Spring 2004

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Recommended Citation
Ryan Edward Shaw, Avoiding a Manifest Injustice: Missouri Decides Not to Execute the Actually Innocent, 69 Mo. L. Rev. (2004)
Available at: https://scholarship.law.missouri.edu/mlr/vol69/iss2/7

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Avoiding a Manifest Injustice: Missouri Decides Not to Execute the “Actually Innocent”

State ex rel. Amrine v. Roper

Are you suggesting, even if we find Mr. Amrine is actually innocent, he should be executed?

That’s correct, your honor.

I. INTRODUCTION

On April 29, 2003, the Missouri Supreme Court held, in a 4-3 decision, that Joseph Amrine (“Amrine”) presented clear and convincing evidence that he was actually innocent of a prison murder in 1985 for which he had been convicted and sentenced to death. The court, however, had to change the law in Missouri to reach that decision and set Amrine free. Amrine had petitioned the court for a writ of habeas corpus, alleging that his imprisonment and impending execution represented a manifest injustice because he was actually innocent of the crime for which he had been charged. Until the Amrine decision, Missouri followed the traditional approach to habeas relief in which a prisoner’s claim of actual innocence could be used to examine a constitutional violation at trial, but not to examine the evidence of actual innocence itself. Under the previous law, Amrine could have been executed even with persuasive evidence of actual innocence. In granting habeas relief to Amrine, the Missouri Supreme Court changed that. In so doing Missouri became one of only a handful of states granting a writ of habeas corpus on a freestanding claim of actual innocence.

The United States Supreme Court laid the groundwork for a freestanding claim of actual innocence at the state level in Herrera v. Collins, a case in which the Court ruled, ironically, that it would not recognize such a freestanding claim in federal courts.

This Note will examine Amrine’s case in light of the decision

1. 102 S.W.3d 541 (Mo. 2003) (en banc).
2. Adam Liptak, Prosecutors See Limit to Doubt in Capital Cases, N.Y. TIMES, Feb. 24, 2003, at A1. (This exchange took place between Judge Stith of the Missouri Supreme Court and Missouri Assistant Attorney General Frank A. Jung at a hearing on Amrine’s case on February 4, 2003.).
3. See Amrine, 102 S.W.3d at 548-49.
4. Id. at 545.
5. Id. at 545-46.
6. Id. at 547 n.4.
8. See id. at 416-17.
in *Herrera* and the subsequent cases; cases in which states made determinations about state habeas relief in response to the ruling of the United States Supreme Court.

II. FACTS AND HOLDING

On October 18, 1985, in one of the recreation rooms at the Jefferson City Correctional Center, someone stabbed inmate Gary Barber ("Barber") to death.\(^9\) Amrine, a prisoner at the facility, was charged with the murder after another inmate claimed he heard Amrine admit to the killing.\(^{10}\) Terry Russell ("Russell") was the man initially identified as the perpetrator by the officer on duty in the recreation room at the time but, upon questioning, Russell implicated Amrine.\(^{11}\) The State's case against Amrine consisted of the testimony of three inmate witnesses: Russell, Randy Ferguson ("Ferguson") and Jerry Poe ("Poe").\(^{12}\) Russell testified at trial that Amrine admitted to the murder.\(^{13}\) Ferguson testified that Amrine and Barber walked beside one another for several minutes before Amrine pulled a knife from his waistband and stabbed Barber. Poe did not describe the murder but testified only that he observed Amrine stab Barber.\(^{14}\) No physical evidence linked Amrine to the murder and, in his defense, Amrine introduced evidence showing that he was not the killer.\(^{15}\)

The officer on duty in the recreation room at the time of the stabbing testified that he had initially identified Russell as the perpetrator.\(^{16}\) It was Russell the officer thought he saw with Barber before Barber pulled the knife from his own back, collapsed, and died.\(^{17}\) Six other inmates testified that "Amrine was playing poker in a different part of the room at the time of the stabbing."\(^{18}\) Three of those inmates also identified Russell as the person with Barber.\(^{19}\) The jury, however, found Amrine guilty of Barber's murder and sentenced him to death.\(^{20}\)

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
Amrine appealed directly to the Missouri Supreme Court, which affirmed his conviction. Amrine then filed for post-conviction relief. At the hearing, Ferguson and Russell testified and recanted their trial testimonies, disavowing their identifications of Amrine as the murderer. "Poe did not appear or testify in any of the state post-conviction proceedings, leaving his trial testimony [implicating Amrine] intact." The circuit court denied Amrine’s petition for relief and, on appeal, the Missouri Supreme Court affirmed the judgment. At that time, the Supreme Court did not address the fact that Ferguson and Russell had recanted their statements against Amrine.

Amrine then sought habeas corpus relief in the United States District Court for the Western District of Missouri. The district court denied Amrine’s petition despite his argument that the recantations proved Amrine was actually innocent, noting both Amrine’s failure to produce any “new evidence” and the continued existence of the un-recanted testimony of Jerry Poe. The court did not address the credibility of the recantations of Russell and Ferguson.

