IN THE MISSOURI SUPREME COURT

No. 84656

STATE ex rel.
JOSEPH AMRINE,

Petitioner,

v.

AL LUEBBERS,

Respondent.

PETITIONER'S STATEMENT, BRIEF AND ARGUMENT

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

CONSTITUTIONAL PROVISIONS

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.* of the Revised Statutes of the State of Missouri. Because Petitioner Joseph Amrine is confined under sentence of death, his petition "may be filed in this Court in the first instance." Rule 91.02(b). Because of the probability that Mr. Amrine is innocent of the murder for which he is condemned to die, this Court has the power to review the merits of his case to remedy a manifest injustice, notwithstanding the filing or disposition of any previous post-conviction litigation. Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000).

STATEMENT OF FACTS

A. OVERVIEW

Petitioner devoted nearly forty pages of his pending petition for a writ of habeas corpus under Rule 91 to a discussion of the factual background and procedural history of this capital case. Petitioner believes it would serve no useful purpose to rehash in this brief all of the facts supporting his claim of actual innocence and his other claims that his capital murder trial did not comport with the state and federal constitutions. Before launching into his legal arguments in support of habeas relief, however, it is necessary for petitioner to briefly recount the procedural history of this case and the compelling evidence supporting his claim that he is truly innocent of the murder for which he was convicted and condemned to die.

Joseph Amrine was convicted of the October 18, 1985, murder of fellow inmate Gary "Fox" Barber at the Jefferson City Correctional Center. His conviction was based solely on the testimony of inmate informants Randy Ferguson, Terry Russell and Jerry Poe. (Trial Tr. 258-441).[1] The mounting evidence of Mr. Amrine's

[1]Citations to the record herein are abbreviated as follows: Trial Transcript will be "Trial Tr."; Transcript of Rule 29.15 Hearing will be "29.15 Tr."; Federal Hearing Transcript will be "Fed. Hrg. Tr."; Exhibits filed in support of Habeas Corpus Petition will be "Ex."

innocence has trickled into the courts in bits and pieces, beginning with the out-of-court recantations of Randy Ferguson within days of the jury's verdict. (Trial Tr. 860-900; 914-22). Eventually, all three inmates who accused Joseph Amrine of killing Gary Barber gave sworn testimony admitting that they lied against Amrine at trial for their own benefit. (Fed. Hrg. Tr. 19-50; Ex. 3; Ex. 6).

In sharp contrast to the state's informants, corrections officer John Noble saw the commotion that resulted in Barber's death, and identified Terry Russell as the assailant who fled as Barber pursued him. (Trial Tr. 182, 191-92; Fed. Hrg. Tr. 54, 60-63). In spite of Noble's observations, Russell avoided prosecution for Barber's murder by accusing Amrine, a fact which Russell later admitted under oath. (Fed. Hrg. Tr. 29). Russell's recantation was joined by Jerry Poe and Randy Ferguson, two young prisoners who were finally given sanctuary from sexual predators in the Missouri State Penitentiary as consideration for their false testimony against Amrine. Only Officer Noble stands by his original report of what he saw in the Jefferson City Correctional Center on October 18, 1985.

If Mr. Amrine were brought to trial today on the evidence now available, the state, according to sworn testimony of trial prosecutor Thomas Brown, could not produce enough evidence to take the case to a jury. (Fed. Hrg. Tr. 10). No witness or physical evidence now links him to Barber's death, and the only remaining

eyewitnesses establish that the wrong man was convicted of murdering Gary Barber. They include witnesses who testified at trial that they were playing cards with Joe Amrine when Barber was stabbed (Trial Tr. 575-646), and other witnesses who, like Officer Noble, saw Terry Russell running from Gary Barber, and at least one inmate, Kevin Dean-Bey, who saw Terry Russell strike the fatal blow. (Ex. 9; Fed. Hrg. Tr. 67-85). Because the evidence surfaced in a piecemeal fashion throughout Mr. Amrine's appeals, he has never received full and fair consideration of the truly persuasive evidence that he is innocent in any of his prior appeals. In the final analysis, some of the most persuasive evidence that Mr. Amrine is innocent – including the testimony of Officer Noble – was ignored or rejected because it was no longer "new."

B. PROCEDURAL HISTORY

Joseph Amrine was convicted of first degree murder and sentenced to death on September 20, 1986, in the Circuit Court of Cole County, Missouri, for the October 18, 1985, stabbing death of fellow inmate Gary "Fox" Barber in the Missouri State Penitentiary in Jefferson City. This Court affirmed Amrine's conviction and sentence on direct appeal in State v. Amrine, 741 S.W.2d 665 (Mo. banc 1987).

Thereafter, Amrine filed a motion for post-conviction relief pursuant to Rule 29.15. After holding an evidentiary hearing, the Circuit Court denied relief. This Court

affirmed the denial of post-conviction relief to Amrine in Amrine v. State**,** 785 S.W.2d 531 (Mo. banc 1990).

Amrine thereafter filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in the United States District Court for the Western District of Missouri. After the case languished in District Court for nearly six years, the District Court denied habeas relief to Amrine without a hearing on February 26, 1996. Amrine appealed this decision to the Eighth Circuit Court of Appeals. At that point, undersigned counsel entered their appearance as counsel for Amrine in the federal proceedings.

The undersigned counsel submitted to the Eighth Circuit a motion to remand the case with supporting affidavits urging the Eighth Circuit to remand the case for an evidentiary hearing on the question of Amrine's actual innocence. The Eighth Circuit, sitting en banc, thereafter remanded the case for a hearing on Amrine's gateway claim of actual innocence in Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. en banc 1997).

In 1998, United States District Judge Fernando Gaitan conducted an evidentiary hearing on the actual innocence issue. Judge Gaitan heard the live testimony of Terry Russell and other witnesses. However, due to logistical problems resulting from their incarceration in other jurisdictions, the testimony of inmates Randall Ferguson and Jerry Poe was taken by videotaped deposition, and copies of those tapes were

submitted to the Court. (Ex. 3; Ex. 6). In an unpublished 1998 decision, Judge Gaitan issued a decision holding that Amrine could not meet the actual innocence test by finding, perversely, that the court could only consider the recantation of Poe because the recantations of Russell and Ferguson, since they were obtained during state court proceedings, were not "new." On appeal, the Eighth Circuit affirmed Judge Gaitan's 1996 and 1998 orders that denied Amrine habeas relief in all respects. Amrine v. Bowersox, 238 F.3d 1023 (8th Cir. 2001).

The Supreme Court denied certiorari on October 9, 2001. Amrine v. Luebbers, 122 S.Ct. 372 (2001). Thereafter, the Attorney General moved this Court to set an execution date for petitioner. Petitioner filed an original petition for a writ of habeas corpus, pursuant to Rule 91.02(b), in July of 2002. After ordering the State of Missouri to show cause, this Court recently issued an order setting the case for full briefing and argument.

C. THE MURDER, PRE-TRIAL INVESTIGATION, AND TRIAL

Officer John Noble was watching inmates in the multi-purpose room of Housing Unit 5 at 2:25 p.m., October 18, 1985, when he saw two inmates, Terry "Tat-tat" Russell and Gary "Fox" Barber, engaged in what appeared to be horseplay. Then Officer Noble saw Barber drop a homemade knife as he fell to the ground, blood running from his nose and mouth. (Trial Tr. 172-77; Ex. 5, p. 54). According to

prison security procedures, the room was sealed, back-up officers were called, and Barber was placed on a stretcher and rushed to the infirmary, where he was pronounced dead. (Ex. 5, p. 58). Based on Noble's contemporaneous identification, Russell was taken into custody and questioned. (Trial Tr. 182, 222). At the time, Noble had no idea that a week earlier, officers had intervened in an assault between Russell and Barber. As a result of their prior altercation, Barber and Russell were placed in disciplinary confinement, from which they were released barely two hours before the stabbing. (Ex. 5, p. 61).

After Noble identified him as the perpetrator, Terry Russell was questioned about Barber's murder. Russell was acutely aware that he was the chief suspect because he fought with Barber only a week earlier. (Ex. 7, p. 28). The stabbing occurred during the first contact they had with one another since being released from disciplinary confinement. Russell also knew he had been identified by a corrections officer as the assailant. After being given his Miranda rights, Russell was told by Cole County Deputy George Brooks that he would be charged with the murder of Gary Barber. (Fed. Hrg. Tr. 25-30).

To deflect suspicion away from himself, Russell claimed that Joe Amrine admitted to Barber's stabbing. Amrine made a convenient target because of a rumor – originally started by Russell – that Barber was bragging that he got Amrine drunk

and took advantage of him sexually. (Fed. Hrg. Tr. 30. 46). Contrary to Noble's testimony, Russell claimed that he was not in the room when the stabbing occurred. Russell's story was that he had been allowed to leave the multi-purpose room to get some aspirin for a headache, and, when he returned, Barber was being loaded onto the stretcher. (Trial Tr. 279-83). According to Russell, he asked Amrine why he did it, and Amrine said, "Because I had to." (Trial Tr. 287-88). Russell now admits that his trial testimony was false; he accused Amrine to avoid being charged himself. (Fed. Hrg. Tr. 21-22; 29, 46).

Based only on Russell's accusation, Joseph Amrine was questioned by Brooks as a suspect in Barber's stabbing. He made a voluntary statement denying any involvement in the crime. (Trial Tr. 458). A week or so before Barber was killed, Russell had told him about Barber's alleged boast. Amrine took Russell with him to question Barber about the rumor. Barber denied Russell's allegation, and Amrine accepted his answer. Amrine walked away, but Russell and Barber fought and were locked down as a result. Amrine told authorities that there was no animosity between him and Barber. (Trial Tr. 459-61). Officers observed small drops of what appeared to be blood on Amrine's clothes, which Amrine urged them to test. Amrine insisted that the tiny drops of blood on his clothes "can't be [Barber's] blood because I didn't get near him." (Trial Tr. 461). Subsequent testing of Amrine's clothes at the Missouri

State Highway Patrol Crime Laboratory, based on pre-DNA technology, suggested the blood was human, but the age, type and origin of the blood were impossible to determine. Amrine told officers that he was playing cards with several other inmates in the multi-purpose room when Barber was stabbed. (Trial Tr. 458). A number of inmates verified Amrine's account. (Trial Tr. 496-646).

Jerry Poe was a young, small inmate in Housing Unit 5 at the time of the incident. On the afternoon of October 18, 1985, Poe saw officers remove Amrine from his cell for questioning about Barber's stabbing. The following day, he passed a note to the captain of the housing unit saying he had information on Barber's stabbing. On October 21, 1985, Poe was questioned about Barber's death and, after being promised protective custody in the Cole County Jail, he made a statement implicating Amrine in the stabbing of Gary Barber. (Ex. 6, pp. 531, 560). Even before Poe seized the opportunity to get out of the penitentiary, a decision had already been made to charge Amrine with Barber's homicide.

Poe's version of Barber's stabbing was the second to emerge. According to Poe, Barber was near the heavy punching bags in the multi-purpose room when another inmate, allegedly Joseph Amrine, ran up behind him and stabbed him in the back and fled, taking the weapon with him. (Ex. 6, p. 560). Other evidence already known at this point in the investigation contradicted this story, most notably the fact

that Noble saw the knife, which Barber had pulled from his own back, and recovered it after Barber collapsed. (Trial Tr. 175-76; Ex. 5A, p. 599; Ex. 6, p. 535).

Poe later admitted that his statement and testimony against Amrine were both false and were motivated by his desire for protection from sexual predators in the prison. (Ex. 6, pp. 535-35). His sworn testimony was captured on videotape, the transcript of which was submitted as Exhibit 6 to the petition. When asked why he lied against Amrine, Poe explained, "I was just young, and they scared me into telling them what they wanted to hear, you know." (Ex. 6, p. 16). From October 21, 1985, until April, 1996, the prosecution continued with Russell and Poe providing the only testimony linking Amrine to Barber's murder.

