collateral estoppel or res judicata were applicable to habeas proceedings, it could not apply here because the restrictive nature of prior proceedings precluded "a full and fair opportunity to litigate" the issue of Amrine's innocence, which is "a prerequisite to application of principles of res judicata." Poyner v. Murray, 508 U.S. 931 (1993), citing Montana v. United States, 440 U.S. 147, 153 (1979); accord, Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).

One final point needs to be made regarding respondent's collateral estoppel argument. This Court has held that principles of collateral estoppel should not be applied against a litigant if doing so would be unjust or "inequitable." Oates v. Safeco Insurance Co. of America, 583 S.W.2d 713, 721 (Mo. banc 1979). In Oates, this

Court refused to apply the doctrine in an insurance case because a conflict of interest existed between the insured and the insurance company. Id. at 720-721. If it is inequitable and unjust to apply collateral estoppel in this context, it goes without saying that it would be the ultimate inequity to turn a blind eye to a prisoner's claim of innocence on procedural grounds and allow him to be executed without reviewing the case. This is especially true where every previous decision maker – the jury, the post-conviction court and the federal habeas court – considered only a fraction of the evidence now available. For all these reasons, petitioner's claim of innocence should be reviewed by this Court *de novo*.

II.

PETITIONER'S CONVICTION WAS SECURED THROUGH THE PROSECUTION'S USE OF THE PERJURED TESTIMONY OF JERRY POE, RANDY FERGUSON, AND TERRY RUSSELL IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

Contrary to respondent's assertion, there is no great leap from the allegation that the state's key witnesses admit to having lied under oath at Mr. Amrine's trial and Mr. Amrine's claim that his conviction was secured through perjured testimony. (Resp. br. 18). Petitioner's claim does not rest on a bare assumption that the recantations are true. To the contrary, petitioner urges the Court to look beyond the recantations at the entire body of evidence now available. In addition to the recantations, petitioner asks this Court to consider the inconsistencies of the witnesses' trial testimony, the pressures that caused them to testify falsely against Amrine, the testimony of the corrections officer who saw the event, the statements and testimony of other inmates who were present, and the absence of physical evidence to corroborate the claims upon which Amrine was convicted. No prior court has examined the totality of the

evidence which established without question that Amrine was convicted on perjured testimony.

While respondent relies on the findings of the post-conviction court on the credibility of Russell's and Ferguson's recantations, those findings, as noted in Argument I above, were based on an incomplete record. The post-conviction court lacked critical pieces of evidence which would have dramatically changed its view of the evidence. For example, the court was unaware that Ferguson and Poe had given hopelessly contradictory versions of the crime prior to petitioner's trial, as described in Argument III. (Pet. Br. pp. 71-75). Furthermore, the court, like the jury, was misled about the probative value of Officer Noble's testimony that he saw Terry Russell fleeing from Gary Barber during the stabbing. Nor did the post-conviction court know that Kevin Dean had actually seen the stabbing and would have testified that Terry Russell was the perpetrator.

All of respondent's attacks upon the credibility of Russell, Ferguson and Poe are equally applicable to their trial testimony. Every criticism launched at the reliability of inmate testimony applies with even greater strength to their trial testimony against Amrine. Courts repeatedly warn of "the inherent problem of credibility of fellow inmates." United States v. Snyder, 787 F.2d 1429, 1432 (10th Cir. 1986). Also see Coppola v. Powell, 878 F.2d 1562, 1571 (1st Cir.), cert. denied, 493 U.S. 969 (1989),

refusing to find trial error harmless because, like Amrine's case, "the testimony of three jail inmates raises serious questions of credibility." These factors increase rather than diminish the importance of viewing events in light of all of the other evidence and testimony available. What the record fails to reveal is any attempt by any previous court to address the critical issue of the reliability of the witness recantations in comparison with the version of events given at Amrine's trial. Carriger v. Stewart, 132 F.3d 463, 473-75 (9th Cir. 1997).

A reliable analysis of Amrine's guilt or innocence would start with the fact that his conviction is based solely on the testimony of jailhouse informants, given in exchange for promises of protective custody, dismissal of other pending charges, and avoidance of other potential charges, including the murder of Gary Barber. "[C]riminals who are rewarded by the government for their testimony are inherently untrustworthy, and their use triggers an obligation to disclose material information to protect the defendant from being the victim of a perfidious bargain between the state and its witness." Id., at 479. See also United States v. Bernal-Obesa, 989 F.2d 331, 333-35 (9th Cir. 1993) ("It has long been recognized that the testimony of informants, especially jailhouse informants, should be treated with suspicion."); McNeal v. State, 551 So.2d 151, 154, n.2 (Miss. 1989) (Deploring the "unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement [and]

prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence."). Amrine's case for innocence is particularly strong when viewed against the dubious evidence that was used to convict him. As Justice O'Connor cautioned, "a verdict or conclusion only weakly supported by the record" deserves less deference "than one with overwhelming record support." Strickland v. Washington, 466 U.S. 688, 696 (1984).