Amrine obtained new counsel who succeeded in locating Poe, and Poe recanted his trial testimony in an affidavit. He denied having seen Amrine stab Barber and stated that his accusation at trial was false. The Court of Appeals for the Eighth Circuit ordered an evidentiary hearing in the district court to assess whether Poe’s affidavit warranted habeas relief for Amrine. At the hearing, Amrine presented the recantations of all three witnesses. The district court ruled that only Poe’s recantation was “new evidence” and that it was unreliable. The district court did not even consider the other two recantations

22. Amrine, 102 S.W.3d at 544. Amrine alleged ineffective assistance of counsel.
Id.
23. Id.
24. Id.
25. Amrine v. State, 785 S.W.2d 531, 536 (Mo. 1990) (en banc).
26. Amrine, 102 S.W.3d at 544.
27. Id.
28. Id. at 544-45.
29. Id. at 544.
30. Id. at 545.
31. Id.
32. Amrine v. Bowersox, 128 F.3d 1222, 1230 (8th Cir. 1997). “[A] petitioner may obtain federal habeas review of defaulted constitutional claims if new evidence establishes that it is more likely than not that no reasonable juror would convict in light of the new evidence.” Amrine, 102 S.W.3d at 545 n.2 (citing Schlup v. Delo, 513 U.S. 298, 331 (1995)).
33. Amrine, 102 S.W.3d at 545.
34. Id.
because it determined that those recantations were not new evidence. The Eighth Circuit affirmed the judgment. The United States Supreme Court denied certiorari on Amrine's appeal.

Amrine petitioned the Missouri Supreme Court for a writ of habeas corpus. Amrine's claim rested on the contention that all the available evidence established his innocence, and that his continued incarceration and eventual execution would constitute "a manifest injustice entitled him to habeas relief even though his trial and sentencing were otherwise constitutionally adequate." The issue was one of first impression in Missouri. The Missouri Supreme Court held that a defendant, sentenced to death, may assert a freestanding claim of actual innocence by a writ of habeas corpus independent of any constitutional violation at trial, and that the court will grant habeas relief if the defendant can make a clear and convincing demonstration of actual innocence. The court determined that the evidence Amrine presented at trial, along with the recantations, was clear and convincing and undermined confidence in the

35. Id.
36. Amrine v. Bowersox, 238 F.3d 1023, 1033 (8th Cir. 2001). The Eighth Circuit agreed with the district court's assessment of the recanter's testimony:

The district court . . . ruled that evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence. The testimony of . . . Russell and Ferguson was thus not new evidence, and the court did not err by deciding to focus on the testimony of Poe. The district court was to "make its own credibility determinations" in order to ascertain whether the new evidence proffered by Amrine was sufficiently reliable to warrant conducting a Schlup actual innocence analysis. After considering the videotaped deposition, the district court found that Poe was not a credible witness and that his recantation could not be relied upon. . . . This is a credibility determination which is entitled to
great deference, and we see no reason to overturn it. Id. at 1029 (citation omitted).
38. Amrine, 102 S.W.3d at 545.
39. Id. "Because the recantations were made over the course of [several] years and between rounds of federal court proceedings, no court has addressed, at once, all of the evidence" Amrine claimed showed his actual innocence. Id. Thus, the Missouri Supreme Court was the first forum in which all of the existing evidence of Amrine's claim was considered. Id.
40. Id.
41. Id.
42. Id. at 547.
43. Id. at 548.
original verdict.\textsuperscript{44} Accordingly, the court granted habeas relief and set aside the conviction and death sentence.\textsuperscript{45}

III. LEGAL BACKGROUND

A. Habeas Corpus Relief and "Gateway Claims"

The writ of habeas corpus has its origin in the English common law and was a remedy by which a person could challenge the legality of his or her imprisonment.\textsuperscript{46} Traditionally, the writ has been an important safeguard of individual freedom against arbitrary and lawless government action in that it allows a person to demand of his jailer a justification for his detention.\textsuperscript{47} The United States Constitution recognized the right of a prisoner to seek habeas corpus relief.\textsuperscript{48} The federal courts were also given the power to issue the writ in the original grant of federal jurisdiction.\textsuperscript{49} The Missouri Constitution recognizes and makes available state habeas corpus relief.\textsuperscript{50} Additionally, Missouri statute provides for habeas relief.\textsuperscript{51} "Missouri law provides that a writ of habeas corpus may be issued when a person is restrained of his or her liberty in violation of the constitution or laws of the state or federal government."\textsuperscript{52}

In \textit{State ex rel. Simmons v. White},\textsuperscript{53} the Missouri Supreme Court noted that habeas corpus relief is available in Missouri after a criminal conviction only in very limited circumstances.\textsuperscript{54} These limitations are the result of the need for finality in criminal proceedings and the respect afforded to trial court judgments.\textsuperscript{55} For example, courts in Missouri have discretion to issue the writ only when other remedies are inadequate or unavailable.\textsuperscript{56} Also, in order to avoid unending challenges, a person cannot raise in a habeas corpus proceeding