Randall Ferguson was a young inmate who was being sexually dominated by stronger prisoners. At the time of Barber's stabbing, Ferguson was "owned" by inmate Clifford Valentine. (Ex. 3, p. 12). Corrections officer Danny Bower responded to the emergency radio call and saw Ferguson standing near Barber's body. Bower observed that Ferguson had droplets of blood on his forehead. (Trial Tr. 225). George Brooks questioned Ferguson about Barber's stabbing. (Fed. Hrg. Tr. 91). Clifford Valentine demanded that he be permitted to accompany Ferguson during questioning, and he was permitted to do so, which Brooks admitted to be highly unusual. (Fed. Hrg. Tr. 102). Knowing that the blood on his forehead made

him a suspect, Ferguson denied any knowledge of Barber's stabbing and refused to submit to questioning. (Ex. 3, pp. 16-17). Ferguson was questioned dozens of times before Amrine's trial. (Ex. 3, p. 18). In April of 1986, about two weeks before Amrine's trial, Ferguson changed his story. In exchange for protective custody and the dismissal of a felony weapons charge, Ferguson, at the urging of George Brooks, agreed to testify against Amrine. (Fed. Hrg. Tr. 103-04; Ex. 3, p. 26).

Ferguson's statement to Brooks set forth a third scenario for Barber's stabbing, the one the state elected to present at trial. In sharp contrast to the versions of the offense provided by a confidential informant (Barber was sitting at the table), and Jerry Poe (the assailant sneaked up from behind), Ferguson claimed that Amrine and Barber paced back and forth, side-by-side, for several minutes prior to the stabbing. Amrine supposedly had his arm around Barber's shoulders, then reached into the waistband of his trousers, pulled out the knife, and stuck it in Barber's back. (Trial Tr. 392-94). The prosecutor avoided the discrepancies with the prior versions by simply not asking Poe to describe the stabbing. (Trial Tr. 334). Ferguson also described an elaborate plot involving a number of other inmates to deliver the murder weapon to Amrine. Although he mentioned several inmates by name, no one was ever charged as an accomplice in the stabbing. (Ex. 3, 503-04; Trial Tr. 397-400).

Joseph Amrine was defended at trial by Julian Ossman, a former part-time Cole County Public Defender. Mr. Ossman was trial counsel in a number of capital cases that landed his clients on death row. At least six men he defended during the 1980s on capital murder charges were sentenced to death. Various federal courts have found Mr. Ossman constitutionally ineffective in at least three of these capital cases.[2] In one instance, one of Ossman's former clients, Eric Clemmons, after having his conviction overturned by the Eighth Circuit, was acquitted on retrial. See Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997).

The evidence adduced at trial was accurately summarized in a prior Eighth Circuit opinion as follows:

> [Gary] Barber was stabbed in the back with an icepick at a punching bag. There were two correctional officers and approximately 45 to 50 inmates in the room at the time. Amrine has always maintained

[2]Two separate federal district judges found Ossman ineffective in capital cases involving Martsay Bolder and Emmett Nave. However, both Bolder and Nave were subsequently executed after the Eighth Circuit reinstated their death sentences because their ineffectiveness claims were procedurally defaulted during state post-conviction proceedings. Bolder v. Armontrout, 921 F.2d 1359 (8th Cir. 1990); Nave v. Delo, 22 F.3d 802 (8th Cir. 1994).

that he did not kill Barber and that he was involved in a poker game in a different area of the room at the time of the stabbing.

Amrine was charged with first degree murder, and the state relied primarily on three witnesses at trial. Inmates Randy Ferguson and Jerry Poe were the only people who claimed to have seen the killing, and they both testified that they saw Amrine stab Barber. A third prisoner, Terry Russell, testified that he had not seen the murder but that there were bad feelings between Amrine and Barber, that Amrine had threatened Barber a week before the killing, and that Amrine admitted his guilt to him afterward. Although he had not been in the recreation room at the time of the slaying, Russell had suggested to investigators that Amrine was the killer. Russell also testified that Barber and he had been placed in detention for fighting with each other and that they had been released back into the general population only hours before the stabbing.

Amrine offered testimony to show he could not have been the killer and to suggest that Terry Russell was. Six prisoners who had been in the recreation room testified that Amrine was involved in a poker game in a different part of the room at the time of stabbing. Five of them saw Barber turn and chase after someone after he was stabbed, before he

collapsed and died. Three identified Terry Russell as the person being chased by Barber; none of them named Amrine.

The two correctional officers who had been in the recreation room testified that they first became aware something was wrong when they saw Barber run across the room toward another inmate before he collapsed. Officer John Noble was called by the state and initially testified that he was sure the person Barber had been chasing was Terry Russell and that he had told another officer this just shortly after the stabbing. After repeated questioning by the prosecution, Noble indicated he was not certain that Russell was the one being chased by Barber and that Russell and Amrine were similar in size, coloration, and hairstyle. A third correctional officer stationed outside of the room testified that he saw Russell leave the recreation room before the stabbing, and a fourth said he saw Russell both inside and outside the recreation room after the incident.

The state's case did not rest on physical evidence. Although a small amount of blood was found on Amrine's clothing, there was no evidence as to its age or source. A state serologist testified that he had been unable to determine the blood type because there was too little to

provide a sample that could be tested. The jury found Amrine guilty of first degree murder and sentenced him to death.

Amrine v. Bowersox, 128 F.3d 1222, 1223-24 (8th Cir. en banc 1997).

As will be pointed out in greater detail in Argument III below, Ossman did little or nothing to point out to the jury the glaring inconsistencies in the stories told by Poe and Ferguson. Ossman also did not impeach Poe, Ferguson, or Russell with readily available evidence that would have called their credibility into serious question. Ossman also failed to interview several inmate witnesses who could have aided Mr. Amrine's defense, including Kevin Dean-Bey, an inmate who testified in the federal evidentiary hearing that he actually saw Terry Russell stab the victim in the back with an icepick-type weapon. Jurors who heard the trial evidence indicate that the defense gave them little or nothing to work with. (Ex. 1; Ex. 2).

D. THE RECANTATIONS AND THE POST-CONVICTION PROCEEDINGS.

As noted earlier, the first witness to recant his trial testimony against Amrine was Randy Ferguson, who admitted he lied at trial within days after the verdict was rendered. Ferguson first recanted in a letter to fellow inmate Robert Arnold before Amrine's formal sentencing on September 20, 1986. Ferguson again recanted his trial testimony during Amrine's 29.15 hearing. At that hearing, Terry Russell also admitted

under oath that his trial testimony against Amrine was false. Jerry Poe inexplicably did not appear or testify during any of the state post-conviction hearings. The 29.15 motion court declined to credit the testimony of Russell or Ferguson because they were merely trying to help a fellow inmate. That ruling was subsequently affirmed by this Court. Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990).

Mr. Amrine thereafter petitioned for a writ of habeas corpus in the United States District Court for the Western District of Missouri. Amrine's first federal habeas counsel argued that he was actually innocent of Barber's stabbing. However, no new evidence of innocence was offered. The district court, on February 26, 1996, denied the petition without a hearing, rejecting numerous claims on procedural default grounds. That court refused to consider matters pertaining to the credibility of Russell and Ferguson "in light of the continued existence of witness Poe's testimony." Amrine v. Bowersox, No. 90-0940-CV-W-2, p. 16 (W.D. Mo., Feb. 26, 1996).

Undersigned counsel located Jerry Poe, who was in federal custody, and after obtaining a sworn statement from him admitting he committed perjury at Mr. Amrine's trial, successfully moved the Eighth Circuit to remand the case to the district court for a hearing on Amrine's gateway claim actual innocence. Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. en banc 1997). At the 1998 hearing, the district court heard the videotaped recantations of Randy Ferguson and Jerry Poe, and heard the live

testimony of Terry Russell, John Noble, Kevin Dean-Bey and others. On October 29, 1998, the district court issued a brief memorandum denying Amrine's claim of actual innocence, in which he only considered the recantation of Jerry Poe, because that was the only evidence that was "new."

The Eighth Circuit later affirmed the two separate district court orders denying petitioner federal habeas relief in Amrine v. Bowersox, 238 F.3d 1023 (8th Cir. 2001). Also see Ex. 6, Dep. Ex. 3). On the actual innocence question, the court of appeals also refused to consider all of the evidence of Amrine's innocence that existed or emerged prior to the commencement of federal habeas proceedings, because in their view, that evidence was not new. As a result of the federal court's refusal to address all of the evidence of Joseph Amrine's innocence, this Court will be the first forum that will have the opportunity to address all of the existing evidence that persuasively establishes that Amrine is actually innocent of the crime for which he has been condemned to death.

POINTS RELIED ON

I.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 20, 1986, BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THE MURDER OF GARY BARBER AND, AS A RESULT, HE IS ENTITLED TO A NEW TRIAL UNDER MISSOURI LAW RELATING TO NEWLY DISCOVERED EVIDENCE, AND HIS CONTINUED INCARCERATION AND EXECUTION 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.

Herrera v. Collins, 506 U.S. 390 (1993).

Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000).

Donati v. Gualdoni, 216 S.W.2d 519, 521 (Mo. 1948).

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

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 SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 20, 1986, BECAUSE 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 PETITIONER'S RIGHTS SECURED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

United States v. Agurs, 427 U.S. 97 (1976).

Wilson v. Lawrence County, 260 F.3d 946 (8th Cir. 2001).

United States v. Young, 17 F.3d 1201 (9th Cir. 1994).

State v. Mooney, 670 S.W.2d 510 (Mo. App. E.D. 1984).

U.S. Const. Am. VIII and XIV

Mo. Const. art. I, § 10

III.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS FIRST DEGREE MURDER CONVICTION AND SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 26, 1986, BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE TRIAL COUNSEL, JULIAN OSSMAN, DUE TO HIS INCOMPETENCE AND THE FACT THAT HE LABORED UNDER AN ACTUAL CONFLICT OF INTEREST BY REPRESENTING RANDY FERGUSON ON UNRELATED CHARGES, FAILED TO EFFECTIVELY CROSS-EXAMINE RANDY FERGUSON, JERRY POE AND TERRY RUSSELL WITH AVAILABLE EVIDENCE TO IMPEACH THEIR CREDIBILITY, FAILED TO INVESTIGATE AND PRESENT CREDIBLE ALIBI WITNESSES, FAILED TO PRESENT EXCULPATORY FACTS KNOWN BY THE ONLY CORRECTIONS OFFICER PRESENT, AND FAILED TO PRESENT EVIDENCE DIMINISHING THE PROBATIVE VALUE OF THE PROSECUTION'S BLOOD EVIDENCE. HAD OSSMAN

PERFORMED COMPETENTLY, THERE IS A REASONABLE LIKELIHOOD THAT PETITIONER WOULD HAVE BEEN ACQUITTED.

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

Gordon v. State, 684 S.W.2d 888 (Mo. App. W.D. 1985).

Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995).

Cuyler v. Sullivan, 446 U.S. 335 (1980).

U.S. Const. Am. VI and XIV

ARGUMENT I.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 20, 1986, BECAUSE HE CAN PERSUASIVELY ESTABLISH THAT HE IS ACTUALLY INNOCENT OF THE MURDER OF GARY BARBER AND, AS A RESULT, HE IS ENTITLED TO A NEW TRIAL UNDER MISSOURI LAW RELATING TO NEWLY DISCOVERED EVIDENCE, AND HIS CONTINUED INCARCERATION AND EXECUTION 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 and sentence of death 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 circumstance in which an innocent man has been condemned to die for a murder he did not commit. While Missouri courts have recently struggled over the appropriate procedural remedy for prisoners in Mr. Amrine's situation, there is 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. Amrine guilty of murder on the evidence now available, this Court should exercise its inherent power to grant relief from his conviction and sentence.

The probability that Mr. Amrine is innocent has a 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. Second, a prisoner who makes a colorable claim of innocence is entitled to have a court review the constitutionality of his conviction, regardless of any issue relating to procedural default or timeliness of his claim. Both aspects of judicial consideration of innocence claims rest on the recognition that "[t]he quintessential miscarriage of justice is the execution of a person who is entirely innocent." Schlup v. Delo, 513 U.S. 298, 324-25 (1995). The case for Mr. Amrine's innocence is strong enough that it justifies relief from his conviction and sentence under both state and federal law. Under this point, petitioner will first address his contention that, in light of his actual innocence, both state law and the state

constitution require that he receive habeas relief. Second, petitioner will argue that his continued incarceration and potential execution, in light of the fact that he has brought forth convincing evidence of his innocence, violates his rights secured under both the Eighth and Fourteenth Amendments to the United States Constitution. Third, and alternatively, in the unlikely event that this Court should hold that it is powerless to vacate Amrine's conviction and death sentence on his "free-standing" claim of actual innocence, his persuasive showing of actual innocence provides a sufficient basis to overcome any alleged procedural impediment to a *de novo* review of the merits of his other constitutional grounds for relief advanced in his petition. See Schlup v. Delo, 513 U.S. 298 (1995); Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000).

