

IN THE MATTER OF: JOSEPH AMRINE, CP48

**Potosi Correctional Center
Mineral Point, Missouri 63660**

**TO: THE HONORABLE BOB HOLDEN
Governor, State of Missouri**

APPLICATION FOR PARDON

**THIS IS A CAPITAL CASE
APPLICATION FOR WARRANT OF EXECUTION PENDING**

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PART I

SUMMARY OF ARGUMENT

I. INTRODUCTION

Although Joseph Amrine is innocent of the murder of Gary Barber, for which he is condemned to die, his plea that the courts hear and consider all of the evidence before passing judgment has fallen on deaf ears. If Mr. Amrine were brought to trial today on the evidence now available, the state could not produce enough evidence to take the case to a jury. Without exception, the jurors who were willing to discuss the case and review the new evidence have declared that, without a doubt, Joseph Amrine is innocent of the murder of Gary Barber. This includes jury foreman Russell Gross and jurors Larry Hildebrand and Bev Thoenan. Mr. Gross states that "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." Nevertheless, the courts have failed to prevent Amrine's execution for strictly technical procedural reasons that

bar the review of all the evidence in the case.

At his original trial, Amrine was convicted on the least reliable evidence imaginable, i.e. inmates who themselves were viable suspects in Barber's murder, whose testimony was contradicted by John R. Noble, the only corrections officer who saw the incident. Now, all three of Amrine's accusers, Terry Russell, Jerry Poe and Randall Ferguson, have admitted that they lied when they accused Amrine of killing Barber. Mr. David Knefelkamp, a highly qualified polygraphist with strong law enforcement credentials, recently tested Randall Ferguson and concluded that he was telling the truth when he declared that his trial testimony against Amrine was totally false. Officer Noble stands by his original report that he saw Terry Russell involved in the altercation with Barber, while Russell, Ferguson and Poe admit that they lied against Amrine to save themselves. Unfortunately, the courts have refused to review the evidence for technical procedural reasons having nothing to do with the integrity of Amrine's case for innocence.

The framers of the Missouri Constitution gave the Governor the power to issue pardons and commutations because, in their wisdom, they knew there would be cases in which the courts would fail to accomplish a just result. "The power to grant clemency, to remit punishment and pardon offenses is ancient and recognized in almost every nation."^[1] "It is a discretionary power, almost entirely unreviewable by the courts, and subject, typically, only to the standards and procedures as the state or national executive chooses to impose upon itself."^[2] In a decision erecting the very rule of procedure that barred Amrine from having his evidence considered by the courts, Chief Justice Rehnquist deliberately shifted the responsibility for such cases to the Governor:

Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted. In England, the clemency power was vested in the Crown and can be traced back to the 700's. . . .

Executive clemency has provided the "fail safe" in our court criminal justice system. (citation omitted).

It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.

Herrera v. Collins, 506 U.S. 390, 411-12, 415 (1993). Clemency is especially appropriate in this case because changes in the law designed to hasten executions have disabled the courts from correcting an obviously unjust conviction and sentence of death. There is not one scintilla of competent evidence presently linking Joseph Amrine to the death of Gary Barber. Further, there is persuasive evidence pointing to Terry Russell as the actual killer of Gary Barber.

II. SUMMARY OF THE PRE-TRIAL INVESTIGATION

In retrospect, it is clear where the investigation in this case slipped off track and focused on an innocent person.

Terry Russell, the actual killer of Gary Barber, was the one who brought Joseph Amrine's name into the investigation.

Although his motives were obvious, a decision was made early in the investigation to build a prosecution around Russell's accusation. A witness-by-witness summary of the key events in the case, in the order that each entered the investigation, makes it clear that Terry Russell avoided prosecution by framing Joe Amrine for the murder of Gary Barber.

Officer John Noble, a seasoned corrections officer at Missouri State Penitentiary (now known as Jefferson City Correctional Center), was watching inmates in the multi-purpose room at 2:25 p.m., October 18, 1985, when he saw what at first appeared to be two inmates, Terry "Tat-tat" Russell and Gary "Fox" Barber, engaged in "horseplay." Then Officer Noble saw Barber drop a homemade knife as he fell to the ground, blood running from nose and mouth. According to prison security procedures, the room was sealed, back up officers were called, and a stretcher was called to transport Barber to the infirmary, where he was pronounced dead. In the investigation that was launched simultaneously with these events, Officer Noble identified Terry Russell as the man he saw running from Gary Barber. Russell was taken into custody and questioned. 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 that attack, Barber and Russell were placed in disciplinary confinement, from which they were released barely two hours before the stabbing.

Terry Russell. Based on Officer Noble's eyewitness identification, Russell was questioned by authorities as a suspect in Barber's murder. Russell was acutely aware that he was the chief suspect in the stabbing. Russell was read his Miranda rights. He had fought with Barber only a week earlier, and this was the first contact they had with one another since being released from administrative segregation. Russell knew he had been identified by a corrections officer as the assailant. He was told by Cole County Deputy George Brooks that he would be charged with the murder of Gary Barber. 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.

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. According to Russell, he asked Amrine why he did it, and Amrine said, "Because I had to." Russell now admits that his trial testimony was false; he accused Amrine in order to deflect suspicion away from himself.

Joseph Amrine. Based on Russell's accusation, Amrine was questioned by Brooks as a suspect in Barber's

stabbing. Amrine made a voluntary statement in which he denied any involvement in the crime. 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. 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. A number of inmates verified Amrine's account.