\textsuperscript{44} Id. at 548-49.
\textsuperscript{45} Id. at 549.
\textsuperscript{46} 39 AM. JUR. 2D Habeas Corpus § 1 (1999).
\textsuperscript{47} Id.
\textsuperscript{48} U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.").
\textsuperscript{49} Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789).
\textsuperscript{50} MO. CONST. art. I, § 12 ("That the privilege of the writ of habeas corpus shall never be suspended.").
\textsuperscript{51} MO. REV. STAT. § 532.010 (2000); MO. SUP. CT. R. 91.01.
\textsuperscript{52} State ex rel. Armire v. Roper, 102 S.W.3d 541, 545 (Mo. 2003) (en banc) (citing State ex rel. Nixon v. Jaynes, 63 S.W.3d 210, 214 (Mo. 2001) (en banc)).
\textsuperscript{53} 866 S.W.2d 443 (Mo. 1993) (en banc).
\textsuperscript{54} Id. at 445.
\textsuperscript{55} See id. at 446.
\textsuperscript{56} Id. at 445-46.
claims that could have been raised earlier on direct appeal or in a previous post-conviction proceeding.\textsuperscript{57} There are two exceptions to that rule.\textsuperscript{58} The first occurs when the petitioner uses habeas corpus to challenge jurisdictional issues.\textsuperscript{59} The second (the exception at issue in Amrine’s case) occurs when there exist “circumstances so rare and exceptional that a manifest injustice results” if habeas corpus relief is not granted.\textsuperscript{60}

In Simmons, the Missouri Supreme Court did not explicitly define what constitutes a “manifest injustice” for the purpose of habeas cases.\textsuperscript{61} But in Clay v. Dormire,\textsuperscript{62} the court adopted the standard enumerated by the United States Supreme Court in Schlup v. Delo\textsuperscript{63} and held that, in Missouri:

[T]he manifest injustice . . . standard requires the habeas corpus petitioner “to show that ‘a constitutional violation has probably resulted in the conviction of one who is actually innocent,’” and further, “[t]o 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].”\textsuperscript{64}

Thus, in Clay, the Missouri Supreme Court tied the manifest injustice exception to the petitioner’s probable showing of actual innocence based on new evidence.\textsuperscript{65} Adopting the position of the federal courts under Schlup, once this new evidence pointing to actual innocence was shown to the court’s satisfaction, the manifest injustice standard became a “gateway” for the court to reach the merits of the petitioner’s otherwise barred claim of constitutional error.\textsuperscript{66}

\textsuperscript{57} Id. at 446.
\textsuperscript{58} Id.
\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. 2000) (en banc).
\textsuperscript{62} Id.
\textsuperscript{63} 513 U.S. 298 (1995).
\textsuperscript{64} Clay, 37 S.W.3d at 217 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).
\textsuperscript{65} Id. The court found this tying together of actual innocence and the manifest injustice standard especially appropriate in Missouri because of “the fact that defendants are already afforded an initial habeas-like post-conviction relief proceeding under Rule 29.15 or Rule 24.035 in which constitutional claims (usually involving ineffective assistance of trial counsel) like those that so often appear in habeas corpus petitions may be presented.” Id. at 218.
\textsuperscript{66} Schlup, 513 U.S. at 315. “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 . . . .” Id. at 316; see also Herrera v. Collins, 506 U.S. 390, 404 (1993). It is important to note that under Clay we are not yet to the thrust of Amrine’s freestanding claim of actual innocence. While new evidence of actual
B. The Herrera Decision

But what if a petitioner attempts to use the manifest injustice standard not as a gateway for review of constitutional error at trial, but rather to assert that new evidence showing actual innocence makes continued imprisonment and (impending) execution itself unconstitutional? Such a "freestanding" claim of actual innocence came before the United States Supreme Court in *Herrera v. Collins.* In *Herrera,* the Court addressed the question of whether or not, in the absence of a constitutional violation at trial, a defendant's claim of actual innocence could serve as grounds for federal habeas corpus relief.

The state trial court in Texas found Herrera guilty of murdering two police officers and sentenced him to death. He appealed his conviction and sentence but the trial court's verdict was affirmed. He also filed three unsuccessful petitions for habeas corpus relief (two state and one federal) arguing evidentiary issues. Herrera then filed a petition for a second federal writ of habeas corpus, asserting new evidence demonstrating his actual innocence. He produced several affidavits: one from a lawyer who claimed Herrera's brother Raul (since deceased) had done the killing, one from Raul's son who claimed he had witnessed his father do the killing, and one from a schoolmate of Herrera and Raul who claimed Raul told him he had done the killing. Herrera claimed that because he was innocent his execution would violate the Eighth Amendment's prohibition against cruel and unusual punishment as well as the Fourteenth Amendment's guarantee of due process. The district court granted a stay of

innocence is necessary to meet the manifest injustice standard, this only gives the petitioner review of a claimed constitutional violation or violations at trial. Without such a claim, there is nothing to review once the petitioner passes "through the gateway." See *Schlup,* 513 U.S. at 316.

68. *Id.* at 398-99.
69. *Id.* at 394.
70. *Id.* at 395.
71. *Id.* at 395-96.
72. *Id.* at 396-97.
73. *Id.*
74. *Id.* Herrera argued:

[B]ecause there was no available post-conviction procedure for raising a claim of actual innocence, federal courts were required to provide habeas review. Herrera stressed that he had no existing avenue available to pursue these claims because he had missed the deadline for a motion for new trial and discovery of new evidence is not grounds for state habeas corpus relief. Herrera argued that due process consequently demands that the federal courts step in to guard a defendant's constitutional rights, especially in a capital case.
execution for an evidentiary hearing. However, the Court of Appeals for the Fifth Circuit vacated the stay and held that without an accompanying constitutional violation at trial, a claim of "actual innocence" was not grounds on which it could grant habeas relief. Upon the grant of certiorari by the United States Supreme Court, the Texas Court of Criminal Appeals granted a stay of execution pending the Supreme Court's decision.