A. Missouri Courts Have The Inherent Power to Grant a New Trial Based on New Evidence Establishing Innocence.

Of all legal or factual claims that could conceivably come before this Court seeking extraordinary relief, long after the conclusion of routine appeals and post-conviction proceedings, persuasive claims of innocence such as Mr. Amrine's are rare and compelling. Missouri law has always provided a safety net for persons convicted of crimes for which they were entirely innocent. Even when such claims were not cognizable on habeas corpus, see, e.g., State v. Cerny, 286 S.W.2d 804 (1956), Missouri courts exercised "inherent authority" to grant new trials based on newly

discovered evidence regardless of the prisoner's compliance with time limits or other procedural requirements. State v. Mooney, 670 S.W.2d 510 (Mo. App. 1984); State v. Curtis, 77 Mo. 267 (1883); State v. Murray, 3 S.W. 397 (1887). Innocence is the ultimate equity, justifying judicial review of cases that would otherwise be summarily dismissed as not worthy of the Court's time or resources:

> Indeed, concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system. That concern is reflected, for example, in the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." In re Winship, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). See also T. Starkie, Evidence 756 (1824) ("The maxim of the law is ... that it is better that ninety-nine ... offenders should escape, than that one innocent man should be condemned"). See generally Newman, Beyond "Reasonable Doubt," 68 N.Y.U. L. REV. 979, 980-81 (1993).

Schlup v. Delo, 513 U.S. 298, 325 (1995). While courts have devised rules of procedure to discourage frivolous and protracted litigation that undermines finality of convictions, persuasive claims of innocence transcend those concerns. "Claims of actual innocence pose less of a threat to scarce judicial resources and to principles of

finality and comity" than other types of legal claims. Id. Unlike prisoners who assert purely legal claims that have little or no relationship to the reliability of the jury's verdict, innocent prisoners have no incentive whatsoever to abuse this Court's processes. No rational prisoner would withhold evidence that he is innocent for the purpose of prolonging litigation; any lawyer who would do so should be disbarred.

On the other hand, the state has no legitimate interest in the execution or incarceration of an innocent person. To the contrary, the interests of justice are advanced when an innocent person is exonerated. The prosecutor is "the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). A former Chief Judge of this Court explained the concept eloquently:

> All human systems are fallible and our system of justice is designed with that in mind and, although cumbersome at times, has for its purpose the conviction of the guilty and the acquittal of the not guilty. Even with all the safeguards that are built into the system, it occurs from time to time that an innocent person is imprisoned. That is one of the reasons why Rule 27.20(c) permits plain errors affecting substantial rights to be

> considered on motion for new trial or on appeal, in the discretion of the court, though not raised in the trial court or preserved for review, or defectively raised or preserved, *when the court deems that manifest injustice or miscarriage of justice has resulted therefrom*.

State v. Taylor, 589 S.W.2d 302, 310 (Mo. banc 1979) (Bardgett, J., dissenting) (emphasis in original). Similarly, Judge Stephan of the Eastern District Court of Appeals spoke of the "perversion of justice which could occur if we were to close our eyes to the existence of the newly discovered evidence." State v. Williams, 673 S.W.2d 847, 848 (Mo. App. 1984).

The evidence presented by Mr. Amrine in support of his persuasive case for innocence satisfies every element of Missouri law for obtaining a new trial based on new evidence. To qualify for a new trial on the basis of newly discovered evidence, a defendant must establish each of the following four elements:

> (1) the evidence has come to the knowledge of the defendant since the trial; (2) it was not owing to want of due diligence that it was not discovered sooner; (3) the evidence is so material that it would probably produce a different result on a new trial; and (4) it is not cumulative only or merely impeaching the credit of the witness.

State v. Williams, 652 S.W.2d 102, 114 (Mo. banc 1983). The evidence supporting Mr. Amrine's innocence consists in part of admissions by the state's key witnesses, Jerry Poe, Terry Russell and Randy Ferguson, that they committed perjury at Amrine's trial. Recantation by a key government witness "is substantial evidence" which satisfies this legal standard. United States v. Ramsey, 726 F.2d 601, 604 (10th Cir. 1984). In a separate concurrence in that case, Judge McKay explained the importance of recanted testimony:

> Where, as here, the recanting affidavit is from the critical witness in the case, great danger lies in letting the verdict stand even if the recantation is subsequently recanted. . . The danger of an erroneous conviction based on such unreliable testimony is great indeed. As the Supreme Court has indicated, 'the dignity of the United States government will not permit the conviction of any person on tainted testimony.' Mesarosh v. United States, 352 U.S. 1, 9 (1956).

726 F.2d at 605.[3] Additionally, recanted testimony satisfies the "due diligence" element of the test for newly discovered evidence; "it is unrealistic to assume that the defense attorneys could have elicited the recantation at trial. Thus, the defendant, exercising reasonable diligence, could not have discovered and produced this evidence at trial." United States v. Ramsey, 726 F.2d at 604-05. Missouri courts have also found recantations by prosecution witnesses to satisfy the test for newly discovered evidence because it calls into question the integrity of the judgment of guilt. State v. Mooney, 670 S.W.2d 510 (Mo. App. 1984); State v. Platt, 496 S.W.2d 878 (Mo. App. 1973).

The materiality of the new evidence is not open to question in this case. "To satisfy this requirement, the newly discovered evidence need only be 'credible and reasonably sufficient to raise a substantial doubt in the mind of a reasonable person as to the result in the event of a new trial.'" State v. Stone, 869 S.W.2d 785, 787 (Mo. App. 1994), citing State v. Jennings, 34 S.W.2d 50, 54 (Mo. 1930). The prosecuting

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[3]Also applicable here is Judge McKay's suspicion of trial testimony from a witness who was himself a suspect in the crime. "The temptation to perjure in the first instance to satisfy the government, which controls future prosecution and sentencing, is so great that suspicion of the original testimony ought at least to have equal dignity with the suspicion of recanted testimony." Id. at 606.

attorney in this case, Tom Brown, admitted that, without the testimony of the three recanting witnesses, "we would not have had a case." (Fed. Hrg. Tr. 10). The only reliable, direct and unrecanted testimony remaining in the case is that of corrections officer John Noble that he saw Amrine's first accuser, Terry Russell, fleeing from Barber during the stabbing.

Under rare circumstances similar to this case, Missouri courts have granted relief based on newly discovered evidence of innocence discovered after the expiration of time limits:

> Under the unique circumstances of this case, we are willing to overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence. The basis of the granting of relief for such reason is that it was not known, or could not reasonably have been discovered earlier. That this evidence was not discovered before the expiration of the time for the filing of a motion for new trial should not defeat the laudable concept of a new trial based on such evidence.

State v. Williams, 673 S.W.2d at 848. This is especially true where, as here, the prisoner's conviction is based on perjured testimony:

> However, even where the time for filing a motion for new trial has expired, there is authority for the trial judge to grant a new trial in any

> case in which the accused was found guilty of a crime on the basis of false testimony, where the trial court is satisfied that perjury had been committed, and that an improper verdict or finding was occasioned thereby.

State v. Mooney, supra, at 514-15, relying on this Court's opinions in Donati v. Gualdoni, 216 S.W.2d 519, 521 (Mo. 1948), and State v. Harris, 428 S.W.2d 497, 500 (Mo. 1968) ("where it appears from competent and satisfying evidence that a witness for the prosecution has deliberately perjured himself and that without his testimony accused would not have been convicted, a new trial will be granted."). Particularly apropos to this case is the rhetorical question posed by the Mooney court: "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 unjust 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 has expired?" 670 S.W.2d at 515.

As noted above, early habeas corpus jurisprudence suggests that newly discovered evidence of innocence is not cognizable on habeas corpus. However, more recent decisions of this Court clearly establishes habeas corpus jurisdiction over truly persuasive claims of innocence such as Amrine's. Missouri Supreme Court Rule

91.01 provides that "any person restrained of his liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint." The origin of this right is found in the Missouri Constitution, which expressly commands that "the privilege of the writ of habeas corpus shall never be suspended." MO. CONST., art. I, § 12. The guarantee of the protection of the writ of habeas corpus has been a part of Missouri's constitutional jurisprudence since 1820. MO. CONST. of 1820, art. 13, § 11; MO. CONST. of 1875, art. 2, § 26.

In keeping with the spirit of the Great Writ, this Court recently suggested that it would be the appropriate remedy for a prisoner challenging a guilty plea based on newly discovered evidence of innocence. Wilson v. State, 813 S.W.2d 833 (Mo. banc 1991). Wilson had filed a motion under Rule 29.15 challenging his plea of guilty to first degree murder, alleging that a reliable confession from the real killer justified vacating his plea. This Court ruled that claims based on newly discovered evidence of innocence are not cognizable under Rule 29.15, but suggested that it would entertain the claim if presented in a petition for writ of habeas corpus. Though the Court's statement extending the habeas remedy to free-standing innocence claims appears in dicta, the Court's more recent decision in State ex rel. Simmons v. White, 866 S.W.2d 443, 445-46 (Mo. banc 1993), explicitly held that habeas corpus relief is available to

a prisoner who can demonstrate a "manifest injustice." In Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. banc 2000):

> this Court [held] that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner "to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'"

quoting Schlup v. Delo, 513 U.S. at 327. Thus, habeas corpus review is clearly appropriate in a case such as Amrine's where the evidence establishes that an innocent person has been convicted. Public respect for and confidence in the judicial system depends on the ability of the courts to rectify manifest injustices such as this one.

B. It Would Violate the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment to Continue to Incarcerate and Potentially Execute Petitioner in Light of the Persuasive and Convincing Evidence Now Before this Court That He Is Innocent of the Murder of Gary Barber.

United States Supreme Court Justice Sandra Day O'Connor described the execution of an innocent person as "a constitutionally intolerable event." Herrera v. Collins, 506 U.S. 390, 419 (1993) (O'Connor, J., concurring). It has been nearly ten years since the United States Supreme Court issued its confusing and fragmented opinion in Herrera v. Collins. The Herrera decision, undoubtedly because it generated no less than six separate opinions by various members of the Court, has engendered

much confusion and disagreement among inferior federal courts as to whether free-standing claims of actual innocence advanced by condemned prisoners are constitutionally viable. For instance, some courts have stated that Herrera "rejected free-standing claims of actual innocence as a basis for habeas review." Meadows v. Delo, 99 F.3d 280, 283 (8th Cir. 1996). On the other hand, other federal courts, including the Eighth Circuit itself in prior decisions, have held that federal habeas courts may entertain convincing claims of actual innocence, particularly if the prisoner has no state avenue under which to advance his claim. See, e.g., Felker v. Turpin, 83 F.3d 1303, 1312 (11th Cir. 1996); Triestman v. United States, 124 F.3d 361, 379 (2nd Cir. 1997); Cornell v. Nix, 119 F.3d 1329, 1334 (8th Cir. 1997); Wainwright v. Lockhart, 80 F.3d 1226, 1229-30 (8th Cir. 1996).

A thorough review of the opinions from the justices in Herrera demonstrates, beyond any doubt, that the majority of the Court believed that executing an innocent person would violate the United States Constitution. The only two disagreements among this majority of justices involved the appropriate test for actual innocence and whether this constitutional right was rooted in the cruel and unusual punishment clause of the Eighth Amendment or the Due Process Clause of the Fourteenth Amendment. Justice Rehnquist's opinion for the Court, after stating in dicta, that claims of innocence are not historically cognizable in habeas proceedings, actually held that,

assuming that a persuasive demonstration of innocence would violate the Constitution, that Herrera could not come close to meeting the extraordinarily high threshhold showing necessary to obtain any relief from his conviction and death sentence. 506 U.S. at 417-19.

Justice O'Connor, in her concurring opinion that was joined by Justice Kennedy, wrote that she "cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution . . . , regardless of the verbal formula employed." Id. at 419-20 (O'Connor, J., concurring). However, Justice O'Connor concluded that Herrera was not entitled to habeas relief because his claim of innocence was unpersuasive to her under any standard of review. Id.

Justice White, echoing Justice Rehnquist, stated in his concurring opinion that he would make the assumption that a persuasive claim of actual innocence would violate the Constitution. Id. at 429 (White, J., concurring). Justice White proposed that the test for granting habeas relief should at least be as stringent as the sufficiency of the evidence test of Jackson v. Virginia, 443 U.S. 307 (1979). In his view, Herrera's claim fell well short of meeting this substantial burden of proof. Id.