Randall Ferguson was a young inmate who was being forced to submit sexually to stronger, more aggressive prisoners. At the time of Barber's stabbing, Ferguson was "owned" by inmate Clifford Valentine. 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. George Brooks questioned Ferguson about Barber's stabbing. 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. 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. Ferguson was questioned dozens of times before Amrine's trial. He adhered to this position, but changed his story at the last minute under circumstances discussed in further detail below.

Confidential informant. An unidentified confidential informant was interviewed and supposedly gave the following description of Barber's murder:

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). This first version of events—which placed Barber sitting at the card table when he was stabbed from behind—was never attributed to a specific source, beyond the "confidential informant" whose identity was never revealed. Based on other information related to the case, counsel for Mr. Amrine believes that this individual was Clifford Valentine, a sexually predatory inmate who, at the time, dominated Randall Ferguson and several other young prisoners.

George Brooks, a Cole County Deputy Sheriff who had previously served as chief investigator for the Missouri State Penitentiary, was in charge of the investigation into Barber's death. He used his standard approach to investigating prison incidents. First, he ordered corrections officers to prepare handwritten reports of the incident. Then Brooks reviewed the reports, and edited them to fit his theory about what occurred. He admitted that he would "iron out" any "inconsistencies" in the officers' statements. (Hrg. Tr. 107). The edited reports were then typed and returned to the officers for their signatures. The original handwritten reports were destroyed. This process produced a report by Danny Bower corroborating Russell's spurious alibi. Bower claimed that, as he was responding to the scene of Barber's assault, he encountered Russell in the hallway near a control center – a location where inmates were not generally allowed.

Based on the above information, Brooks prepared a report on October 21, 1985, for Superintendent Bill Armontrout accusing Amrine of Barber's death, giving the confidential informant's version of the stabbing.

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. 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. 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.

Poe later admitted that his statement and testimony against Amrine were false, and were motivated by his desire for protection from sexual predators in the prison. His sworn testimony was captured on videotape, the transcript of which is submitted as Exhibit 6. 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." (*Id.* at 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, despite his insistence that he saw nothing, was approached again and again about becoming

a witness against Amrine. George Brooks testified in post-conviction proceedings that Ferguson was questioned about Barber's death as many as thirty times, and each time he denied having witnessed the murder. Brooks explained his persistence in pursuing Ferguson as a witness:

Well, you'd have to consider Inmate Ferguson's position at that time. And that position, from my professional opinion, was that *Inmate Ferguson was very easily coerced*. In other words, his particular situation inside the penitentiary was what a person told him to do. And the person that I would refer to would be what I consider to be his homosexual partner or daddy, if you want to refer to it in that nature. As long as he's under his influence, he's going to do what he says.

(29.15 Tr. 313-14) (emphasis added). Finally, in response to Brooks' repeated interrogations, a promise for protective custody and the dismissal of pending felony weapons charges, Ferguson agreed to testify against Amrine. This occurred in April, 1986, less than two weeks before Amrine's trial.

Ferguson's April statement set forth a third scenario for Barber's stabbing, and the one the state elected to present at trial. In sharp contrast to the versions of the offense provided by the 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. The prosecutor avoided the discrepancies with the prior versions by simply not asking Poe to describe the stabbing. Ferguson also described an elaborate plot involving a number of other inmates to deliver the murder weapon to Amrine. Although he mentioned several by name, no one was ever charged as an accomplice in the stabbing. The defense did nothing to expose the serious flaw in the state's case.

Ferguson now admits that his testimony at trial against Amrine was false, and a recent polygraph test reveals that he is now telling the truth. He did not see Joseph Amrine stab Gary Barber.

Though stripped of extraneous detail, the above summary is a fair and objective statement of the evidence developed by the prison investigation prior to Amrine's trial. Clearly, the state's case had serious problems from the very beginning. Unfortunately, the discrepancies and weaknesses in the state's case were never made clear to the jury, for reasons explained in more detail below.

III. JOSEPH AMRINE'S JURY TRIAL

Joseph Amrine was defended at trial by Julian Ossman, a former public defender who is legendary in the Missouri Bar for his incompetence in the defense of capital cases. At the same time Ossman was representing Amrine, he was also "defending" Eric Clemmons, an innocent defendant who spent fourteen years on death row in the August, 1985, prison killing of inmate Henry Johnson. See *State v. Clemmons*, 753 S.W.2d 901 (Mo. banc 1988). Based on Ossman's incompetence, the Eighth Circuit Court of Appeals granted Clemmons a new trial, and Clemmons was subsequently re-

tried and found innocent of Johnson's murder. *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997). In the *Clemmons* case, Ossman failed to investigate the case and present evidence to impeach the testimony of prosecution witnesses. His performance in this case was deficient in precisely the same manner.

In sharp contrast to defense counsel, then-prosecutor Tom Brown presented the state's evidence in a skillful and effective manner. As a result, the state's case against Joe Amrine was presented to the jury in a polished and coherent manner, without any challenge by the defense. On the other hand, none of the substantial questions surrounding the credibility of the state's case – including the identity of the true killer – were presented to the jury.

The prosecution avoided the significance of Officer Noble's observations by eliciting testimony that he might have been mistaken that Terry Russell was the assailant, and by presenting other evidence through Officer Dobson that Noble "froze" out of fear after the stabbing. Though Noble stands by his original identification, and adamantly denies Officer Dobson's claim that he failed to take quick, decisive action in response to the incident, Ossman did not give Noble a chance to explain his observations and actions to the jury.

The prosecution also avoided another serious defect in its case, the dramatically divergent description of the crime by every single witness, by eliciting only one version of the crime from one witness, Randall Ferguson. Poe's description of the crime was omitted from his testimony. Again, Ossman failed to inform the jury that Poe's account of the stabbing was completely at odds with Ferguson's.