Finally, respondent makes a passing reference to the audiotaped interview of Kevin Booker, again relying on an unreliable inmate informant. (Resp. br. 21). The sequence of events surrounding his statement is illustrative of the lack of integrity of the evidence on which Amrine's conviction was obtained. Booker's name surfaced in the investigation of this case because he was one of the inmates who arrived in the prison infirmary carrying Fox Barber's stretcher. According to his affidavit, Booker was approached by an investigator for the Missouri State Penitentiary prior to Amrine's federal habeas hearing, and advised to make a statement against Amrine or risk losing an upcoming parole date. He then made a tape-recorded statement in which he claimed that he saw Barber stabbed while he was sitting at the poker table, a version of events that does not fit any previous evidence in the case:

> Q. Okay. And did you see Joseph Amrine stab Fox Barber that day in the rec room here?

A. I did see Joe Amrine sitting at a table along with Mr. Fox Barber and I did witness Joe Amrine stab Barber in the back with an ice pick, yes, sir.

(Fed. Hrg. Tr. 127). Booker is the only witness who places Barber at the table at the time of the stabbing. At the hearing under oath, Booker denied seeing the stabbing. (Fed. Hrg. Tr. 88).

Conclusive proof that the state manufactured Booker's statement against Amrine is found in the October 18, 1985, report and trial testimony of Sgt. Dobson which established that Booker was not even in the room when the stabbing occurred. Dobson encountered Booker in the kitchen on the way to the hospital and asked him to help carry Barber's stretcher. (Fed. Hrg. Tr. 112, Trial Tr. 505, Hearing Exh. 9). Knowing that Booker's testimony could not be true, the state nevertheless presents it to this Court in its unscrupulous pursuit of Amrine's execution. Respondent's attempt to rely on such evidence underscores the serious doubts surrounding the evidence against Amrine.

Regardless of whether Judge Brown or any prison investigator knew his witnesses were lying, Napue v. Illinois, 360 U.S. 264 (1959), recklessly developed misleading testimony, Wilson v. Lawrence County, 260 F.3d 946 (8th Cir. 2001), or was simply bamboozled by his convict-witnesses, State v. Harris, 428 S.W.2d 497, 500 (Mo. 1968), the law empowers this Court to correct the resulting miscarriage of

justice. This Court should discharge petitioner from his conviction and sentence because he is innocent of the murder of Gary Barber, and his conviction rests entirely on perjured testimony.

III.

THIS COURT CAN VINDICATE PETITIONER'S RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL BECAUSE THE FULL SCOPE OF COUNSEL'S PERFORMANCE HAS NEVER BEEN LITIGATED ON THE MERITS IN PRIOR PROCEEDINGS AND BECAUSE PETITIONER IS ACTUALLY INNOCENT.

Respondent yet again attempts to limit the Court's consideration of the entire scope of the evidence in the case by relying on pedantic procedural arguments. As this Court held in Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000), Mr. Amrine's innocence allows him to have his claims of ineffective assistance of counsel heard on the merits, irrespective of the procedural status of the claims. Of course, in examining a claim of ineffective assistance of counsel, this Court views the record as a whole. Consideration of "the totality of the omitted . . . evidence" is an essential ingredient of a reasonable decision on an ineffective assistance of counsel claim. Williams v. Taylor, 529 U.S. 362, 416 (2000) (O'Connor, J., concurring). A state court decision is "unreasonable" if "it fail[s] to evaluate the totality of the available . . . evidence" proffered at trial and in post-conviction proceedings. Id. This includes all of the deficiencies in counsel's performance, even those previously addressed by the Court.