Justice Blackmun's dissent, joined by Justices Stevens and Souter, expressed the view that executing an innocent person would violate society's "evolving standards of decency" so as to constitute cruel and unusual punishment and that it would "shock the conscience" to allow an execution to take place where a prisoner has presented

persuasive evidence of innocence. Id. at 430-37 (Blackmun, J., dissenting). Justice Blackmun's dissenting opinion is also significant because it clearly recognizes that most of Justice Rehnquist's opinion for the court is dicta. As Justice Blackmun pointed out: "I therefore disagree with the long and general discussion that precedes the court's disposition of this case. . . That discussion, of course, is dictum because the court assumes, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional." Id. at 430 (emphasis added). Justice Blackmun concluded that a prisoner should be entitled to federal habeas relief on a claim of actual innocence under the Eighth Amendment and the Due Process Clause if he can establish that he is probably innocent. Id. at 442.

Only Justices Scalia and Thomas, in their concurring opinion, explicitly rejected the view that actual innocence would render a condemned prisoner's execution unconstitutional. Id. at 427-29. (Scalia, J., concurring). Justice Scalia's opinion is also significant because, like Justice Blackmun's dissent, he clearly expresses the view that Justice Rehnquist's discussion regarding whether innocence alone is a cognizable ground for federal habeas relief is dicta. As Justice Scalia stated: "I would have preferred to decide that question, particularly since, as the court's discussion shows, it is perfectly clear what the answer is." Id. at 427.

As the foregoing examination of the fragmented Herrera decision demonstrates, a majority of the court would clearly hold that a capital defendant who presents a convincing claim that he is innocent can establish a constitutional violation. Five justices clearly stated that executing the innocent is unconstitutional, two justices assumed so without deciding, and only two took a contrary position. The more difficult question that other courts have grappled with and that this Court must consider is "how innocent a prisoner must be" in order to be entitled to habeas relief from a conviction and death sentence on federal constitutional grounds. In this regard, this Court should seek guidance from the well-settled rule of United States Supreme Court jurisprudence that holds that when no single rationale commands a majority of the Court, the holding of the Court should be viewed as the position taken by those justices who concurred in the judgment on the narrowest grounds. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 764-65, n.9 (1988). In Herrera, the opinion that concurred in the judgment on the narrowest grounds was the concurring opinion of Justice O'Connor, joined by Justice Kennedy.

Justice O'Connor's concurring opinion holds, under the Eighth Amendment and substantive due process, that executing an innocent is inconsistent with the Constitution. Id. at 419. However, Justice O'Connor found it unnecessary to articulate the burden of proof for reviewing courts to apply in evaluating innocence

claims because she found Herrera's claim of innocence totally unconvincing. Id. at 420-27.

Intervening factual and legal developments in the nine years since Herrera was decided provide even more impetus in support of the Herrera majority's position that the execution of an innocent man would violate the Eighth Amendment and substantive and procedural due process. Herrera was decided before the recent surge of exonerations of capital and non-capital inmates through DNA testing and other means. Although the justices acknowledged the "undeniable fact" that the criminal justice system is fallible, Id. at 415, Justice O'Connor nevertheless noted society's "high degree of confidence in its criminal trials" in light of the constitution's "unparalleled protections against convicting the innocent." Id. at 420 (O'Connor, J., concurring). Recent experience has undermined this "high degree of confidence."

Studies of the criminal justice system reveal an alarmingly high risk of wrongful arrests and convictions in the United States. See Daniel Givelber, Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?, 49 RUTGERS L. REV. 1317, 1346-58 (1997) (collecting studies); National Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996); State of Illinois, Report of the Governor's Commission on Capital Punishment (April 2002), http://www.idoc.state.il.us/ccp/ccp/reports/ commission_reports.html. More than one

hundred people have been released from death row in the past thirty years because of powerful evidence of innocence, which in some cases did not surface until decades after conviction. See Keith A. Findley, Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions, 38 CAL. W. L. REV. 333, 336-37 (2002), citing The Death Penalty Information Center, http://www.deathpenaltyinfo.org/innoc.html. One hundred nine people have been exonerated based on DNA evidence. See http://www.innocenceproject.org/. Even the Department of Justice and the FBI Crime Laboratory agree that innocent people can be and have too often been convicted because of bad lawyering, bad science, and/or bad identification processes. See National Institute of Justice, supra, at 12-21; Roger Roots, Are Cops Constitutional?, 11 SETON HALL CONST. L.J. 685, 720-21 & n.235 (2001), citing U.S. Dep't of Justice, Office of Inspector General, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (1997) (detailing Justice Department's findings of impropriety at the FBI Crime Lab). There is still no way to measure how many innocents remain in prison or on death row. See Samuel Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 61 LAW & CONTEMP. PROBS. 125, 127 (1998); Givelber, supra, at 1322-25.

The fallibility of the criminal justice system is no longer the abstraction discussed in Herrera. It bears names such as Larry Osborne, who was recently

acquitted by a Kentucky jury and became the 102nd death row inmate to be exonerated since 1976. See Deborah Yetter, Man Sent to Death Row Is Acquitted in Retrial, LOUISVILLE COURIER-JOURNAL, Aug. 2, 2002, at 1A (2002 WL 20246086). It reaches cases such as that of Larry Johnson, who spent eighteen years in a Missouri prison for a rape that he did not commit. See Tim Bryant et al, DNA Test Frees Man After 18 Years; St. Louisan Convicted of Raping Student is First to Be Released Because of New Law, ST. LOUIS POST-DISPATCH, July 30, 2002, at A1. It entails struggles such as that of Steven Toney, who spent thirteen years in prison until the Eighth Circuit effectively ordered the state of Missouri to allow a DNA test. See Joe Holleman, Man Wrongly Convicted Savors Freedom at Last; Brentwood Man Served 13 Years in Rape Case, ST. LOUIS POST-DISPATCH, August 11, 1996, at 1D; Toney v. Gammon, 79 F.3d 693 (8th Cir. 1996). It calls for a judicial reexamination of the remedies available when newly discovered evidence proves a prisoner's innocence -- an inquiry that neither Herrera nor any other controlling decision precludes.

Nor has the clemency process lived up to the hopes expressed in Herrera. The court described clemency as the "fail safe in our criminal justice system." 506 U.S. at 415. This view fails to recognize the reality that executive clemency has become increasingly politicized. It is almost *never* meaningfully considered by elected governors or appointed boards, for "the political gains from getting tough on criminals far outweigh any possible benefits from assisting people convicted of violent crimes."

See David Horan, The Innocence Commission: An Independent Review, 20 N. ILL. U. L. REV. 91, 107-08 (2000). A review of Missouri's clemency proceedings led one author to doubt whether newly-discovered evidence of the prisoner's innocence is given any weight at all. See Cathleen Burnett, Justice Denied: Clemency Appeals in Death Penalty Cases 169, 177-78 (2002).

Politics aside, those who entertain clemency requests lack the resources to take "actual innocence" claims seriously. In Texas, for example, former Governor George W. Bush approved one death sentence about every two weeks, and the Board of Pardons heard more than 5000 applications a year. See Rochelle L. Haller, The Innocence Protection Act: Why Federal Measures Requiring Post-Conviction DNA Testing and Preservation of Evidence Are Needed in Order to Reduce the Risk of Wrongful Executions, 18 N.Y.L. SCH. J. HUM. RTS. 101, 121 (2001); see also The Innocence Protection Act of 2000: Hearings on H.R. 4167 Before the House Judiciary Committee on Crime, 106th Cong. 2nd Sess. (2000) (statement of Congressman Robert C. Scott, Virginia: "The governor has no subpoena power, no right or opportunity to cross-examine key witnesses or to observe witnesses subject to cross-examination by advocates familiar with the case. Nor does the governor have other investigatory power necessary to ensure fairness.").

In light of these post-Herrera developments, there can be little dispute that many innocent men are wrongly convicted and even, in some cases, sentenced to die in this

country. Joseph Amrine is one of these men. To incarcerate someone who is actually innocent, even if not under a sentence of death, is both "cruel" and "unusual" under the Eighth Amendment under any definition of these terms. Even if a sentence of death was not involved in this case, it is clear that it is both cruel and unusual to imprison someone who is actually innocent. Robinson v. California, 370 U.S. 660, 667 (1962). It is even more offensive to contemporary standards of fairness and decency to permit a death sentence to be carried out upon an innocent man.

There can also be little doubt that the continued incarceration and potential execution of an innocent man would violate firmly established substantive due process principles. The touchstone of substantive due process as defined over the years in Supreme Court jurisprudence is to prevent the government from engaging in conduct that "shocks the conscience" or interferes with the rights "implicit in the concept of order liberty." Rochin v. California, 342 U.S. 165, 172 (1952); Palko v. Connecticut, 302 U.S. 319, 325-26 (1937). Justices O'Connor and Kennedy agreed that nothing could be more shocking to the conscience or offensive to basic concepts of fairness than the continued imprisonment and execution of an innocent man. Herrera v. Collins, 506 U.S. at 419.

Finally, to allow Mr. Amrine to remain in prison and ultimately be executed would also violate procedural due process. In several pre-Herrera cases, inferior federal courts have held that a state's failure to cure a conviction, after credible newly

discovered evidence emerges, violates due process if the newly discovered evidence would probably produce acquittal upon retrial. Lewis v. Erickson, 946 F.2d 1361, 1362 (8th Cir. 1991); Sanders v. Sullivan, 863 F.2d 218, 224-25 (2nd Cir. 1988). More recently, the Second Circuit held that the absence of a judicial remedy would likely violate due process in the case of a clearly innocent prisoner. Triestman v. United States, 124 F.3d 361, 379 (2nd Cir. 1997).

Given the fact that the Supreme Court has recognized the existence of a constitutional right of innocent people not to be executed, it stands to reason that this Court must provide a procedure by which to enforce that right. The Due Process Clause of the Fourteenth Amendment requires that state prisoners must be "given some clearly defined method by which they may raise [in state court] claims of denial of federal rights." Young v. Ragen, 337 U.S. 235, 239 (1949). In Williams v. Kaiser, 323 U.S. 471 (1945), and Tomkins v. Missouri, 323 U.S. 485 (1945), the Missouri Supreme Court did not require the state to answer a petition for writ of habeas corpus and refused to allow the petitioner an opportunity to prove the allegations. 323 U.S. at 473; 323 U.S. at 486. Instead, the Missouri Supreme Court summarily disposed of the respective habeas petitions by declaring that they "failed to state a cause of action." 323 U.S. at 487; Id. The United States Supreme Court ruled that because the court failed to accord the state prisoners a full and fair hearing of their federal constitutional claims, the decisions denying those claims had to be reversed. 323 U.S.

at 473-74; 323 U.S. at 487. It is a fundamental constitutional principle under the Fourteenth Amendment that a prisoner's access to the courts cannot be obstructed or denied. Johnson v. Avery, 393 U.S. 483 (1969). Thus, the failure to extend to Mr. Amrine the benefit of Missouri's well-established procedures for adjudicating untimely motions for new trial based on newly discovered evidence of innocence would deprive him of procedural due process.

Having established that the execution and the continued incarceration of a clearly innocent man violates the federal constitution, this Court must ultimately decide whether Joseph Amrine has established his innocence under the appropriate test. Although petitioner believes that the test articulated by Justice Blackmun in Herrera is correct and appropriate, it is not even necessary in this case, unless the Court chooses to do so to provide guidance in future cases, for this Court to formulate a test for relief for free-standing claims of innocence. Under any test ranging from the sufficiency of the evidence test of Jackson v. Virginia, 443 U.S. 307 (1979), or the probable innocence test of Justice Blackmun which was later adopted in Schlup v. Delo, 513 U.S. 298 (1995), it is beyond dispute that Mr. Amrine is entitled to habeas relief. In reaching this conclusion, the Court need look no further than the federal hearing testimony of Prosecutor Tom Brown, in which Mr. Brown indicated that in light of the recantations of Poe, Ferguson, and Russell, that the prosecution did not have a submissible case against Amrine. (Fed. Hrg. Tr. 10). As a result, this Court should

issue a writ of habeas corpus and hold that Amrine is entitled to a new trial because to continue to incarcerate him and possibly execute him for a crime he did not commit violates the Eighth and Fourteenth Amendments.

C. Because the Case for Mr. Amrine's Innocence Is Truly Persuasive, this Court Should Hear the Merits of His State and Federal Grounds for a New Trial.