The United States Supreme Court denied habeas relief to Herrera on his freestanding claim of actual innocence. The majority opinion, written by Chief Justice Rehnquist, generally affirmed the traditional view that a federal court would not grant habeas relief on a state criminal conviction absent a showing of a constitutional violation at trial. However, the Court did not rule definitively on whether the Constitution required habeas relief if a petitioner made a "truly persuasive demonstration of 'actual innocence.'" Chief Justice Rehnquist's majority opinion assumed for the sake of argument that if a demonstration were made it "would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim." Six other Justices were not so hypothetical. Three concurring Justices, along with three dissenters, all stated that the execution of an innocent person would clearly be a violation of the Constitution.

Without defining the necessary prerequisites to make such a "truly persuasive demonstration," the Court simply stated that, in the interest of finality,


75. *Herrera*, 506 U.S. at 397.
76. *Id.* at 397-98.
77. *Id.* at 398.
78. *Id.* at 416-17.
79. *Id.* at 416. For the traditional view, see *Townsend v. Sain*, 372 U.S. 293, 317 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992):

Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

"History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Herrera*, 506 U.S. at 417.

81. *Id.*
82. Justice O'Connor (joined by Justice Kennedy) and Justice White.
83. Justice Blackmun (joined by Justices Stevens and Souter).
84. See *Herrera*, 506 U.S. at 419-28 (O'Connor, J., concurring); *id.* at 429-46 (White, J., concurring).
a threshold showing would have to be "extraordinarily high." The Court held that Herrera had failed to make such a showing and that his new evidence fell "far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, arguendo, to exist."\footnote{86}

C. Post-Herrera State Decisions

Since the decision in Herrera, several states have addressed the same issue and have held that a freestanding claim of actual innocence, while not currently available at the federal level, is available for state habeas relief. In In re Clark,\footnote{87} the California Supreme Court, while refusing to grant habeas relief to a capital prisoner in that case, affirmed that it would recognize such claims based on actual innocence.\footnote{88} The court found it persuasive that in Herrera six of the nine United States Supreme Court Justices had expressed the belief that executing an innocent person violates the Constitution, even if the Rehnquist opinion did not explicitly say as much.\footnote{89} The Court found it unnecessary to constrain itself to the federal limitation requiring a constitutional error at trial.\footnote{90} Rather it stated, "A refusal to consider a claim of factual innocence based on newly discovered evidence would be [itself] constitutionally suspect in a capital case."\footnote{91} The court set a heavy burden on such claims, requiring the petitioner to present evidence that would "undermine the entire prosecution case and point unerringly to innocence or reduced culpability."\footnote{92}

\footnote{85. Id. at 417.}
\footnote{86. Id. at 418-19. The Court found Herrera's affidavits insufficient, noting that affidavit evidence in this context is disfavored. Id. The affidavits themselves were obtained over an eight year period with no explanation as to why they were not presented sooner. Id. There were credibility problems due to lack of opportunity to cross examine, and, other than Raul's son's affidavit, they consisted of hearsay. Id. The Court reasoned that the affidavits were being used for delay. Id. at 417-18.}
\footnote{87. 855 P.2d 729 (Cal. 1993) (en banc).}
\footnote{88. Id. at 760-61.}
\footnote{89. Id. at 760. While Justice Rehnquist's majority opinion only assumed a violation for the sake of argument, the concurring opinions of Justice O'Connor (joined by Justice Kennedy) and Justice White, along with the dissenting opinion of Justice Blackmun (joined by Justices Stevens and Souter) all expressed the view that the execution of an innocent person would be a violation of the Constitution. See supra notes 82-84 and accompanying text.}
\footnote{90. Clark, 855 P.2d at 760.}
\footnote{91. Id.}
\footnote{92. Id. at 761 n.33 (quoting People v. Gonzalez, 800 P.2d 1159, 1196 (Cal. 1990)): The requirement that a petitioner demonstrate his or her innocence requires more than a showing that the evidence might have raised a reasonable doubt as to the guilt of the petitioner. The petitioner must establish actual innocence, a standard that cannot be met with evidence that a reasonable jury
In *State ex rel. Holmes v. Honorable Court of Appeals for the Third District*, the Texas Criminal Court of Appeals also counted a majority of Justices in the *Herrera* decision as stating that executing an innocent person violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court found that a state writ of habeas corpus for a capital prisoner's claim of actual innocence was an "appropriate vehicle" to avoid such a constitutional violation. In line with *Herrera*, the *Holmes* court set a very high burden of proof for a petitioner in Texas. The court held that a petitioner must demonstrate that "based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could find proof of guilt beyond a reasonable doubt.'"  

The Texas Criminal Court of Appeals modified the high burden of *Holmes* in *Ex parte Elizondo*. While *Elizondo* was not a capital case, it included a lengthy discussion of *Holmes*. The court decided that a burden of proof for a freestanding claim of actual innocence was too high if it was "conditioned upon a finding that no rational juror could convict the applicant after introduction of the newly discovered evidence." Under that standard, exculpatory evidence can never outweigh inculpatory evidence, making relief impossible.  