Ossman did not challenge Poe, Ferguson or Russell on their strong motives to fabricate their testimony against Amrine. He did not explain to the jury the value of the prosecutor's promise of protective custody to Ferguson and Poe. Ossman did not inform the jury that Russell was the first suspect in Barber's death, and that he and Ferguson both received immunity from prosecution for Barber's murder by implicating Joseph Amrine. He did not challenge Russell's testimony with evidence of prison security procedures that make his alibi claim totally implausible. He did not prove that Russell's claim that he was talking with another inmate named Johnny or Harry Heard was a flat-out lie – prison records reveal that no such person was incarcerated in that prison on that date. Trial counsel made no attempt to interview Harry or Johnny Heard. If he had, he would have learned that there was no such inmate by either name in the Missouri State Penitentiary when Barber was stabbed.^[3] See Ex. 7C.

Second, counsel failed to elicit Russell's admission in his deposition that inmates at the control center were asking him about the 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. (Hrg. Tr. 73, 79). Counsel simply failed to conduct a reasonable investigation.

By all appearances, and by his own admission, Terry Russell lied against Amrine to save his own skin from prosecution for stabbing Gary Barber. A competent, lawyer-like challenge of his credibility would have caused a reasonable juror to have reasonable, if not serious, doubts of Amrine's guilt.

Trial counsel further failed to introduce prior statements of Jerry Poe and Randy 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 Randy 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. (Trial Tr. 428). The prosecutor skimmed over this aspect of Poe's testimony, 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, not only did he at first claim that Barber was struck from behind, but also that the assailant took the knife with him, which is refuted by Officer John Noble's testimony at trial. 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 through there, and this guy just came right up right*

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. The jury heard only Ferguson's version of the crime. Trial counsel's feeble attempt at cross-examination merely reshaped Poe's direct examination. Ossman did not even attempt to expose Poe's original statement, which was fundamentally inconsistent with Ferguson's. Effective representation would have injected serious doubts about the truthfulness of all three of the state's indispensable witnesses.

Ossman failed to interview Kevin Dean-Bey and Ronnie Ross, potential witnesses for the defense. Ross testified that he was with Amrine, watching him play cards, when Barber was stabbed. (29.15 Tr. 124-25). Kevin 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). The lower courts rejected this aspect of Amrine's claim because such testimony was "merely cumulative" of Amrine's other alibi witnesses. 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). Applicant 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.

The prosecutor vigorously argued that the 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 Joe's clothing? Got any explanation for that blood on the same clothes he was wearing in that room? Mr. Ossman didn't address that. And maybe he had so many other 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) (emphasis added). 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 clothes 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 Highway Patrol 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.

The statements of jurors in this case make it clear that the state’s flimsy case made it through the trial unscathed because of Ossman’s poor performance. The foreman of the jury, Russell Gross, recalls that “[t]he 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.” (Ex. 1, p. 1). Likewise, juror Larry Hildebrand had misgivings about the fairness of the trial. “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.” (Ex. 2, p. 1). Juror Hildebrand confirms that Ossman’s defense was so inept that the jury never even discussed the key issues in the case. “In spite of [Officer John Noble’s] 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.” (*Id.* at 2).

Jurors now know that Ossman had plenty to work with. Russell Gross states, “After being fully informed of the evidence in the case, I now think that Terry Russell killed Mr. Barber.” (Ex. 1). Larry Hildebrand agrees, stating:

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 that 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.

(Ex. 2, p. 3).

The only witnesses who stand by their testimony at this time are those who say that Joe Amrine is completely innocent in the death of Gary Barber. This includes Officer John Noble, the only corrections officer who saw the crime, and several inmates who were playing cards with Mr. Amrine when Terry Russell stabbed Gary Barber. There is no physical evidence implicating him in the crime. Amrine’s only accusers are inmate-informants who made contradictory statements in exchange for their own safety and freedom, who now admit that they lied at Mr. Amrine’s trial. All of the

evidence now points unerringly toward Amrine's innocence.

Unfortunately, the courts have not seen fit to correct this blatant miscarriage of justice in this case for technical procedural reasons. The evidence of Amrine's innocence has trickled in piece-by-piece over the course of the last fifteen years. Because the courts have adopted a restrictive definition of "new evidence," the most persuasive evidence of Amrine's innocence has never been considered by the courts. While Mr. Amrine argued that "new" evidence should include any reliable evidence that the jury did not hear, the courts have restricted the scope of new evidence to that which could not have been discovered "earlier" through the use of due diligence. Under that standard, if the evidence could have been found and presented by Julian Ossman at the time of trial, the courts could not consider it in support of Amrine's present claim of innocence. Because of the piecemeal course of litigation of the case, and Ossman's incompetent performance, no judge has ever looked at the evidence in the case in its entirety to determine whether Joseph Amrine is actually innocent. As a result, the judicial process has utterly failed to produce a reliable result in this case, and an innocent man stands condemned to die.

The above summary states the essence of the case for Mr. Amrine's innocence. Counsel for Mr. Amrine understands that claims of innocence by death row prisoners are typically viewed with skepticism. This case, however, is exceptional. Should the Governor doubt any aspect of the facts exonerating Mr. Amrine, a more detailed explanation of the new evidence, and its bearing on Mr. Amrine's innocence, is set out below.

PART II

ARGUMENT AND EVIDENCE IN SUPPORT OF AMRINE'S ACTUAL INNOCENCE

The only witness who stands by his trial testimony, Corrections Officer John Noble, declares that Terry Russell is the person who killed Gary Barber. All testimony against Joseph Amrine has been recanted. The St. Louis Post-Dispatch has analogized this case to "Executing Without Evidence." (Ex. 10). Though the recantations of Poe, Ferguson and Russell have been viewed with skepticism, the evidence as a whole shows that it is the trial testimony against Amrine that is not to be trusted.