Mr. Amrine's ability to prove his innocence of the murder of Gary Barber plays a procedural as well as substantive role in these proceedings. As noted above, state and federal law explicitly recognized the right of innocent prisoners to obtain relief from their convictions upon a truly persuasive showing of actual innocence of the crime. In addition, a prisoner who can demonstrate a reasonable probability of innocence is entitled to have his claims for relief heard in spite of potentially applicable procedural barriers. This Court in Clay v. Dormire, 37 S.W.3d 214 (Mo. banc 2000), explicitly adopted the notion of innocence as a gateway to judicial review of procedurally defaulted evidence and issues:

> Following the lead of the United States Supreme Court's habeas corpus cases, and most recently Schlup v. Delo, 513 U.S. 298, 327 (1995), this Court holds that the manifest injustice or miscarriage of justice standard requires the habeas corpus petitioner "to show that 'a constitutional violation has probably resulted in the conviction of one who is actually

innocent,'" Id. (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)), and further, "to establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light [of new evidence of innocence]," Id. As explained in Schlup and earlier cases, the actual innocence component of the miscarriage of justice standard is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits, [and] . . . without any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice . . . ." 513 U.S. at 315-16 (quoting Herrera v. Collins, 506 U.S. 390, 404 (1993)).

37 S.W.3d at 217. Of course, as the Supreme Court noted, our legal system is based on the fundamental principle

> that the line between innocence and guilt is drawn with reference to a reasonable doubt. See In re Winship, 397 U.S. 358 . . . Thus, [when] a court is . . . deciding whether a petitioner has made the requisite showing of innocence under Carrier, the analysis must incorporate the understanding that proof beyond a reasonable doubt marks the legal boundary between guilt and innocence.

Schlup v. Delo, 513 U.S. 298, 327. The rationale for allowing innocent prisoners to present their claims free of procedural impediments is simple and straightforward. If a prisoner can make a persuasive showing of innocence, "a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of non-harmless constitutional error. . ." Id. at 319. Application of innocence gateway requires courts "to make a probabilistic determination about what reasonable, properly instructed jurors would do." Schlup v. Delo, 513 U.S. 329.

The miscarriage of justice standard is primarily concerned with the truth and, therefore, requires the court to engage in the broadest possible range of inquiry:

> The Carrier standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of petitioner's showing, therefore, the district court is not bound by the rules of admissibility that would govern at trial. Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the Carrier standard, we believe that Judge Friendly's description of the inquiry is appropriate: the habeas court must 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. 325.

A jury hearing all of the evidence now available in this case would not hear a single witness testify under oath that Mr. Amrine was involved in the murder of Gary Barber. To the contrary, the only eyewitness testimony now available consists of Officer Noble, who saw Terry Russell flee from Barber during the stabbing, Kevin Dean-Bey, who saw Terry Russell stab Barber in the back, and the witnesses who testified for the defense at Amrine's trial that he was playing cards when Barber was stabbed. Unquestionably, Mr. Amrine would not be convicted on the basis of all the evidence now available.

For the foregoing reasons, this Court should issue the writ of habeas corpus granting Mr. Amrine relief from his conviction and sentence.

II.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS UNCONSTITUTIONAL CONVICTION AND SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 20, 1986, BECAUSE 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 PETITIONER'S RIGHTS SECURED BY THE EIGHT AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF MISSOURI.

The recantations of Jerry Poe, Terry Russell, and Randy Ferguson, apart from establishing petitioner's actual innocence of Gary Barber's murder, also establish that Amrine's conviction was secured through the prosecution's use of the perjured testimony of these three men. This claim, like the innocence issue, involves a constitutional question which this Court must review *de novo*. State v. Woolfolk, supra.

It is well settled that a conviction secured through the prosecution's use of perjured testimony violates the Due Process Clause of the Fourteenth Amendment. See, e.g., United States v. Agurs, 427 U.S. 97, 112 (1976); Napue v. Illinois, 360 U.S. 264 (1959); United States v. Foster, 874 F.2d 491, 494-95 (8th Cir. 1988). It is also well settled that a sentence, including a sentence of death obtained through the use of materially false or misleading evidence violates the Due Process Clause and the Eighth Amendment. Johnson v. Mississippi, 486 U.S. 587 (1988); United States v. Tucker, 404 U.S. 443 (1972); Townsend v. Burke, 334 U.S. 736 (1948). Missouri law also mandates relief from convictions based on perjured testimony:

> It would be patently unjust for a trial judge to refuse to grant a new trial in any case in which an accused was found guilty of a crime on the basis of false testimony, and the court "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned," * * * would be under a duty to grant a new trial.

State v. Mooney, 670 S.W.2d 510, 514 (Mo. App. E.D. 1984), quoting State v. Harris, 428 S.W.2d 497, 500 (Mo. 1968). Long ago, this Court unequivocally declared that "No verdict and resultant judgment, in any case, could be said to be just if the result of false testimony." Donati v. Gualdoni, 216 S.W.2d 519, 521 (Mo. 1948).

Based upon the facts presented in this habeas petition and brief, there can be little dispute that petitioner's conviction was secured through the perjury of Poe,

Russell, and Ferguson. Under the federal due process standard, a prisoner who can establish that the perjured testimony was material to his conviction is entitled to a new trial. To establish the materiality of the perjured testimony, petitioner must show that there is a reasonable probability that the result of the trial would have been different, but for the prosecution's use of the perjured testimony. Strickler v. Greene, 527 U.S. 263, 289-90 (1999); Kyles v. Whitley, 514 U.S. 419, 434 (1995). There can also be little dispute that this evidence was material, particularly in light of the prosecutor's own admission that, without the testimony of Poe, Russell, and Ferguson, he did not have a submissible case. (Fed. Hrg. Tr. 10).

Although many of the perjured testimony cases refer to the state's "knowing" use of perjured testimony, it is clear that prevailing jurisprudence in this area does not require that the prosecutor himself actually knew he was presenting perjured testimony at the time these witnesses testified. Due process requires that a conviction be overturned based on perjured testimony even if the perjured testimony was known only to police investigators and not the prosecutor. Kyles, 514 U.S. at 437-38. Petitioner has presented strong circumstantial evidence that the trial prosecutor knew or should have known that he was presenting perjured testimony. First, the prosecutor must have known that at least one or two of his three key witnesses were committing perjury given the widely divergent stories that they told to investigators. (See Trial Tr. 334, 394; Hab. Pet. at 71). The trial prosecutor skillfully glossed over the major

inconsistency between Ferguson's and Poe's accounts of the homicide by not specifically asking Poe how the stabbing occurred. (Id. at 334-35). The trial record also reveals that the prosecution skillfully neutralized the exculpatory evidence from Officer Noble suggesting that Terry Russell was the actual murderer. (Id. at 183-206).

In addressing similar instances of the prosecution's use of perjured testimony where it could not be directly established that the prosecutor personally acted in bad faith, many federal courts have held that it is not necessary that the prosecutor knew or should have known of the perjured testimony at the time it was presented. See Killian v. Poole, 282 F.3d 1204, 1208 (9th Cir. 2002). The Ninth Circuit persuasively explained its rationale in this regard as follows:

> [A] government's assurances that false evidence was presented in good faith are of little comfort to a criminal defendant wrongly convicted on the basis of such evidence. A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different.'

United States v. Young, 17 F.3d 1201, 1203-04 (9th Cir. 1994) (citations omitted).

In any event, petitioner believes that the evidence establishes, at the very least, that the prison investigators, if not the prosecutor himself, acted in reckless disregard for the truth in conducting their investigation of Gary Barber's murder. It is well settled that a prisoner sets forth a colorable due process violation if he can establish that the law enforcement agencies who investigated the case acted in reckless disregard of the truth. Wilson v. Lawrence County, 260 F.3d 946, 957 (8th Cir. 2001). As noted earlier, both the investigators and the trial prosecutor disregarded and unfairly denigrated the reliable observations of the only untainted eyewitness to this murder, corrections officer John Noble. Both the prosecutor and investigators also, in light of Noble's observations and other independent evidence, recklessly ignored the inescapable fact that Terry Russell was the likely murderer.

The most compelling evidence showing that the investigators in this case recklessly disregarded the truth, that Russell was the real murderer, in order to build a false case of guilt against Joe Amrine comes from the mouth of the chief investigator in this case, George Brooks. Brooks brazenly described his *modus operandi* of altering his reports after the fact to fit his own theory of how a crime occurred:

> Q. Now, on October 18th of 1985 – I assume you have access to all of the IOCs [inter-office communications] that were written on that day; is that correct?
>
> A. I have not reviewed them prior to today.

Q. But at that time, you had access to them; is that correct?

A. Yes, sir.

Q. The officers write handwritten IOCs and then those are reviewed; is that right?

A. Usually, yes, sir.

Q. Were you involved in the process of reviewing those handwritten IOCs?

A. I'm not sure that I was, sir.

Q. Have you been in investigations such as this [sic] involved in that process?

A. Yes, sure.

Q. And then occasionally in that process you would edit some of those IOCs for clarity and accuracy before they get typed up; is that correct?

A. Yes, sir, that would be a fair statement.

Q. And so you can iron out little apparent inconsistencies between IOCs in the process of doing that; isn't that true?

A. You might, yes, sir.

Q. And then after these handwritten IOCs are edited, then they are typed up and returned to the officer for signing, is that correct?

A. That's the general procedure, yes, sir.

(Fed. Hrg. Tr. 106-07). Though Brooks seems to defend his evidence tampering as good law enforcement technique, his co-workers would testify that his intent was far less benevolent. The evidence in this case fits a pattern described by Deborah Stafford, a former Missouri State Penitentiary investigator:

> In my experience with Arthur Dearixon, I observed an alarming lack of regard for facts, integrity, and professionalism in his investigative techniques. Most "investigations" began with a desired outcome as the first step, then the process of collecting "evidence" began.

(Ex. 11).[4] Ms. Stafford described the first step in that process:

> As part of the investigative process, it was common practice for Mr. Dearixon to have officers who were involved in specific cases submit handwritten Inter Office Communications (IOCs). He would then direct me to review all of the reports for discrepancies and then type the reports to reflect only one picture of what happened.

Id. George Brooks admitted that this practice is routinely followed; it was likely followed in this case. (Fed. Hrg. Tr. 106-07). He described the same process that

[4]Arthur Dearixon is an investigator who has worked closely with George Brooks on this and other cases at the Missouri Department of Corrections.

Ms. Stafford describes in her affidavit. (Id.) The "discrepancies" edited out of the IOCs are clearly things that might cause the state to have problems with its case -- in other words, Brady material.

A number of curious facts betray the deficiency of Brooks' investigation. When Ferguson was taken into custody, his penitentiary "daddy," Clifford Valentine, was allowed to accompany him, which is highly unusual. (Fed. Hrg. Tr. 101-02). Although Ferguson was taken into custody because blood had been observed on his face, Id., Brooks admitted that "I didn't really interview him at that time." (Fed. Hrg. Tr. 108). Realizing that he could not base a prosecution solely on the testimony of Poe and Russell, Brooks later questioned Ferguson about thirty times between October, 1985, and April, 1986. (29.15 Tr. 78). The Missouri post-conviction hearing court appears openly skeptical of Brooks' claim that no pressure was applied to get Ferguson to testify against Amrine:

> Q. (By the Court) Isn't this a form of coercion to make a deal with a witness who's told you 30 times before that he doesn't know anything? Didn't you consider that coercion?"
>
> A. (George Brooks) Do I consider it coercion?
>
> Q. Yes.
>
> A. No, not necessarily, Judge.

(29.15 Tr. 314). The court's skepticism is well-founded. Brooks began his "investigation" of Ferguson's knowledge of the crime by unequivocally communicating to Ferguson that the state wanted his testimony very badly:

Q. In fact, you told him on that day that he had information that was very valuable to you, didn't you?

A. I told him I believed that, yes, sir.

Q. At the time that he made that statement to you, he had not yet told you that he had seen anyone kill Gary Barber, had he?

A. I don't believe so, no, sir.

Q. All right. And it wasn't until after you told him that the information that he possessed was very valuable to you that he decided to cooperate with you; isn't that correct?

A. That sounds correct, yes, sir.

(Fed. Hrg. Tr. 110). The unspoken part of that message came through loud and clear: the state was willing to trade almost anything for testimony against Joe Amrine. Before Brooks let Ferguson know that he could sell his testimony for a high price, Ferguson adamantly and repeatedly denied having seen the murder:

Q: Could you tell us what you saw.

A: I don't know. I didn't see nothing.

Q: You didn't see anything?

A: Yea

Q: Were you in the room?

A: I was there.

Q: What were you doing?

A: I was talking to some friends, punching on the bag.

Q: Did you see Barber whenever he was stabbed?