When we conduct a legal sufficiency-of-the-evidence review . . . we do not weigh the evidence tending to establish guilt against the evidence tending to establish innocence. Nor do we assess the credibility of witnesses on each side. We view the evidence in a manner favorable to the verdict of guilty. In practice, this means we assume that the jury weighed lightly the exculpatory evidence and disbelieved entirely the exculpatory witnesses. We make this assumption no matter how powerful the exculpatory evidence may seem to us or how credible the defense witnesses may appear. If the inculpatory evidence standing alone is enough for rational people to

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94. *Id.* at 397.
95. *Id.* at 398.
96. *Id.*
97. *Id.* at 399.
99. The defendant had been convicted of aggravated sexual assault. *Id.* at 204.
100. *Id.*
101. *Id.*
believe in the guilt of the defendant, we simply do not care how much credible evidence is on the other side.\textsuperscript{102}

However, the \textit{Elizondo} court found that the lower "more probable than not" standard which was necessary for a "gateway" claim under \textit{Schlup} was too low a burden for a freestanding claim of actual innocence.\textsuperscript{103} A "gateway" claim under \textit{Schlup} rested on the petitioner's accusation that the verdict resulted from a constitutional error at trial, requiring a lower burden of proof on the petitioner since the basis of the verdict's constitutional validity is called into question.\textsuperscript{104} A freestanding claim of actual innocence must carry a higher burden because the verdict is the result of an error-free trial.\textsuperscript{105}

The court determined that the proper standard for a freestanding claim of actual innocence would allow the court to make a case-by-case determination of the reliability of the new evidence.\textsuperscript{106} The court could then directly weigh the new exculpatory evidence against the inculpatory evidence which was the basis for conviction.\textsuperscript{107} Because the jury's conviction at trial is considered valid, the job of the court is not to review its verdict, but to decide if the jury would have reached a different verdict in light of the new evidence.\textsuperscript{108} The court will then grant relief if the petitioner can convince the court "by clear and convincing evidence that no reasonable juror would have convicted him in light of the new evidence."\textsuperscript{109} Thus the "clear and convincing" standard articulated by the court in \textit{Elizondo} reached a middle ground between the "no rational juror" standard (which was too high) and the "more probable than not" standard (which was too low).\textsuperscript{110}

Connecticut and Illinois also recognize freestanding claims of actual innocence as appropriate for habeas relief and extend them to non-capital cases as well. In \textit{Summerville v. Warden, State Prison}\textsuperscript{111} the Connecticut Supreme Court decided the issue on non-constitutional grounds, basing its decision on the idea that habeas corpus is an inquiry into the fairness of a criminal proceeding.\textsuperscript{112} In the face of no procedural error, the court could still grant habeas review in

\textsuperscript{102} \textit{Id.} at 205-06 (citing Jackson v. Virginia, 443 U.S. 307 (1979)).
\textsuperscript{103} \textit{Id.} at 208-09.
\textsuperscript{105} \textit{Id.}
\textsuperscript{106} \textit{Elizondo}, 947 S.W.2d at 207.
\textsuperscript{108} \textit{Herrera}, 506 U.S. at 444 (Blackmun, J., dissenting).
\textsuperscript{109} \textit{Elizondo}, 947 S.W.2d at 209.
\textsuperscript{110} \textit{See id.}
\textsuperscript{111} 641 A.2d 1356 (Conn. 1994).
\textsuperscript{112} \textit{Id.} at 1368.
extraordinary cases. Because the conviction of an innocent person represents such an extraordinary case, the court determined its habeas corpus jurisprudence was not meant to prevent hearing a freestanding claim of actual innocence. Connecticut adopted the high standard of the California Supreme Court in Clark and denied relief in Summerville. However, it did so because that standard was argued by the petitioner. The court did not rule out adopting a different standard (such as clear and convincing evidence of actual innocence) in future cases.

In People v. Washington, the Illinois Supreme Court decided to recognize the freestanding claim in a non-capital case on state constitutional grounds. The court read Herrera as stating that, at least for non-capital cases, a freestanding claim of actual innocence was not available under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court noted that it was not obligated to interpret the Due Process Clauses of the Illinois Constitution and the United States Constitution in the same way, even though they are identical. After stating its belief that no person should be deprived of life or liberty in the face of compelling evidence of actual innocence, the court held "as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." The grant of habeas relief would depend on an evidentiary showing of actual innocence which was "of such conclusive character" as would 'probably change the result on retrial.'

In contrast Ohio and Virginia have held that a freestanding claim of actual innocence is an insufficient basis for habeas relief. In these cases, the state courts chose to abide by the federal rule and recognize a claim for habeas relief based on actual innocence only as a "gateway" to analyze a constitutional error at trial.

113. Id. The court argued from the standpoint of “cause and prejudice.” Id. (citing Murray v. Carrier, 477 U.S. 478, 496 (1986)).
114. See id.
115. Id. at 1375.
116. Id. at 1376 n.22.
117. Id. at 1376.
118. 665 N.E.2d 1330 (Ill. 1996).
119. Id. at 1335.
120. Id.
121. Id.
122. Id. at 1337.
123. Id. (quoting People v. Silagy, 507 N.E.2d 830, 834 (Ill. 1987)).
IV. INSTANT DECISION

A. The Freestanding Claim of Actual Innocence

In State ex rel. Amrine v. Roper, the Missouri Supreme Court first had to decide whether it would recognize, as a matter of first impression, a claim for habeas corpus relief on a freestanding claim of actual innocence. The court began its discussion by noting the traditional limitations on habeas review, including the time limitation on claims that could have been raised at an earlier proceeding. To get around this limitation, Amrine asserted the "manifest injustice" exception recognized in Simmons. The court agreed that the manifest injustice exception was applicable, stating, "It is difficult to imagine a more manifestly unjust and unconstitutional result than permitting the execution of an innocent person."