I. THE MOST RELIABLE EVIDENCE POINTS TO AMRINE'S INNOCENCE.

Officer Noble is the only witness in this case who has no ax to grind and nothing to gain or lose from his testimony. He is the only eyewitness to the crime who is not a convicted felon, never received any deals or consideration

for his testimony, and clearly had no involvement in Barber's death. He has consistently given the same exculpatory information, which was distorted at trial by the prosecutor's skillful efforts to minimize the probative value of his observations. He has no doubt that he identified the person who was involved in the altercation with Barber. Although the prosecutor was able to draw out for the jury an apparent equivocation on his identification, Noble explained to the district court that he was simply unsure of the inmate's name. After the perpetrator was apprehended, searched and questioned, according to Noble, "it turned out to be Terry Russell." (Hrg. Tr. 61). Surprisingly, the state opted to disregard Noble's observations and rest its case on the highly suspect and inconsistent testimony of three inmates who had much to gain by naming Joe Amrine. The reliability of the state's inmate-informants must be measured in light of Noble's more trustworthy observations.

A. The Testimony of Amrine's Witnesses that Amrine was Playing Cards When Barber Was Killed is Consistent With the Testimony of Eyewitness John Noble.

Amrine's persistent assertion of his innocence is corroborated by a plausible alibi defense. A number of prisoners testified that they were in the recreation room playing cards with Amrine when Barber was stabbed. **James McChan** testified that he was sitting at the card table playing cards with Amrine and others when the disturbance occurred. (Trial Tr. 502). Like John Noble, he turned to see Barber chasing Terry Russell, whom he knew as "Tat-tat," shouting, "I'm going to get you." (Trial Tr. 503-05). **John Ball** was running the card game that was in progress when Barber was stabbed. He remembered that the card game included Amrine because "I still had a full house." (Trial Tr. 531). He saw Russell standing by some benches near a guard when Barber collapsed and died (Trial Tr. 520), which is consistent with Noble's testimony that Russell was in the room when Barber was stabbed. (Hrg. Tr. 61-62). **Cornelius "Red" Dodson** was also playing cards with Amrine when Barber was stabbed. (Trial Tr. 538-39). Like Officer Noble, Dodson said it appeared that Barber was chasing Tat-tat. (Trial Tr. 540-41). **Brian Strothers** testified that Joe Amrine was at the poker table when Barber was stabbed. (Trial Tr. 554-55). He saw Barber chase Tat-tat, then fall to the floor. (Trial Tr. 557-58, 564).^[4] **James Louis** was standing by the poker table when he saw Gary Barber chase Terry Russell after he had been stabbed. (Trial Tr. 578, 585). He testified that Amrine was at the poker table at the time. (Trial Tr. 582-85).

B. Terry Russell, The First Inmate to Accuse Amrine, Testified Against Amrine to Avoid Prosecution for Barber's Murder.

Mr. Amrine became a target of the investigation in this case only when the prime suspect, Terry Lee Russell,

was apprehended and questioned within minutes of the stabbing, after Officer Noble identified Russell as the perpetrator. Russell and Barber had fought a week before the stabbing, and they had been released from disciplinary confinement that very morning.^[5] Unaware of the bad blood between Barber and Russell, Officer Noble reported that he had seen Russell fleeing from Barber. Russell admitted that, to deflect suspicion away from himself, he pointed the finger at Amrine because he knew of a prior conflict between Amrine and Barber:

- 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.

(Hrg. Tr. 29-30) (emphasis added). In addition to avoiding prosecution for the murder of Gary Barber, Russell's unholy alliance with prison investigators earned him protective custody and a prosecutorial commendation to the parole board that gained his release so he could kill again. (Hrg. Tr. 20).

C. The Testimony of Randall Ferguson, Jerry Poe and Terry Russell Was Given in Exchange for Protection From Sexual Predators and Other Consideration.

The investigation into the murder of Gary Barber produced false statements by all three inmate witnesses for the

prosecution. Today each of the three men who testified against Joe Amrine admit that they lied for their own benefit.

Terry Russell and Randall Ferguson were both viable suspects in Barber's murder when they implicated Amrine. Russell testified, without contradiction, that an investigator from the Attorney General's office told him he could be prosecuted for the murder of Barber if he testified on Amrine's behalf at the district court hearing. (Hrg. Tr. 45). Randall Ferguson also admitted at trial that he testified against Amrine to "save my own ass." (Trial Tr. 928). Ferguson was concerned that "[i]f I didn't testify to what I seen, you know, charges could have possibly been put on me." (*Id.* at 929).

Terry Russell's eagerness to accuse Amrine to save his own skin effectively ended the search for the truth. Instead, prison investigators looked for vulnerable snitches willing to echo Russell's accusation of Amrine in exchange for protection or to keep their parole dates. In Jerry Poe and Randall Ferguson, they found two particularly vulnerable and susceptible young men who were willing to fabricate testimony in return for protection from the sexual predators that were rampant in the Missouri State Penitentiary. Prison investigator George Brooks admitted that he could have coaxed Ferguson to say anything with an offer of protection. The atmosphere of sexual exploitation of young prisoners was a tremendously coercive tool that the prison investigators utilized to secure the cooperation of Poe, Ferguson and Russell. Ferguson describes the pressure he felt to give false testimony:

- A. After I gave this statement, they turned the tape recorder off, and George Brooks asked me if they took me out of the prison, protect me, if I would change my story.
- Q. Why would he ask you if you needed protection, do you know?
- A. Because they knew what was going on with me being forced into homosexuality and all that. They knew what was going on . . . They never did anything to stop it, but they knew.
- Q. And how important was that to you to get away from that?
- A. Oh God. It was real important. I -- I was having a hard time living with myself. It was -- oh, it was real important, because it hurt, you know, so much. Not just physically to be raped, but inside, you know. So it was real important. I -- I just couldn't take it no more.