The primary thrust of petitioner's claim of ineffective assistance of counsel is the failure of trial counsel to competently challenge the credibility of the state's witnesses and present affirmative proof of Amrine's innocence that was available to him. Though unnecessary to the core of Amrine's claim that his trial counsel's poor performance contributed to the conviction of an innocent person, Mr. Amrine also asks this Court to revisit the conflict of interest issue which was rejected on the appeal of his post-conviction motion in the trial court. Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990). Respondent asks this Court to give that prior rejection of the conflict claim controlling weight, and petitioner respectfully urges this Court to do otherwise, as the briefing tendered to this Court in those proceedings offered the Court very little assistance in identifying the facts or the controlling law. Mr. Amrine's court-appointed counsel, in Point XVII of his brief in this Court, did not present any specific facts in support of the argument, and cited only Strickland v. Washington, 466 U.S. 668 (1984), without explaining either the existence or the significance of the conflict of interest. (See Appellant's Brief, #71826, filed December 1, 1989, p. 48).

First, the record reflects that the Cole County Public Defender's office represented Randy Ferguson on a pending felony charge of unlawful use of a weapon in State v. Ferguson, Cole County Case No. CR385-404 FX, based on a knife that was found in Ferguson's cell. Those charges were filed against Ferguson prior to the

murder of Gary Barber, and were still pending when he testified against Joe Amrine. He was defended on that charge by Don Catlett, Julian Ossman's supervisor in the Cole County Public Defender's office. (29.15 Tr. 99). Mr. Catlett also participated in Amrine's representation, signing several pleadings before and after Amrine's trial. (L.F. 5,6,161.) Ferguson testified that the prosecution "brought in an attorney from Boone County because they said my attorney was from this Cole County Public Defender's Office could be a conflict of interest." (29.15 Tr. 99). Exh.3, dep. exh. 4 reflects that this occurred on April 16, 1986; petitioner was arraigned on an information in lieu of indictment on April 18, 1986, and his trial commenced on April 28, 1986, just twelve days after Ferguson turned state's evidence against him. (See Trial Tr. p. i). Prior to that point, Ferguson and Amrine were defended by the same public defender's office.

Thus, Ossman was informed practically on the eve of his client's capital trial that the state had a new eyewitness to the crime, and he presumably knew that the witness was also his firm's client. Inexplicably, Ossman did nothing in response to this significant development. He did not inform Amrine of his attorney-client relationship with Ferguson, or discuss the potential or actual conflict of interest arising from a simultaneous representation that had existed for months. He did not move to continue the case to prepare for Ferguson's testimony, even though Ferguson's story

completely rewrote the state's theory of the offense and raised allegations, for the first time, of alleged accomplices who had been endorsed as defense witnesses – Clifford Valentine, Omar Hutchinson and Darrell Sadler. He did not explore the state's overtures and repeated questioning of Ferguson during the lengthy period of dual representation. Ultimately, Ossman miserably failed to seriously challenge any aspect of Ferguson's story.

When there is a conflict of interest, prejudice must be presumed as to the underlying claim of counsel's ineffectiveness. See Cuyler v. Sullivan, 446 U.S. 335, 348-49 (1980). A defendant establishes a Sixth Amendment violation by demonstrating that "an actual conflict of interest adversely affected his lawyer's performance." Id. at 348. Also see Atley v. Ault, 191 F.3d 865 (8th Cir. 1999). "An attorney who represents both the defendant and a prosecution witness in the case against the defendant is representing conflicting interests. ... There is, however, no deprivation of constitutional right if the defendant knowingly consents to being represented by an attorney who also represents a prosecution witness." State v. Risinger, 546 S.W.2d 563, 565 (Mo. App. 1977), citing Ciarelli v. State, 441 S.W.2d 695, 697 (Mo. 1969). Accord, State v. Cox, 539 S.W.2d 684 (Mo. App. 1976).

Risinger is particularly instructive here because the state claimed there was no actual conflict of interest at the time of trial, as the witness Matlock's case had already

concluded when he pled guilty and was sentenced before Risinger's trial. The Court rejected that argument, stating that "the public defender could not in any event employ his knowledge of Matlock's Juvenile activities gained through privileged or confidential communications to impeach Matlock as a witness." 546 S.W.2d at 567. In Ferguson's case, colleagues of Amrine's counsel had represented him for at least seven months before being replaced by counsel from the Boone County office; they had requested and obtained a mental evaluation of their client, and unquestionably had obtained attorney-client privileged communications and information from him. Ossman was ethically hog-tied in his ability to vigorously pursue information about Ferguson's background and criminal history or his dealings with the state on his weapons charge which were relevant to impeach his credibility in Amrine's trial. It can never be known precisely what might have been done by competent counsel, not laboring under a conflict of interest, to challenge Ferguson's testimony. That is precisely why prejudice to the accused is presumed when trial counsel represents conflicting interests. Cuyler v. Sullivan, 446 U.S. 335 (1980).