The use of the manifest injustice standard allowed the court to avoid an explicit ruling on the larger constitutional question of actual innocence taken up by several Justices in Herrera and by several state courts. After noting the opinions in Herrera in which six Justices argued that the execution of one who was legally and factually innocent would be a violation of the federal Constitution, the Missouri Supreme Court stated:

Article I, section 10 of the Missouri constitution similarly provides that "no person shall be deprived of life, liberty or property without due process of law." The constitutional guarantee of due process protects the individual from the arbitrary exercise of governmental power. Even were there no federal constitutional violation in the execution of an innocent person, this Court could find as a matter of state law that, as the purpose of the criminal justice system is to convict the guilty and free the innocent, it is completely arbitrary to continue to incarcerate and eventually execute an individual who is actually innocent. Because of our finding that such an execution would constitute a manifest injustice in this case, however, this Court, too, avoids finally resolving this issue today.

The court noted that normally proof of a manifest injustice would serve as a "gateway" to allow review of the petitioner's claims of constitutional error at

125. 102 S.W.3d 541 (Mo. 2003) (en banc).
126. Id. at 545-46.
127. Id. at 546.
128. Id.
129. Id. at 547.
130. Id. (emphasis added).
However, Amrine was not seeking "gateway" review of constitutional error as was available under Clay. Rather he admitted that he received a constitutionally adequate trial, but still sought habeas relief from his imprisonment and future execution. Thus, the Missouri Supreme Court had to determine whether it would bypass Schlup and Clay to recognize a claim for habeas corpus relief on a freestanding claim of actual innocence.

The court found that the wording of Herrera left open the possibility of recognizing such a claim when the United States Supreme Court, for argument's sake, stated that a federal court might entertain the idea if no "state avenue" existed. The Missouri Supreme Court stated that regardless of whether a federal court would review the conviction, a state court could review such a conviction if permitted by state law. Missouri state law expressly gives the Missouri Supreme Court the authority to review the evidence in death penalty convictions. The purpose of this review is to avoid wrongful convictions and executions. Because the execution of an innocent person would obviously result in a manifest injustice, the court determined:

[I]t is incumbent upon the courts of this state to provide judicial recourse to an individual who, after the time for appeals has passed, is able to produce sufficient evidence of innocence to undermine the habeas court's confidence in the underlying judgment that resulted in defendant's conviction and sentence of death.

Therefore, the court concluded, in the words of Herrera, that Missouri had "a state avenue" to process a freestanding claim of actual innocence and that the writ of habeas corpus was the appropriate means to assert such a claim.

131. Id. at 546.
132. Id.
133. Id.
134. Id. at 547.
136. Amrine, 102 S.W.3d at 546-47.
137. MO. REV. STAT. § 565.035.3 (2000). The court noted that this statute gave it the authority to look at not only the sufficiency of evidence in a capital case, but also to examine the "strength of the evidence." Amrine, 102 S.W.3d at 547; see State v. Chaney, 967 S.W.2d 47, 59 (Mo. 1998) (en banc).
138. Amrine, 102 S.W.3d at 547.
139. Id.
140. Id.
B. The Burden of Proof

In *Herrera*, the United States Supreme Court posited that the burden of proof necessary to establish actual innocence on a freestanding claim in federal court would be "extraordinarily high."\(^{141}\) Having recognized the existence of such a claim under Missouri law, the Missouri Supreme Court took up the question of the appropriate burden of proof for such a claim in Missouri.\(^{142}\) The court reasoned that the unique situation of the freestanding claim of actual innocence required a burden of proof that struck a balance between the proof necessary (1) to grant habeas relief due to a constitutional defect, and (2) to overturn a conviction on direct appeal.\(^{143}\)

Like the Texas Court of Criminal Appeals in *Elizondo*, the Missouri Supreme Court determined that the appropriate standard should be "clear and convincing" evidence of actual innocence.\(^{144}\) While the United States Supreme Court determined that the burden to demonstrate a showing of actual innocence is "extraordinarily high," the Missouri Supreme Court attributed that result to concerns of federalism on the part of the federal courts; such concerns did not affect the Missouri Supreme Court.\(^{145}\) Under the "clear and convincing" standard, evidence of actual innocence is persuasive to the court if "it instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true."\(^{146}\) The court required that Amrine's evidence meet this clear and convincing burden of proof.\(^{147}\)

C. Clear and Convincing Evidence of Actual Innocence

Examining the facts of the case, the court determined that Amrine met the standard of clear and convincing evidence of actual innocence.\(^{148}\) The court examined Amrine's conviction in light of all the evidence currently available in the case.\(^{149}\) Because the recantations of the three witnesses occurred over the course of several years, and different witnesses' testimonies had been examined in different court hearings, no single court had ever reviewed, at one time, all of

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143. *Id.* at 548.
144. *Id.*; see *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (en banc).
145. *Amrine*, 102 S.W.3d at 548.
146. *Id.* (quotation marks omitted).
147. *Id.*
148. *Id.*
149. *Id.*
Amrine’s evidence of actual innocence. Thus, the Missouri Supreme Court was the first appellate court to examine all the existing evidence in the case.