(Ex. 4, p. 21). It appears that Ferguson's age and vulnerability to sexual predators in the penitentiary were exploited to coax him into giving testimony with was badly needed to make a case against Amrine.

Although Ferguson was taken into custody because blood had been observed on his face (Hrg. Tr. 101-02), Brooks admitted that "I didn't really interview him at that time." (Hrg. Tr. 108). Brooks testified that it was not until the following April, when he was helping the prosecutor prepare for trial, that he made a deal for Ferguson's testimony against Amrine. He began his "investigation" of Ferguson's knowledge of the crime by telling him that the state wanted his testimony very badly. Ferguson learned at that point that the state was willing to trade almost anything for testimony against Joe Amrine. Before Brooks advised Ferguson of his bargaining position, Ferguson had adamantly denied having

seen the murder:

- Q: (by Brooks) Could you tell us what you saw.
 A: I don't know. *I didn't see nothing.*
 Q: You didn't see anything?
 A: Yeah.
 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: Did you see Barber at all?
 A: I seen him lying on the floor after he was dead.

(Ex. 4, Dep. Ex. 3) (emphasis added). Yet despite his initial account that he saw nothing, Ferguson has now admitted that he leaped at the opportunity for protection from the forced homosexuality and degradation which the Department of Corrections had previously denied him. (Ex. 4, p. 21). By dangling the carrot in front of Ferguson *before* making his formal written statement, Brooks assured that Ferguson would implicate Amrine even if he were innocent. This is precisely why Brooks focused on Ferguson in the first place. Brooks admitted that "*my professional opinion was that Inmate Ferguson was very easily coerced.*" (29.15 Tr. 313-14) (emphasis added).

A number of factors establish that the investigation focused on nailing Amrine, rather than searching for the truth. When Ferguson was taken into custody for questioning, Brooks allowed his penitentiary "daddy," Clifford Valentine, to accompany him, which is highly unusual. (Hrg. Tr. 102). Valentine's presence was particularly inappropriate given the nature of his relationship with Randall Ferguson, and the influence Valentine had over Ferguson both mentally and physically. Ferguson described the pain and humiliation he was suffering at his hands:

- Q. Were you having any special problems in the Missouri State Penitentiary in 1985?
 A. Yes sir. I'm sorry.
 Q. Sure. Can you tell me what those problems were?
 A. I was being forced in homosexual stuff by Clifford Valentine and others.
 Q. When you say homosexual stuff, can you describe what they were doing to you?
 A. I was forced to have sex with men; oral sex and anal sex.
 Q. What would happen if you refused to cooperate?
 A. I would get hurt.
 Q. And were you ever actually hurt?
 A. Yes. At one time an officer let another inmate into my cell, and closed the door, and he beat me up, and then forced himself on me. He had sex with me forcefully. He raped me.
 Q. What was your relationship with Clifford Valentine in October of 1985?

- A. He was the big guy that was forcing me into sex, but he was also the only one strong enough to protect me.

(Ex. 4, pp. 12-13). Valentine's dominance of Ferguson is particularly significant in light of the fact that Valentine pressured Ferguson to cooperate with Brooks' investigation and testify against Amrine. Ferguson explained:

[H]e (Valentine) did tell me he wanted me to testify, you know, because they was talking about giving him TVs and stuff, but it wasn't really a physical thing, you know. It was more of, like - well, I mean, I was always scared of him. So he didn't have to beat on me or nothing to threaten me, you know. It was words, you know. They was talking about giving him TVs, and he wanted me to testify, is what he was saying then.

(Ex. 4, p. 46). Furthermore, Valentine's cell was directly adjacent to Ferguson's -- there was no escape from him.

Although Brooks knew that Ferguson was the target for Valentine's sexual abuse, he had done nothing to protect him up to this point. When his questioning about Barber's stabbing was preceded by a promise of protective custody, Ferguson was willing to do anything to protect himself. Ferguson's sworn deposition recanting his trial testimony includes a tearful account of his decision to lie against Joe Amrine in order to escape the abuse and humiliation of being Valentine's penitentiary punk.

George Brooks verifies Ferguson's fear of Valentine and Valentine's dominance of Ferguson. Brooks testified that Valentine insisted upon accompanying Ferguson to the control center for questioning and investigation. Amazingly, Brooks allowed it to happen. (Hrg. Tr. 102). It also suggests a shoddy investigation in which Ferguson was eliminated as a suspect with no investigation whatsoever into his possible involvement in or knowledge of the stabbing. (Hrg. Tr. 108-09).

The specter of prosecution was also used to pressure Randall Ferguson:

Q. Now, were there any promises made to you regarding your testimony that do not appear in the exhibit?

A. Yes sir.

Q. And what were those promises?

A. That I would -- I got a radio from Richard Lee. He gave me a radio to use while I was in jail, and that -- that -- I was told that I would stay in the jail until my next parole hearing, which would have been in the following February, and that if I went somewhere else, that I would get a T.V. from George Brooks, and that *they wouldn't press charges on me for killing Gary Barber.*

Q. *Had they suggested to you that that was a possibility?*

A. *Yeah.*

Q. And were you worried about that.

A. *Yeah. I was -- I was scared, because they -- they kept saying I had blood on me and stuff. I didn't know.*

(Ex. 4, pp. 27-28) (emphasis added). Thus, at least two of the three inmate witnesses testified against Amrine out of fear

of being prosecuted themselves for the murder of Gary Barber.^[6]

Jerry Poe also testified convincingly that he was pressured into giving false testimony against Amrine. Poe was told that if he did not testify against Amrine, he would nevertheless be labeled a snitch and put back into the general population -- essentially a death threat in that environment. (Ex. 6, p. 13). As inducement, he was offered protective custody. Brooks even raised the possibility of out-of-state custody and asked him to make a first choice and two alternate selections from a list of twenty-eight member states of the Uniform Interstate Corrections Compact. (Ex. 6, pp. 11-12). 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). Ferguson and Russell also were immediately put into protective custody as a pre-condition to speaking to Brooks about Barber's murder. (Hrg. Tr. 103-04; Ex. 4, p. 21).