A: No.

Q: What did you see?

A: Nothing.

Q: You didn't see Barber at all?

A: I seen him laying on the floor after he was dead.

(Ex. 3, Dep. Ex. 3) (emphasis added). Ferguson admittedly leaped at the opportunity for protection from the forced homosexuality and degradation which the Department of Corrections had previously denied him. (Ex. 3 at 21). By dangling the carrot in front of Ferguson before finding out what he had to say, Brooks assured that Ferguson would implicate Amrine regardless of whether or not Amrine was guilty.

After pressuring Ferguson to cooperate, Brooks took a statement that in no way resembled the working theory of the case up to that point. In fact, Ferguson's version of events given for the first time in April, 1996, is the third version of the Barber stabbing that appears in prison reports. The first is the October 21, 1985, letter from

Warden Armontrout stating that Barber was sitting at a table playing cards when he was stabbed in the back by another inmate. (Ex. 8). The second appears in Jerry Poe's statement of October 21, 1985, given in exchange for protective custody in the Cole County Jail. (Ex. 6, Dep. Ex. 1). Poe states that the perpetrator sneaked up behind Barber and stabbed him in the back, then fled, taking the knife with him. (Id.). Ferguson described an elaborate scenario in which the knife was delivered to the recreation room through a convoluted series of events that started the night before, and that Amrine recovered the knife and engaged Barber in a conversation. Thereafter, according to Ferguson, Amrine walked side-by-side with Barber, his arm around Barber's shoulder, for fifteen minutes before sneaking the knife out of his pants and sticking it in Barber's back. (Ex. 3, Dep. Ex. 3 & 5). In addition to giving fatally inconsistent versions of the event itself, Poe and Ferguson gave conflicting physical descriptions of the assailant. Poe claimed that the perpetrator wore a green army fatigue shirt, long sleeved, buttoned all the way up to the top. (Trial Tr. 334). Ferguson testified that the stabber wore a white tank-top undershirt. (Trial Tr. 394).

The state finessed the discrepancies between Poe's and Ferguson's stories by presenting Ferguson's scenario as their theory of the case, simply glossing over a slightly adjusted version of Poe's description of the stabbing. (Trial Tr. 334-35). The prosecutor counted on the well-known ineptness of Amrine's defense counsel to overlook the dramatic shift in the case; he was not disappointed. The chain of events

lends credence to Poe's testimony that George Brooks altered his testimony to make it match the other witnesses:

> Q. Were there any attempts to change your testimony before the trial?
>
> A. I think they changed it a couple of times, I think. Because they said it didn't match up, you know, with other testimony. So they had to go back and change something or another, you know. So I really don't -- I really didn't pay too much attention to what they was changing or anything else. I just done whatever they told me to do.
>
> Q. Do you remember specific details that they had told you to change?
>
> A. It was something about running around whenever, you know, whoever Barber was supposed to have been chasing, there was something about how he chased him around the room, whether he cut across and tried to cut him off or something like that. I don't remember exactly. But that's one of the details, you know, that they had changed in my statement or something to match up with somebody else's or something.

(Ex. 6, pp. 24-25).

The conduct of prison investigators has constitutional implications in this case. Recognizing the "constitutional right to be free from bad faith or malicious prosecution," the Fifth Circuit Court of Appeals observed:

> If, then, the Fourteenth Amendment imposes a duty on state prosecutors to charge only upon ascertaining probable cause, it follows that one acting under color of state authority ... can be liable for subverting the performance of that duty, as by maliciously tendering false information to the prosecutor which leads him to believe probable cause exists where there is none. Since this would violate federally guaranteed rights, it therefore can be grounds for a sec. 1983 action. Wheeler v. Cosden Oil and Chemical Co., 743 F.2d 254, 260 (5th Cir.), modified but affirmed in relevant part, 744 F.2d 1131 (5th Cir. 1984). Deliberately concealing or deliberately failing to disclose exculpatory evidence, like "maliciously tendering false information," can, as under the circumstances here present, form the basis for an inference that a defendant police officer acted with malice in initiating and maintaining a prosecution.

Sanders v. English, 950 F.2d 1152, 1163 (5th Cir. 1992).

In sum, regardless of the precise standard of review that this Court employs, there are two inescapable truths that establish that petitioner is entitled to habeas relief in light of the perjured testimony of Poe, Russell, and Ferguson. First, there is

absolutely no doubt that agents of the state either deliberately or recklessly disregarded the truth during the pre-trial investigation and in presenting its case against Amrine at trial. Second, there can be no dispute that this perjury was material to the prosecution because, as Tom Brown stated, without Poe, Russell, and Ferguson, the prosecution had no case. (Fed. Hrg. Tr. 10). This misconduct by the state agents involved in this prosecution is not only morally reprehensible, but also violates the spirit of both the United States and Missouri Constitutions which require that all accused citizens be accorded fundamental fairness by the government officials who are charged with enforcing and upholding the laws. Habeas relief is warranted.

III.

PETITIONER IS ENTITLED TO THE ISSUANCE OF A WRIT OF HABEAS CORPUS DISCHARGING HIM FROM HIS FIRST DEGREE MURDER CONVICTION AND SENTENCE OF DEATH IMPOSED BY THE CIRCUIT COURT OF COLE COUNTY ON SEPTEMBER 26, 1986, BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS RIGHTS SECURED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION BECAUSE TRIAL COUNSEL, JULIAN OSSMAN, DUE TO HIS INCOMPETENCE AND THE FACT THAT HE LABORED UNDER AN ACTUAL CONFLICT OF INTEREST BY REPRESENTING RANDY FERGUSON ON UNRELATED CHARGES, FAILED TO EFFECTIVELY CROSS-EXAMINE RANDY FERGUSON, JERRY POE AND TERRY RUSSELL WITH AVAILABLE EVIDENCE TO IMPEACH THEIR CREDIBILITY, FAILED TO INVESTIGATE AND PRESENT CREDIBLE ALIBI WITNESSES, FAILED TO PRESENT EXCULPATORY FACTS KNOWN BY THE ONLY CORRECTIONS OFFICER PRESENT, AND FAILED TO PRESENT EVIDENCE DIMINISHING THE PROBATIVE VALUE OF THE PROSECUTION'S BLOOD EVIDENCE. HAD OSSMAN

PERFORMED COMPETENTLY, THERE IS A REASONABLE LIKELIHOOD THAT PETITIONER WOULD HAVE BEEN ACQUITTED.

Substantial evidence points to the likelihood that the State of Missouri has convicted the wrong man in the murder of Gary "Fox" Barber. The state's case rested entirely on the testimony of jailhouse informants, the most dubious and untrustworthy evidence imaginable. Amrine's steadfast assertion of innocence is substantiated by the eyewitness testimony of John Noble, the only corrections officer to witness the crime, and eleven other inmates who swear that Amrine was playing cards when Barber was stabbed. The trial prosecutor admitted that, without the testimony of three prison snitches, the state would not even have a case against Amrine. (Fed. Hrg. Tr. 10). While all three of the convicts who accused Amrine have recanted their trial testimony, corrections officer John Noble adamantly stands by his original report -- written the day Barber died -- that he correctly identified the apparent perpetrator, whose identity was later established as that of state's witness Terry Russell. (Ex. 5, p. 54

A competent trial lawyer would have established Amrine's innocence at trial if the lack of credibility of these three inmate witnesses had been revealed to the jury. In this regard, petitioner contends that Ossman was ineffective for failing to adequately cross-examine and impeach the testimony of these witnesses in spite of several readily available means to do so, and further for failing to elicit exculpatory testimony from

Officer Noble. Counsel's failures and oversights in the guilt or innocence stage of trial include: (1) trial counsel labored under an actual conflict of interest; (2) trial counsel failed to cross-examine and impeach the testimony of Randy Ferguson, Terry Russell and Jerry Poe with dramatically inconsistent pre-trial statements; (3) trial counsel failed to interview witnesses before trial and made no effort to prepare and present the most credible defense witnesses in support of Amrine's plausible alibi defense, including Ronnie Ross and Kevin Dean-Bey, who would have testified that Terry Russell, not Joe Amrine, killed Fox Barber; (4) trial counsel did not elicit evidence diminishing the probative value of minuscule drops of blood on Amrine's clothing, relied upon by the state to corroborate its highly vulnerable snitches; and (5) trial counsel failed to elicit exculpatory testimony from Officer Noble. Several aspects of Ossman's inept performance which directly affected the crucial question of the credibility of the state's snitches are discussed in further detail below.

A. Trial Counsel, Julian Ossman, Breached His Duty of Competent Performance.

The probability of Amrine's innocence has a strong bearing on both prongs of the familiar Strickland test, in terms of the duty expected of a competent lawyer defending an innocent man against a capital charge, and the likelihood that a competent performance would have produced a different result. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." Kimmelman v. Morrison, 477 U.S. 365, 394-95 (1986). "The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 466 U.S. 668, 685 (1984). Because trial counsel did an incompetent job of challenging the credibility of the state's inmate informants, this case involves "the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker..." Id. at 694. Furthermore, the fact that Ossman's office represented Randy Ferguson, one of the state's snitches, during negotiations for his testimony, raises serious questions that counsel labored under a conflict of interest.

1. Trial counsel had an actual conflict of interest arising from his office's dual representation of Amrine and Randall Ferguson.

Under any objective assessment, trial counsel's performance was abysmal. Before examining counsel's specific failures, this Court should note that Julian Ossman had a conflict of interest arising from the fact that he was from the same public defender office as the attorney who represented Randall Ferguson. (29.15 Tr. 99). It is difficult to imagine a more actual conflict than that presented by a law firm representing a criminal defendant in a case while also representing a witness who is a viable suspect of the same homicide and who is actively negotiating for protective

custody, parole and dismissal of pending charges in exchange for testifying against the defendant. See Gordon v. State, 684 S.W.2d 888 (Mo. App. W.D. 1985). Where trial counsel has a conflict of interest, a petitioner need not prove prejudice to prevail on an ineffective assistance of counsel. Holloway v. United States, 960 F.2d 1348, 1351 (8th Cir. 1992). Because of the crucial role of counsel to our system of justice, the prejudice standard applied to claims of ineffective assistance of counsel is modified where trial counsel is laboring under a conflict of interest:

> In a case of joint representation of conflicting interests the evil -- it bears repeating – is in what the advocate finds himself compelled to refrain from doing . . . . It may be possible in some instances to identify from the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible.

Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978). In emphatically rejecting the suggestion that a defendant must show prejudice in order to be entitled to relief, the Court followed the time-worn principle set forth in Glasser v. United States, 315 U.S. 60 (1942):

> Glasser established that unconstitutional multiple representation is never harmless error. Once the Court concluded that Glasser's lawyer had a conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. The conflict itself demonstrated a denial of the "right to have the effective assistance of counsel." 315 U.S. at 76. Thus, a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.

Cuyler v. Sullivan, 446 U.S. 335, 349 (1980); accord, Strickland v. Washington, 466 U.S. at 692.

In this case, counsel failed to challenge Ferguson's testimony with contradictory details provided by his fellow snitch, Jerry Poe. Further, counsel neglected to press the issue of Ferguson's status as a homosexual punk in need of protective custody (Ex. 3, p. 21), as well as the extent of the consideration that Ferguson received as a result of his testimony against Amrine. If one gives Ossman credit for a minimal level of competence, then his office's dual representation of Amrine and Ferguson is the only plausible explanation for his oversight.

The remainder of Mr. Amrine's claim of ineffective assistance of counsel focuses on Ossman's performance, independent of his office's relationship with an important state's witness. Ossman's performance "must be considered in light of the

strength of the government's case." Johnson v. Baldwin, 114 F.3d 835, 838 (9th Cir. 1997); accord, Eggleston v. United States, 798 F.2d 374, 376 (9th Cir. 1986). The state's case against Amrine, built entirely on the unreliable testimony of jailhouse snitches, with only scant corroboration, presents "a verdict or conclusion only weakly supported by the record" which deserves less deference, and greater scrutiny, "than one with overwhelming record support." Strickland at 696. Many circumstances of this case imposed a duty on Ossman to use all reasonable means at his disposal to challenge the credibility of Jerry Poe, Randall Ferguson and Terry Russell, elicit exculpatory evidence of other inmates and corrections officers present, and challenge the probative value of the only piece of physical evidence available. Unfortunately, Mr. Ossman failed miserably to do so.

2. Trial Counsel Failed to Effectively Cross-examine Randy Ferguson, Jerry Poe, and Terry Russell with Available Evidence to Impeach Their Credibility.