The court noted that there was already a significant amount of evidence introduced at trial which pointed to Amrine’s innocence. The officer on duty in the recreation room where the murder happened had initially identified Russell as the killer, not Amrine. Six inmates testified that Amrine was playing cards with them at the time of the murder. No physical evidence linked Amrine to the case, and the court noted that Amrine was convicted solely on three inmates’ testimonies. While this evidence was sufficient for the conviction, it was not overwhelming. Additionally, all three witnesses eventually recanted their testimony, making this case one of the rare situations where no credible evidence remained from the first trial. With three judges dissenting, the majority concluded that such a situation met the clear and convincing burden of proof.

150. Id. at 544-45.
151. Id. at 548.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id. at 548-49. Judge Benton filed a dissent stating that a hearing should be held in which a master would hear and evaluate the evidence. Id. at 550 (Benton, J., dissenting). Benton stated that because previous courts had examined all the recantations and found that they were not credible (and it is the credibility of the witnesses which is the issue) the court should not so readily overturn a conviction affirmed on appeal, a post-conviction hearing affirmed by the Missouri Supreme Court, and several reviews at the federal level. Id. at 551 (Benton, J., dissenting). Judge Price filed a dissent arguing that the majority’s “loss of confidence” in the verdict was not adequate to set it aside; rather Amrine must prove his innocence. Id. (Price, J., dissenting). That all three witnesses recanted only shows that they are liars, and the court must determine when they are lying before deciding to set aside the verdict. Id. at 552 (Price, J., dissenting). Judge Price agreed with Judge Benton that a master should be appointed. Id. (Price, J., dissenting). Price went on to say, however, that the court could set aside Amrine’s death sentence because under Missouri Revised Statutes Section 565.035.3 the court determines whether the death penalty is excessive based on “the strength of the evidence.” Id. (Price, J., dissenting) (quoting State v. Chaney, 967 S.W.2d 47, 60 (Mo. 1998) (en banc)). The “loss of confidence” that the majority has in the verdict is relevant in this analysis because “[a]n assessment of the death penalty cannot withstand this analysis when it is based solely upon the testimony of witnesses all of whom recant.” Id. (Price, J., dissenting). Thus, Judge Price argued that the court should set only the death penalty aside. Id. (Price, J., dissenting).
The majority stated that its confidence in the conviction and subsequent death sentence had been undermined and that it must be set aside.\(^{159}\)

Amrine was not granted immediate release.\(^{160}\) The court stated that because the evidence was sufficient at trial to convict, there would be no double jeopardy if the state elected to retry him.\(^{161}\) The court gave the state thirty days to refile charges before Amrine would be released.\(^{162}\) Amrine was released from prison on June 28, 2003, after the Cole County Prosecutor determined there was not enough evidence for a new trial.\(^{163}\)

V. Comment

In *State ex rel. Amrine v. Roper*, the Missouri Supreme Court broke new legal ground by adopting a new standard of review regarding claims of actual innocence for prisoners on Missouri’s death row. Before *Amrine*, the best a post-conviction habeas petitioner could have expected from a claim of actual innocence was that the court would use the claim as a “gateway” to examine whether there was a constitutional error at trial.\(^{164}\) A petitioner such as Amrine, who conceded a fair trial, would not have had a cognizable claim under the previous law. *Amrine* changed the law in Missouri. Now, a habeas petitioner may assert actual innocence in a writ of habeas corpus as a freestanding claim, and obtain relief if clear and convincing evidence of actual innocence is shown.\(^{165}\)

In *Amrine*, the Missouri Supreme Court chose to follow the lead of a small number of states in recognizing a freestanding claim, based on the United States Supreme Court’s decision in *Herrera v. Collins* which, ironically, had actually refused to grant the claim in a federal case.\(^{166}\) But because the *Herrera* opinion sent mixed signals, it made recognition of the claim possible in state courts. Six Justices (three concurring and three dissenting) agreed that the execution of an innocent person would violate the United States Constitution.\(^{167}\) Two concurring

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159. *Id.* at 549.
160. *Id.*
161. *Id.*
162. *Id.*
167. *See id.* at 419-27 (O’Connor, J., concurring) (joined by Justice Kennedy); *id.* at 429 (White, J., concurring); *id.* at 430-46 (Blackmun, J., dissenting) (partially joined by Justices Stevens and Souter).
Justices argued the contrary.\textsuperscript{168} The majority opinion upheld the traditional "gateway" test against the freestanding claim, but also made an \textit{arguendo} case for recognizing the claim if a state were about to execute an innocent person.\textsuperscript{169} As Justice Blackmun stated in his dissent, \textit{Herrera} "leaves the States uncertain of their constitutional obligations."\textsuperscript{170}

This uncertainty can be seen in the different rationales and results states have come to in their decisions to allow or not allow the freestanding claim. Courts in Texas and California recognized the claim and ruled that executing an innocent person violates the United States Constitution.\textsuperscript{171} Illinois extended habeas relief for freestanding actual innocence claims to non-capital cases through the due process clause of its own state constitution, regardless of whether protection could be extended through the Due Process Clause of the Fourteenth Amendment of the United States Constitution.\textsuperscript{172} Ohio and Virginia refused to acknowledge a constitutional violation and refused to hear freestanding claims.\textsuperscript{173} The Missouri Supreme Court in \textit{Amrine} avoided the federal and state constitutional questions altogether and found it sufficient to decide the case on the manifest injustice standard.\textsuperscript{174} The court did not address the availability of the freestanding claim in non-capital cases, but it is difficult to see why it would not be available in Missouri. If it is manifestly unjust to execute the innocent, one could make a strong argument that it is also manifestly unjust to incarcerate the innocent.