II. THE PRESENT CASE FOR AMRINE'S INNOCENCE IS FAR MORE RELIABLE THAN THE EVIDENCE USED AGAINST HIM AT TRIAL.

Judge Fernando Gaitan, with little or no analysis, speculated that the recantation of the state's critical witnesses should not be believed because they are inmates. Those factors apply with equal or greater force to the testimony they gave against Amrine at his trial. Contrary to the pressure and inducements used to obtain testimony on behalf of the state, Amrine's counsel had nothing to offer witnesses in exchange for their cooperation and truthful testimony. Mr. Poe explained it well:

- Q. (by Mr. O'Brien) Of course, you understand I'm just a --
 A. Yes.
 Q. -- private lawyer?
 A. You ain't got pull like the attorney general's office and all these, you know. If it was the prosecution that was, you know, offering to transfer you and all that stuff, it would be as good as done, you know.
 Q. Uh-huh.
 A. But it ain't like that with the defense.

(Ex. 6, pp. 27-28). In spite of the tools of persuasion still at the disposal of the State of Missouri, including explicit threats of prosecution for perjury and/or murder, each and every witness who claimed that Amrine was involved in Barber's stabbing has repudiated that testimony under oath.

The Governor should consider the fact that all of the inmates acknowledge their liability for potential perjury prosecutions as a result of their testimony. The prosecutor in post-conviction proceedings explicitly raised the possibility to Ferguson that such charges could be filed:

- Q. (by Assistant Attorney General Patricia Joyce) Do you know what the penalties for perjury in a murder trial are?

- A. No, I don't.
- Q. It's a class A felony where you can get life imprisonment. It's your testimony today you lied when Joseph Amrine went on trial and that none of your testimony was correct?
- A. Yes.

(29.15 Tr. 105). This is particularly significant in light of each witness' hopes for release on parole at the time of their recantations.

Jerry Poe: In his sworn affidavit, he states unequivocally that he lied against Joe Amrine:

I am really sorry for what I have done to Joe Amrine. I lied on this man because I was afraid and I hope it is not too late to right a wrong. I am not saying Joe Amrine didn't stab this man because he might have. What I am saying is that I didn't see him or anyone else stab him. I hope someone will finally listen to me this time and I will be glad to testify about what I know about this case.

(Ex. 6, Dep. Ex. 3, p. 9). He testified consistently with his affidavit:

- Q. Now you ended up testifying for the state at Joe Amrine's trial --
- A. Yes.
- Q. -- you saw Joe Amrine stab Gary Barber in the back; do you recall that?
- A. Yes.
- Q. Was that testimony true?
- A. No; it wasn't.
- Q. Did you see anything on that day that indicated that Joe Amrine had anything to do with the death of Gary Barber?
- A. No. Because I didn't even -- like I said, I didn't know none of them people. I didn't know who was who or anything.
- Q. So why did you give false testimony in Joe Amrine's trial?
- A. I don't know. I was just young, and they scared me into telling them what they wanted to hear, you know.
- Q. So the prospect of being labeled a snitch and thrown back into the general population was the reason that you did this?
- A. Yes.

(Ex. 6, pp. 16-17). As noted above, Poe had strong motives to lie. His accusation of Joe Amrine is refuted by the observations of Officer John Noble; his present account of what he saw is the only one on which the Governor should rely.

Randall Ferguson: Ferguson's testimony admitting that he lied against Amrine is truly persuasive. He was so distraught by his role in sending an innocent man to his execution that he immediately, upon hearing the verdict against Joe, began writing letters stating that he had lied. He eventually attempted to confess to murdering Barber himself:

- Q. Why is it that you wanted to confess to the murder of Gary Barber?

- A. Because originally I testified against Joseph Amrine for the murder of Gary Barber, and my testimony was lies. And I just don't think I can live with myself if Joseph Amrine was to be killed because I lied on him, and I would rather myself die than to see him die because of me. You know, I just -- I tried to kill myself several times because of this. I've lived with it 13 years now, and you know, and I just -- I couldn't take it no more. And for twelve, 13 years, I've tried to tell the truth, and nobody has listened, nobody has took me serious, until all of a sudden I came out and said I did it. You know, and for 13 years I've told the truth, and nobody will listen. And then I knew that Joseph's time had been running out, because he has been on death row for so long, I just didn't want to see somebody else die because I lied on him.
- Q. And you thought they might pay more attention to you if you were actually confessing to the crime?
- A. If -- yes.

(Ex. 3, pp. 9-10). Ferguson also wrote to Presidents Bush and Clinton, and sent written requests to his prison caseworker to help him come forward and correct this injustice. His strong determination to clear Amrine is clearly a matter of conscience, and not consistent with any other goal he could hope to attain by coming forward with the truth.