When the state's case hinges on the credibility of a witness, counsel's duty of competence requires reasonable steps to impeach his testimony. Berryman v. Morton, 100 F.3d 1089 (3rd Cir. 1996) (counsel defending a rape charge was found ineffective for failing to cross-examine the complaining witness about prior inconsistent descriptions of her assailants, in which she had initially described defendant, who was 5'5" tall, as being the same height as a co-defendant, who was 6'4" tall). Accord, Hadley v. Groose, 97 F.3d 1131 (8th Cir. 1996) (trial counsel was ineffective for failing to contradict the testimony of a police investigator, who testified that there were footprints in snow outside victim's home consistent with footprints (hiking boots) outside defendant's mother's nearby home, with testimony of another officer who had testified that footprints (cowboy boots) outside defendant's home were different from those outside victim's home.) Where physical evidence is offered to attempt to corroborate or bolster the testimony of key witnesses, counsel has a clear duty to competently challenge the probative value of that evidence. Driscoll v. Delo, 71 F.3d 701 (8th Cir. 1995), cert. denied, 117 S.Ct. 273 (1996). (Trial counsel was found ineffective in guilt phase for failing to adequately cross-examine serologist and impeach state witness with prior inconsistent statement.) In a close case, it is also ineffective

assistance of counsel to allow the state to bolster its case by references to inadmissible polygraph tests. State v. Dornbusch, 384 N.W.2d 682 (S.D. 1986).

Trial counsel failed to introduce prior statements of Jerry Poe and Randall Ferguson establishing that they had given wildly conflicting stories about the stabbing of Gary Barber, proving conclusively that one or both were lying. The state presented only one theory of events at trial, through Ferguson, who claimed that Amrine and Barber paced up and down the recreation room side-by-side, Amrine's arm around Barber's shoulder, for fifteen minutes before Amrine pulled a knife and stuck it in Barber's back:

> A. Gary Barber was sitting over there in that corner there by hisself (sic), and Joe Amrine went over there and started talking to him, squatted down and started talking to him for a few minutes. And then they both got up and started pacing back and forth up and down the rec hall, when Joe had his arm around Gary Barber's shoulder.
>
> Q. Did they have occasion to come together, then, into the general area where you were working out on the heavy bag?
>
> A. Yes sir, they did.
>
> * * * *
>
> Q. And they walked towards your area?

A. Yes.

Q. Were they walking together?

A. Yes sir.

Q. Then did you see something happen at about that time?

A. Yes, sir.

Q. And what was it that you saw happen?

A. I seen Gary Barber and Joe Amrine walk up here.

Q. Stand up if you need to.

A. Right about in here. And Joe took his arm off of Gary Barber's shoulder and pulled the knife out of his waistband and came up with his arm with a circle motion and hit Gary Barber with the knife in the upper back.

(Trial Tr. 390-93). Ferguson testified at trial that petitioner and Barber paced back and forth together for about fifteen minutes just before Barber was killed. (Trial Tr. 428). The prosecutor skimmed over this aspect of Poe's testimony (Trial Tr. 314), so that Ferguson's version was the only one presented to the jury.

A competent defense lawyer would have informed the jury through cross-examination and impeachment that Poe had given a completely different story to investigators. Poe claimed that Amrine ran up behind Barber, stabbed him in the back,

and ran away, taking the knife with him. Trial counsel utterly failed to prove that in his first statement accusing Amrine, Poe told George Brooks:

> The inmate named Gary Barber that got stabbed walked out of a little group of blacks down at the end of the room and walked towards where we were sitting at the table and when he got right by the guy at the punching bag, this other inmate came up behind him and pulled the shank. He pulled it out of the waistband of his pants with his right hand and struck Gary Barber in the back with the shank approximately under the left shoulder blade. He pulled the shank back out of Barber, turned and ran back towards the little group of people down at that end of the room. When Barber got hit with the shank, he turned around and chased the inmate that stabbed him.

(Ex. 6, Dep. Ex. 1, p. 560). Ossman also failed to tell the jury that Poe repeated the strike-from-behind version in his pre-trial deposition:

> Q. (by Mr. Ossman) Tell me exactly -- when you say the stabbing took place, exactly what did you see in regard to the stabbing?
>
> A. A guy just walked up behind Gary Barber and stabbed him, stabbed him in the back.

* * *

Q. How far was the person who stuck him from Barber? Were they walking together?

A. No. Barber was just walking up there, and this guy just came right up behind Barber and stuck him. Barber wasn't even paying attention.

(Ex. 6, Dep. Ex. 2, pp. 9-10) (emphasis added). Inexplicably, Ossman did not present these significant discrepancies to the jury.

Trial counsel also failed to investigate the source of yet another version of Barber's death that could have been used to cross-examine and impeach Russell, Poe and Ferguson, contained in Warden Armontrout's investigative summary:

> It appears that inmate Barber was sitting at a table when assaulted and the weapon was still sticking in his back, he pulled the weapon out of his back, chased Amrine a short distance, fell at the responding officer's feet and the weapon was taken by the staff member.

(Ex. 8, p. 621). The jury in this case heard only Ferguson's version of the crime. Trial counsel's feeble attempt at cross-examination merely rehashed Poe's direct examination. Ossman did not even attempt to expose Poe's original statement, which was fundamentally inconsistent with Ferguson's.

The statement of juror Larry Hildebrand makes it clear that effective representation would have injected serious doubts about the truthfulness of all three of the state's indispensable witnesses:

> I was surprised to see that Poe's description of the crime is completely different from Ferguson's. Poe's statement claims that Amrine sneaked up behind Barber, and stabbed him in the back. Ferguson's version was that Amrine and Ferguson walked up and down the recreation room side-by-side talking with one another for ten minutes or so before Amrine pulled the knife and stuck it in Barber's back, leaving it there. This discrepancy gives me substantial doubts about whether Poe and Ferguson were telling the truth.

(Ex. 2, p. 2). Jury foreman Russell Gross admits that such testimony "probably would have given me a great deal of trouble." (Ex. 1, p. 1).

Another significant defect in counsel's performance is his failure to drive home to the jury the fact that Terry Russell was the primary suspect in the case, who avoided prosecution by accusing Amrine of the murder. Ossman could have presented evidence that Russell was questioned, Mirandized and treated like a suspect, rather than a witness, in his initial encounters with investigators. Russell could have been cross-examined effectively, as indicated by his sworn testimony recanting his trial testimony:

Q. (by Mr. O'Brien) So Mr. Brooks explained to you why he was questioning you about the murder; is that correct?

A. Yes.

Q. And he told you that the fight with Barber made you a suspect?

A. Yes.

Q. The fact that you had both been released from lock-down that very day kind of made you a suspect?

A. Yes.

Q. And that John Noble saw you running from Barber and that also made you a suspect, didn't it?

A. Yes.

Q. Did they say anything about charging you with the crime?

A. Yes.

Q. And what did they tell you?

A. They read me my rights and then they said they was going to charge me.

Q. So your primary concern at that time was that you were going to be charged with murder?

A. Yes.

****

Q. Why would you blame Joe Amrine as opposed to any other inmate who was in that multipurpose room?

A. It was just -- I was just using that as a witness because there was a rumor going out about him and Barber had some words and that's why I used his name.

Q. So you knew about that rumor, about the argument between Amrine and Barber?

A. Yes.

Q. And so you used that to deflect suspicion away from yourself --

A. Yes.

Q. -- is that fair?

A. Yes.

(Fed. Hrg. Tr. 29-30).

Russell's status as a suspect in Barber's murder is factually and legally significant in this case, and trial counsel was clearly ineffective for failing to put that issue before the jury, just as defense counsel in Territory of Guam v. Santos, 54 F.3d 786 (9th Cir. 1995), was found ineffective for failing to cross-examine or impeach the state's key witness with a police memo implicating him in the murder. Similar gaffes by defense counsel have led to convictions and death sentences of innocent people, subsequently released from death row after closer investigation and examination of the

evidence. See, e.g., Martinez-Macias v. Collins, 979 F.2d 1067 (5th Cir. 1992), aff'g Martinez-Macias v. Collins, 810 F. Supp. 782 (W.D. Tex. 1991), granting habeas corpus relief to an innocent man whose conviction was largely based on informant testimony. Again, it should be noted that Mr. Ossman himself has been found ineffective for similar failures in similar circumstances which resulted in an innocent man spending fourteen years on Missouri's death row before being exonerated by a jury. Clemmons v. Delo, 124 F.3d 944 (8th Cir. 1997).

Trial counsel also failed to cross-examine and impeach Terry Russell with facts that establish that he lied in order to embellish his own alleged alibi for the murder of Gary Barber. Russell was a pivotal witness in the case. He was the first person to accuse Amrine of Barber's stabbing. He was the only witness to testify that Amrine had a score to settle with Barber because Barber claimed he had taken advantage of Amrine sexually. (Trial Tr. 267). He claimed that Amrine practically admitted the murder to him in the recreation room right after it happened. (Trial Tr. 287-88; Ex. 7A, P. 602). Although Russell had ample reason to lie, trial counsel's clumsy, meandering cross-examination of Russell merely reiterated the prosecutor's direct examination, and ineptly enhanced rather than undermined his credibility. (Trial Tr. 291). Counsel's failure to cross-examine Russell about his claim of alibi and status as a suspect, and counsel's failure to seek any remedy whatsoever when Russell "volunteered" that he

had taken a lie detector test, left the jury with a badly skewed and undeveloped record on which to judge Russell's believability. (Trial Tr. 310).

Russell was undoubtedly a vulnerable witness, so that independent facts and circumstances which would rebut or corroborate his testimony were very important to the outcome of the trial. Defense counsel failed to check out key aspects of his story, especially Russell's claim that he was at the control center talking to an inmate named Hurd when Barber was stabbed. Trial counsel failed to take reasonable steps to challenge Russell's testimony.

First, trial counsel made no attempt to interview Harry or Johnny Hurd. If he had, he would have learned that there was no such inmate by either name in the Missouri State Penitentiary (now known as Jefferson City Correctional Center) when Barber was stabbed. In the state court 29.15 hearing, Amrine's public defender proved that Johnny Hurd was not a resident of Housing Unit 5. (29.15 Tr. 147). The truth is that no one using the name of Harry or Johnny Hurd was in that prison at that time. (Ex. 7C).

Second, counsel failed to elicit Russell's admission in his deposition that inmates at the control center were asking him about a fight between him and Barber that supposedly had occurred that day before anyone knew of Barber's stabbing. (Ex. 7B, p. 9). According to Russell, the alarm about the stabbing did not go out until five minutes after this conversation. Unless Russell was involved in the stabbing, there was

no fight between him and Barber on that day. Further, trial counsel failed to present evidence from several witnesses that Russell was, in fact, in the room at the time of Barber's stabbing, including Kevin Dean-Bey, who would have named Russell as the perpetrator. (Fed. Hrg. Tr. 73, 79). Counsel simply failed to conduct a reasonable investigation.

Again, the words of the jurors themselves are the most direct evidence that trial counsel's deficient performance undermines confidence in the outcome of the trial:

> I was not really aware that Terry Russell was initially a suspect in Barber's slaying. Had I known, I would have had no difficulty believing that Russell implicated Joe Amrine in order to avoid being prosecuted for Barber's murder. If the defense lawyer had effectively challenged the testimony of the three inmates, I think Joe Amrine would have been acquitted. The jury never even discussed the possibility that Amrine was innocent, or that Terry Russell might have been the real killer.

(Ex. 2, p. 2). Jury foreman Russell Gross confirms that the most viable defense position in the case was never even discussed by the jury:

> The defense attorney, Julian Ossman, did not give the jury any reason to believe that Terry Russell was the actual perpetrator. In fact, that issue did not even come up during the deliberations. The jury did not entertain

that possibility for a second. After being fully informed of the evidence in the case, I now think that Terry Russell killed Mr. Barber.

(Ex. 1, p. 1).

3. Trial counsel failed to interview witnesses before trial and made no effort to prepare and present the most credible defense witnesses in support of Amrine's plausible alibi defense, including Ronnie Ross and Kevin Dean-Bey, who would have testified that Terry Russell, not Joe Amrine, killed Fox Barber.