Whether due to incompetence or ethical lapse, the fact remains that trial counsel failed to use out-of-court statements by Randy Ferguson and Jerry Poe and other means at their disposal to impeach their trial testimony. Respondent actually helps petitioner make his point when he argues that Ferguson and Poe gave perfectly

consistent trial testimony. (Resp. br. 24). In arguing that there is no material inconsistency whatsoever between Jerry Poe's trial testimony and Randy Ferguson's testimony at petitioner's trial, respondent helps make petitioner's point. The jury never heard evidence of the dramatic inconsistencies in the out-of-court statements by Jerry Poe and Randall Ferguson because trial counsel failed to present them to the jury. Nor was the jury made aware of Ferguson's victimization by sexual predators which played a major role in his decision to commit perjury against Amrine. (See Pet. br., pp. 69, 72-76).

Similarly, respondent claims that trial counsel did enough to inform the jury of Terry Russell's interest arising from his status as the primary suspect in the murder of Gary Barber. Trial counsel failed to explicitly make this point to the jury. Respondent claims that an isolated reference to a Miranda warning satisfied counsel's duty in this regard. However, in any case involving an interested witness, the relevant question is the witness' state of mind, i.e., the awareness by the witness of the factors which could be expected to influence his testimony. The passing references relied upon by respondent, requiring only a fraction of a page of the transcript to gloss over the fact that Russell was taken to the control center, read his rights, interviewed and strip-searched prior to giving a statement was barely a blip on the jurors' radar screen. It certainly was inadequate to register with the jury the fact that Russell was very

frightened about the very real possibility that he would be prosecuted for Barber's death. The jury was unaware, for example, that the chief investigator, George Brooks, told Russell that he was a suspect. (Fed. Hrg. Tr., pp. 29-30). The jury was unaware that Brooks told Russell that his prior fight with Gary Barber made him a suspect. Id. The jury was unaware that Brooks told Russell that the fact that he was a strong suspect because the murder happened so quickly after he and Barber were released from lock down for the fight. Id. The jury didn't know that Brooks told Russell that Officer Noble's identification of him made him a suspect. Id. The jury didn't know that Brooks told Russell that they were actually going to charge him with Barber's murder, or that Russell avoided prosecution by pointing the finger at Joe Amrine. Id. There is a dramatic qualitative difference between the evidence that was elicited at trial and the evidence which could have been presented to the jury to demonstrate Russell's well-grounded fear of being prosecuted for Barber's murder.

Finally, trial counsel failed to probe Officer Noble's observations of Terry Russell and Gary Barber. The passages relied upon by respondent again help make petitioner's point. (See Resp. br. 32). The prosecutor asked Officer Noble, "Are you sure or not sure as to the identity of the other inmate you think you saw Gary Barber chasing?" Officer Noble responded he would have to say that he was not sure. However, Officer Noble explained what he meant by that to Judge Gaitan in the federal

proceedings in this case. He testified that he was "certain" of his identification of the individual he pointed out as the perpetrator. (Fed. Hrg. Tr. 52). However, the confusion arose when he was asked to attach names to faces, which he admits he could not do. Nevertheless, he could have assured the jury "positively" that the prisoner he identified at the scene "was in fact the person being chased by Gary Barber." (Fed. Hrg. Tr. 66). He is confident that he identified the correct inmate, who turned out to be Terry Russell. Ossman failed to clarify this critical point for the jury and further failed to inform the jury that Noble was unaware of the fact that Russell and Barber had, only hours before, been released from disciplinary confinement after their previous fight. The knowledge that Noble was confident in his identification would have given the jury considerable reason to doubt Amrine's guilt. Further, Noble's ignorance of the history of animosity between Barber and Russell makes the likelihood of a mistaken identification very remote.

The remainder of petitioner's points are adequately addressed in petitioner's opening brief. Both the Schlup and the Strickland standards are concerned that appellate courts ascertain that compliance with constitutional protections in a criminal trial produce "confidence in the outcome of the trial." Schlup v. Delo, 513 U.S. at 316; Strickland v. Washington, 466 U.S. at 694. Under the totality of the circumstances of this case, the portion of the evidence which would have been

available to a competent trial attorney in and of itself, independent of the recantations, undermines confidence in the outcome of the trial and warrants habeas corpus relief.

CONCLUSION

For the foregoing reasons, Mr. Amrine prays this Court to examine the evidence in this case and issue the Writ of Habeas Corpus discharging him from his conviction and sentence, and to grant such 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 5,785 words, excluding the cover and this certification, 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 27th day of January, 2003, to:

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