When given the opportunity, Ferguson repudiated under oath every aspect of his trial testimony. He admitted that he entirely made up the conversation that he told the jury had taken place between Amrine and an inmate named Joe Moore, in which Amrine allegedly announced his intention to kill Barber. (Ex. 3, pp. 29-30). He testified that the conversation between Amrine, Dean-Bey, Valentine and Hutchinson in which they planned to stab Barber likewise never happened. (Ex. 3, pp. 30-31). Although he saw the fight between Russell and Barber the week before the stabbing, he did not see Amrine anywhere in the vicinity. (Ex. 3, p. 33). He admitted that he made up the whole charade about Saddler lowering a knife down the cell block on a string. (Ex. 3, pp. 36-37). He testified that he did not see Omar Hutchinson plant the knife, nor did he see Joe Amrine retrieve it. (Ex. 3, pp. 39-40). He readily admits that he lied when he testified that Joe Amrine stabbed Gary Barber. (Ex. 3, pp. 42, 48). He explained his motivation for lying, stating, "[b]ut when [George Brooks] said he would stop me from being raped and stuff, I had to do it. But I can't let Joe die, because I lied on him." (Ex. 3, p. 64). It is equally clear that Ferguson's motivation now is to tell the truth about Amrine:

For over twelve (12) years, I've been haunted by Gary Barber's death and Joseph Amrine's conviction for it. In fact, I've made several suicide attempts because of it, two (2) in the past four (4) months. I desperately need to see the greatest injustice ever committed by me rectified.

(Ex. 3, Dep. Ex. 1, p. 2).

Recently, Ferguson agreed to take a polygraph test to determine whether he is telling the truth that Joe Amrine is innocent of the murder of Gary Barber. David Knefelkamp, a Minneapolis polygraphist with substantial experience and expertise and strong law enforcement credentials, concluded that Randall Ferguson is telling the truth when he admits that he lied against Joseph Amrine at his trial. (Ex. 4).

Terry Russell: Russell readily admits that he lied when he testified that Amrine made incriminating statements before and after the stabbing, and that all the testimony he gave to implicate Amrine in Barber's death is untrue. Amrine never told Russell that he was going to kill Barber, and he never told Russell that he killed Barber because he "had to." (Hrg. Tr. 27). Russell also testified that he told investigators on the day of the offense and on the morning of trial that he didn't know anything about the stabbing. (Hrg. Tr. 44).

Noble's testimony undermines Russell's trial testimony completely. He unequivocally placed Russell in the room when Barber was stabbed, in total contradiction of Russell's claim of alibi. (Hrg. Tr. 62). He identified Russell as the inmate being chased by Barber. Id. Russell's fear of being prosecuted for Barber's murder arose from Noble's eyewitness account of the incident. Although the trial prosecutor created the impression that Noble was mistaken about his identification (Trial Tr. 183), Noble explains why this impression was misleading:

- 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.

(Hrg. Tr. 62-63, 66) (emphasis added). Further, when Noble identified Russell, he had no idea he and Barber had just been released from disciplinary confinement for fighting one another a week earlier. (Hrg. Tr. 61). Only by the most astounding of coincidences could Noble have mistaken Russell for Amrine. Further, Noble is the only witness in this case who has no ax to grind and nothing to gain or lose from his testimony. He is the only eyewitness who is not a convicted

felon, never received any deals or consideration for his testimony, and had no involvement in Barber's death. He has consistently given the same exculpatory information, which was distorted at trial in the prosecutor's skillful efforts to minimize the probative value of his observations. If a jury were to credit Noble's testimony that Terry Russell was involved in Barber's stabbing, it would be compelled to acquit Amrine. Nevertheless, the Eighth Circuit's narrow definition of "new" evidence required the district court to ignore the most reliable witness in the case.

No evidence now exists to link Amrine to Barber's murder. There is no evidence whatsoever to contradict Noble's testimony indicating that Terry "Tat-tat" Russell was the real killer. To the contrary, given the fact that Noble had no knowledge of the previous fight between Russell and Barber, or that they had both been released from lock-down that very day,^[7](Hrg. Tr. 61-62). Only by the most astounding of coincidences could Noble have mistaken Russell for Amrine. Noble's identification of Russell cannot be dismissed as mistake or coincidence. The odds of that are implausible, indeed. Because of the grave doubts that Amrine was involved in the murder of Gary Barber, the Governor has the power and the duty to prevent the execution of an innocent man.

III. THE COURTS FAILED TO CORRECT MR. AMRINE'S UNJUST CONVICTION BECAUSE OF PROCEDURAL TECHNICALITIES WHICH BLOCKED CONSIDERATION OF ALL THE EVIDENCE.

The courts have refused to correct Joe Amrine's unjust conviction in spite of their expressed concerns that he is innocent. This anomalous circumstance results from a procedural technicality that bars the courts from looking at all the evidence in deciding Amrine's appeal. The Eighth Circuit Court of Appeals observed:

Amrine's showing of actual innocence is stronger than that in [*Schlup v. Delo*, 513 U.S. 298 (1995)] because neither of the state's two eyewitnesses to that killing ever recanted any part of their testimony implicating Schlup, and here all three of the state's key witnesses against Amrine have recanted. If the trial testimony of Poe, Ferguson, and Russell were not credited, there would appear to be no evidence implicating Amrine in Barber's murder.

Amrine v. Delo, 128 F.3d 1222, 1228-29 (8th Cir. en banc 1997). Although "[t]he strength of Amrine's showing [of innocence] at this point raises the real possibility that his case may be an example of the 'extremely rare' scenario for which the actual innocence exception is intended" (*Id.* at 1228), the Court of Appeals restricted the scope of the evidence that the district court could consider by adopting a narrow definition of what constitutes "new" evidence.