Trial counsel's failure to meticulously prepare for trial is evident in several aspects of his performance. While he presented some witnesses in support of Amrine's plausible alibi defense, he neglected to interview several people prior to trial. The trial record reflects that counsel presented testimony from at least one witness, Brian Strothers, whom he had never spoken with before actually putting him on the witness stand. The trial transcript reflects that Ossman first met and interviewed Strothers in the hallway outside the courtroom as he was brought in to testify, candidly admitting, "I haven't had an opportunity to interview the man, your Honor." (Trial Tr. 551). The prosecutor cross-examined Strothers aggressively about his unfamiliarity with the crime scene diagram. (Trial Tr. 560-69). As a result, Strothers was hopelessly confused on cross-examination.

Likewise, counsel failed to interview Kevin Dean-Bey and Ronnie Ross, potential witnesses for the defense. Ross testified that he was playing cards with Amrine when Barber was stabbed. (29.15 Tr. 123-26). Dean-Bey testified that he saw Joe Amrine playing cards when "Tat-tat" (Russell) came up behind "Fox" (Barber) and stabbed him with a pick. (Ex. 9). Previous courts have speculated, on an incomplete record, that such testimony was "merely cumulative" of Amrine's other alibi witnesses. Amrine v. State, 785 S.W.2d 531 (Mo. banc 1990). The record fails to support this finding in light of the fact that Ross was not subject to impeachment with prior inconsistent statements or refusal to speak with investigators, as he had made a detailed audiotaped statement exonerating Amrine. (29.15 Tr. 140-43). Petitioner personally informed the state post-conviction court about the audiotape of Ross' statement, and complained of trial counsel's failure to listen to it. (29.15 Tr. 262-63). Further, Dean-Bey was the only witness who could say that he personally saw Russell stab Barber in the back. A reasonably competent attorney would have presented such testimony in support of his client's innocence.

Jurors noticed Ossman's amateurish performance:

> My uneasiness about the verdict in the Amrine case has to do with the fact that the defense attorney, Julian Ossman, gave us very little to work with. I have always wondered whether he was ill prepared, or whether he simply had nothing to work with. I tended to think he was ill-prepared

because there were a number of things that I thought could have been done better. Even though I am not an attorney, there were some obvious steps he could have taken to improve his presentation. I got the impression that when he was presenting the defense case, he was meeting his witnesses for the very first time. Their testimony was not very organized or clear, and the defense case seemed very confusing and contradictory. In presenting Joe's "alibi" defense, Mr. Ossman used a hand made sketch that was supposed to be a diagram of the scene of the crime, but it was extremely crude. I think one of the inmates sketched it during his testimony, and the rest of the defense witnesses were asked to refer to it during their testimony. Pillars in the room were represented by vertical rectangles, and the tables at which Mr. Amrine was said to have been sitting were represented by circles. The sketch was obviously not to scale, and the perspective was incorrect. When Mr. Amrine's witnesses testified, they were asked to point out where, on this awkward chart, Mr. Amrine was sitting when Gary Barber was stabbed. They pointed to different places on the drawing, which resulted in the jury rejecting their testimony without much discussion. I thought this could be explained by the bad drawing the defense was attempting to use. However, the inmates didn't have much credibility in the first place

> because they were inmates who were presented to us in chains and prison garb. I think the defense attorney should have used a photograph or an accurate diagram of the recreation room, and the defense witnesses should have been allowed to see it before they testified. The very rough drawing that Mr. Ossman used was very confusing to the jury and clearly confusing to the defense witnesses. The awkwardness of the drawing and the confusion it created destroyed the credibility of the defense case. There was a sharp contrast between the contradictory and faltering testimony of the defense witnesses and the very well-rehearsed and cogently presented state's case.

(Ex. 2, p. 1).

4. Trial counsel did not elicit evidence diminishing the probative value of minuscule drops of blood on Amrine's clothing, relied upon by the state to corroborate its highly vulnerable snitches.

The prosecutor vigorously argued that its inmate-snitches were credible because of the blood on Amrine's clothing, arguing that Amrine was guilty because he had not refuted the blood evidence:

> What about the blood on Amrine's clothing? Got any explanation for that blood on the same clothes he was wearing in that room? Mr. Ossman did not address that. And maybe he had so many things to say, he didn't

> have time. That's one reason. Another reason is there isn't any explanation for that blood on his clothes. The defendant didn't offer you one.

(Trial Tr. 735). Thus, the prosecutor used the indeterminate blood tests to provide "objective" support for the snitch testimony on which he so heavily relied.

Had trial counsel performed competently, the probative value of the tiny drops of blood on Amrine's clothing would have evaporated on further scrutiny. At trial, the state's serologist admitted that he could not age or type the blood. (Trial Tr. 488-89). Dr. Kwei Lee Su, whom the state stipulated "is certified as a serologist and is imminently qualified," (29.15 Tr. 15), testified at the state post-conviction hearing that a serologist should have been able to type the blood if it were fresh, (29.15 Tr. 21), making it likely that the blood on Amrine's clothing had deteriorated with age or that his clothing had been washed prior to the testing. Id. at 23. Dr. Su testified that in spite of the small size of the blood stain, if the Missouri State Highway Patrol Crime Lab had followed standard procedures in the storage and testing of the blood, "we should be able to type it." Id. at 26-27. That circumstance indicates that the blood was not Barber's. Counsel's failure to prepare allowed the jury to place unwarranted reliance on the tiny blood droplets.

5. Trial counsel failed to elicit exculpatory testimony from corrections officer John Noble.

Although officer Noble testified at trial, the probative value of his observations were greatly diminished by the misleading suggestion that he believed his own identification of Terry Russell to be mistaken. To deal with Noble's testimony implicating Russell, the prosecutor attempted to suggest that he had misidentified Amrine as Terry Russell. The prosecutor's attempt led to a peculiar tug of war over Noble's testimony:

> Q. Are you certain that the inmate you later pointed out was the same inmate you saw Barber chasing?
>
> A. Yes.
>
> Q. You are certain that inmate was Terry Russell?
>
> A. No. No. No.
>
> Q. I want the jury to know: are you sure or are you not sure as to the identity of the other inmate you think you saw Gary Barber chasing?
>
> A. No, I would have to say I'm not sure.

(Trial Tr. 183). Noble then answered questions regarding the general appearance of Amrine and Russell, without ever saying whether he believed that he had pointed out the wrong inmate. On cross-examination, he testified:

Q. Now, you indicated, when Mr. Brown first began questioning you, that this inmate that you saw also running at the same time as Mr. Barber was Terry Russell; is that correct?

A. Yes.

Q. To the best of your knowledge, that's who that inmate was; isn't that true?

A. To the best of my knowledge.

Q. And in fact you told, I believe, an officer Bowers to get that inmate, right?

A. Yes, I did.

Q. And to take him out of the room?

A. I pointed that inmate out to Officer Bowers and told him that that was the one that was running at the same time that Barber was.

Q. And that was Terry Russell?

A. Yes, it turns out it was Terry Russell.

(Trial Tr. 189-90). By that time, the jury must have been thoroughly confused about what Noble had seen.

Officer Noble was not given an opportunity at trial to explain that he identified the correct inmate to his fellow corrections officer; his uncertainty merely went to the

inmate's name. (Fed. Hrg. Tr. 60-61). In a forthright and credible manner, Noble cleared up the confusion during the federal court hearing:

Q. You were asked a question by Mr. Brown that is, "Are you certain ... that the inmate you later pointed out to Danny Bowers was the same inmate you saw Barber chasing?" And your response was yes.

A. Yes.

Q. Is that correct?

A. That's correct.

Q. And was that testimony truthful?

A. Yes, it was.

Q. Now, you were later asked, "You are certain that inmate was Terry Russell? And your response was no. What did you mean by that?

A. When I pointed the inmate out to Officer Bowers, I was going on appearance. I'll state again that I did not know Terry Russell -- by looking at him and being able to say yes, this is definitely Terry Russell, no, I could not do that. So I was referring to appearance.

Q. So the difference between those two statements is that you recognized the person that you pointed out to Danny Bowers as

the same person who was being chased by Gary Barber; is that correct?

A. The same person that it appeared -- that Gary Barber appeared to be chasing, yes.

Q. But you're not sure if you can attach the right name to the right faces?

A. I don't think so.

* * * *

Q. Just to make sure that the record is perfectly clear. Can you say positively that the prisoner you pointed out to Danny Bowers was in fact the prisoner being chased by Gary Barber?

A. Yes, sir.

(Fed. Hrg. Tr. 62, 66). Based upon Noble's identification, Russell was taken out of the room, searched, and interrogated about the stabbing of Gary Barber.

Officer Noble was unaware of the previous fight between Russell and Barber, and he did not know that the two had been released from disciplinary confinement that very morning:

Q. Now, at that time, were you aware that Russell and Barber had just been released from lock-down that day after they had been in a fight with one another?

A. No, sir, I was totally unaware of that.

* * *

Q. And you weren't aware that that was the day on which they had each been released?

A. No, sir.

Q. Did you express any concern at all to Danny Bowers that you might be mistaken?

A. No, none that I recall.

Q. Is there any question that Terry Russell was in the room at the time this went down?

A. Seeing that I pointed this inmate out to Officer Danny Bowers, who was in the room, then that puts him in the room.

(Id. at 61-62). Only by the most astounding of coincidences could Noble have mistaken Russell for Amrine. It is implausible that he was mistaken. Had trial counsel given Noble the opportunity on cross-examination to explain himself, Noble would have provided persuasive testimony that Joe Amrine is innocent.

B. Had Ossman Performed Competently, the Result of Amrine's Trial Probably Would Have Been Different.

The issue of prejudice in this case must be evaluated in light of the Supreme Court's holding that "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. at 696. Petitioner has made a persuasive showing that he is actually innocent of the murder of Gary Barber. Trial counsel's errors and omissions give this Court ample reason to question the outcome of Amrine's trial. Juror Larry Hildebrand demonstrates the impact that Ossman's deficient performance had on the deliberations of the jury:

> Mr. Ossman also failed to make any points on cross-examination of the state's witnesses. He did not raise any serious questions of credibility about any aspect of the state's case. I viewed Officer John Noble as a state's witness who supported the overall picture of the case that the state presented, and there were no serious questions whatsoever raised about the scenario presented by the state. We did not consider his testimony about pointing out Terry Russell to be a significant factor in the case. Officer Noble was not viewed by the jury as a key witness. He was presented as part of the state's case. Since he was called as a state's witness, we did not think his testimony had any significance to the defense. In spite of his initial report, the jury never discussed the possibility that Terry Russell was the actual perpetrator of the crime. There were almost no deliberations at all. A comment was made when we first retired to deliberate that we should just vote right away and be

done with it. There really was nothing to discuss, but we took longer than we needed to because, given the gravity of the charge, it seemed inappropriate to return a verdict in just a few minutes. Even though we took our time, there was really no in-depth discussion of the evidence.

(Ex. 2, pp. 1-2). In contrast with the scant defense evidence which jurors were given at trial, a competent presentation of evidence would have produced an acquittal:

The evidence that could have been used by Julian Ossman to contradict the testimony of Poe, Russell and Ferguson gives me a reasonable doubt that Joe Amrine is guilty of the murder of Gary Barber. The retractions by Russell, Ferguson and Poe, when considered together with all the evidence, are more believable than their trial testimony against Joe Amrine. I am convinced the (sic) Joe Amrine is innocent, and he should be pardoned for the murder of Gary Barber. I urge Governor Holden to stop Joseph Amrine's execution and correct this miscarriage of justice.

(Id., Ex. 2, p. 3). The jury foreman, Russell Gross, agrees, stating, "after looking at all the evidence, I now feel that Joe Amrine is completely innocent of the murder of Gary Barber, and I further feel 98% certain that the real killer was Terry Russell." (Ex. 1, p. 1). Gross bluntly states:

Based on the evidence I have seen and heard in this case, I believe that Joe Amrine is innocent of the murder of Gary Barber. If I had to decide

this case again based on all of the facts that I now know I would find Joe Amrine not guilty. I believe that we convicted the wrong man.

(Id., Ex. 1, p. 2).

There is no question that Ossman's deficient performance resulted in the conviction of an innocent man. Competent investigation, presentation of witnesses, cross-examination and argument would have resulted in a powerful case for Amrine's innocence. A reasonable juror would have no doubt that the witnesses against Amrine were not only motivated by overwhelming personal interests, but also that they were actually caught in significant lies about the crime itself. The testimony of other eyewitnesses, including the only corrections officer to witness the crime, would have added compelling weight to a defense claim that the state had charged the wrong man with murder.

For the foregoing reasons, this Court should grant habeas corpus relief on Mr. Amrine's claim of ineffective assistance of counsel.

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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_____

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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 20,116 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 2nd day of January, 2003, to:

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