One thing that is clear is that in his majority opinion in \textit{Herrera}, Chief Justice Rehnquist was hesitant to grant the freestanding claim primarily out of a concern for the finality of state criminal convictions.\textsuperscript{175} The concern for finality is a powerful policy consideration. Criminal proceedings need to come to an end and should not be allowed to drag on indefinitely. An extremely important element in the \textit{Herrera} Court's emphasis on finality was a respect for federalism.\textsuperscript{176} It was the disruptive effect that the freestanding claim of actual innocence (made in a federal court) would likely have on a state's criminal justice system that was the most powerful influence persuading the Chief Justice to abstain from recognizing the claim in \textit{Herrera}.\textsuperscript{177}

\textsuperscript{168} See \textit{id}. at 427-29 (Scalia, J., concurring) (joined by Justice Thomas).
\textsuperscript{169} Id. at 417.
\textsuperscript{170} Id. at 439 (Blackmun, J., dissenting).
\textsuperscript{172} See People v. Washington, 665 N.E.2d 1330 (Ill. 1996).
\textsuperscript{174} See \textit{ex rel}. Amrine v. Roper, 102 S.W.3d 541, 547 (Mo. 2003) (en banc).
\textsuperscript{175} \textit{Herrera}, 506 U.S. at 416-17.
\textsuperscript{176} Id. at 416.
\textsuperscript{177} Id. at 417.
States, however, do not share this same concern for federalism. Thus, the states can more directly balance their interest in finality against the strong policy interest in punishing only those who are guilty and setting free those who are innocent. "After all," stated Chief Justice Rehnquist in *Herrera*, "the central purpose of any system of criminal justice is to convict the guilty and free the innocent."178 In *Amrine*, the Missouri Supreme Court decided that the state's interest in avoiding the execution of an innocent person was the controlling interest and recognized the claim in order to further that interest.179

Limiting habeas relief to "gateway" claims does not adequately serve the state's interest in avoiding the execution of an innocent person. Amrine's case is illustrative. He had persuasive evidence of actual innocence, but was caught up in a procedural nightmare that prevented him from presenting all the evidence at once. He could achieve no relief under the previous system because he had a constitutionally adequate trial. That result does not make sense. Actual innocence is actual innocence with or without a constitutionally adequate trial. The jurisprudence of "gateway" claims is, in the words of Justice Blackmun's dissent in *Herrera*, "perverse."180 As Blackmun noted, the only rationale behind refusing to grant habeas relief to a capital prisoner with persuasive evidence of actual innocence would be "the principle that habeas relief should be denied whenever possible."181

The policy of avoiding the execution of an innocent person also affected the burden of proof the Missouri Supreme Court set for the freestanding claim. The "extraordinarily high" burden espoused in *Herrera*, and followed by the California court in *Clark*, would essentially make relief impossible. The Missouri Supreme Court in *Amrine* followed the logic of the Texas court in *Elizondo*, setting the burden at a "clear and convincing" demonstration of actual innocence. The reasoning behind this standard is sound. It makes relief possible, yet does not show a lack of respect for a constitutionally adequate trial.

This burden will still, however, be a difficult one for capital prisoners to meet. Again, Amrine's case is illustrative. His conviction was based solely on the testimony of three prison inmates, one of whom was the original suspect. Even with all three witnesses recanting, an absence of any physical evidence connecting him to the crime, and eyewitness testimony at the scene identifying someone else as the killer, three judges on the Missouri Supreme Court were still not persuaded to rule that Amrine had met his burden. *Amrine* will undoubtedly lead to more petitions for habeas relief, but it will likely only be the rare capital prisoner who will have evidence equally or more persuasive than Amrine's.

178. *Id.* at 398.
179. *Amrine*, 102 S.W.3d at 547.
181. *Id.* at 439 (Blackmun, J., dissenting).
As Judge Wolff stated in his concurrence to the decision, "we [still] do not know whether Amrine is actually innocent." But we do know that he has persuasive evidence of actual innocence. The evidence that sent him to jail was the testimony of three people who, at one time or another, lied. Whether the death penalty is just at all is certainly a question open for debate, but it is certainly not just to send a man to his death at the hands of the state solely on the testimony of three prison inmates, all of whom have recanted the statements they made at trial.

VI. CONCLUSION

Joseph Amrine’s case clearly looms large in the debate over the death penalty in Missouri, and in the nation. Any time a person who may be innocent is subject to punishment at the hands of the government there is a risk of a major breakdown in the criminal justice system. But the issue takes on a heightened dimension when the death penalty is considered. The incarceration of the innocent is concerning enough, but one can hardly envision a more disturbing situation than the state’s execution of an innocent person.

The decision in *State ex rel. Amrine v. Roper* is a positive step for Missouri’s habeas corpus jurisprudence. Allowing the court to grant habeas corpus relief when a prisoner has made a clear and convincing showing of actual innocence, apart from a constitutional error at trial, is just one more opportunity to ensure (as much as possible) that the criminal justice system fulfills its purpose of convicting only the guilty and freeing the innocent.

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