Virtually all of the evidence supporting Amrine's innocence is "new" in the sense that the jury which convicted

him heard none of it. However, the Court of Appeals restricted the district court's review by defining "new" evidence as that which, through the use of due diligence, could not have been discovered "earlier," meaning at trial and at prior stages of post-conviction review. In essence, the court built a procedural bar into the "actual innocence" test which was enunciated by the Supreme Court to describe circumstances under which the ends of justice require that federal courts reconsider a defendant's conviction. Because the evidence of Joe Amrine's evidence steadily trickled in over time, beginning with his sentencing hearing and continuing to the present day, only the recantation of Jerry Poe fit the circumscribed legal definition of "new" evidence. As a result of the Eighth Circuit's restrictive standard, no court has examined all of the evidence which now points unerringly to Amrine's innocence.

The decision of the Court of Appeals in this case has been criticized by the Honorable Jean Hamilton, Chief Judge of the Eastern District of Missouri, because it effectively nullifies the power of the courts to rescue innocent prisoners such as Amrine, who were convicted because of ineffective assistance of trial counsel:

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

Under the Eighth Circuit's definition of new evidence, the petitioner's Schlup claim must fail, notwithstanding the compelling evidence of actual innocence. Under Amrine, the evidence presented by the petitioner is not "new," and therefore may not be considered by the habeas court. Amrine, 128 F.3d at 1230. The petitioner's claim would be procedurally barred, and the habeas court would be precluded from ruling on the petitioner's ineffective assistance of counsel claim.

In contrast, under Schlup, the evidence presented by the petitioner is "new" because it was "not presented at trial." Schlup, 513 U.S. at 324. Assuming that the new evidence is reliable and sufficient to sustain the petitioner's burden under Schlup, the habeas court must consider the merits of the petitioner's ineffective assistance of counsel claim because failure to do so would result in a "fundamental miscarriage of justice." Id. at 320-21.

Reasonover v. Washington, 60 F.Supp.2d 937, 949, n.8 (E.D. Mo. 1999). Judge Hamilton's criticism of the "new evidence" rule is well-founded. This case illustrates how it can render a court impotent to prevent the execution of an innocent man.

Based on the restrictive "new evidence" rule, the district court in this case refused to consider whether John Noble, Terry Russell and Randy Ferguson were telling the truth about Amrine's innocence. Judge Gaitan also refused to determine the credibility of Kevin Dean-Bey, who saw Terry Russell stab Gary Barber, reasoning that Dean's testimony "is not 'new,' because it was apparently available at the time of Petitioner's trial." If Dean's testimony were credited, a jury would be compelled to acquit, yet the courts ruled that it could not be considered in deciding whether Amrine is

actually innocent of Gary Barber's murder. Similarly, the district court refused to consider evidence that Russell and Ferguson had motives to lie which were not revealed to the jury, and that Ferguson's account of the stabbing was dramatically different than Poe's pre-trial statements. The courts ignored the fact that Russell lied when he told the jury that he was speaking with an inmate named Harry or Johnny Hurd when Barber was stabbed; no such person was in the penitentiary on that day. (Ex. 7C).

CONCLUSION

Judge Hamilton is not the only writer to criticize the decision below; a major Missouri newspaper observed:

The Amrine case has many of the hallmarks of wrongful convictions: No physical evidence, self-interested witnesses, alleged misconduct by investigators, a poor defense lawyer and an appeals process stacked against the defendant.

Executing Without Evidence: Capital Punishment And The Death Penalty, ST. LOUIS POST-DISPATCH, May 5, 2000, p. B-6. The editorial poses the rhetorical question, "Should the state execute a person when no evidence is left standing against him?" This case was identified in Newsweek as one of five cases nationally in which "there may be big questions" about guilt or innocence. *They're On Death Row. But Should They Be?* NEWSWEEK, June 12, 2000, p. 26. The substantial doubts of Amrine's guilt have been cited in support of a moratorium on executions in Missouri. *Illinois Leads, Missouri Stalls*, ST. LOUIS POST-DISPATCH, February 4, 2001, B-2. (Ex. 13).

This case fits a pattern seen in the growing number of death row innocence cases; nearly one in four of the former death row inmates who have been completely exonerated were originally convicted on testimony of co-defendants or jailhouse informants.^[8] Courts are understandably skeptical of such testimony, and repeatedly warn of "the inherent problem of credibility of fellow inmates." *United States v. Snyder*, 787 F.2d 1429, 1432 (10th Cir. 1986). Also see *Coppola v. Powell*, 878 F.2d 1562, 1571 (1st Cir.), cert. denied, 493 U.S. 969 (1989), refusing to find trial error harmless because, like Amrine's case, "the testimony of three jail inmates raises serious questions of credibility." The Oklahoma Court of Criminal Appeals recently cautioned:

Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of a benefit for his or her testimony. This problem is even greater here when we look at the error. . . as to the withdrawal of the statements by the informant and what the informant has to say about promises made to the informant.

Dodd v. State, 993 P.2d 778, 783 (Okla. Crim. App. 2000). The court's words of caution are echoed by the unequivocal warning of Ninth Circuit Judge Stephen S. Trott "[t]he precautionary rule of thumb with a jailhouse confession presented

by another inmate is that it is false until the contrary is proved beyond a reasonable doubt.” Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1394 (1996). Judge Trott cautions:

Criminals are likely to say and do almost anything to get what they want, especially when what they want is to get out of trouble with the law.

This willingness to do anything includes not only truthfully spilling the beans on friends and relatives, but also lying, committing perjury, manufacturing evidence, soliciting others to corroborate their lies with more lies, and double-crossing anyone with whom they come into contact, including - and especially - the prosecutor. A drug addict can sell out his mother to get a deal, and burglars, robbers, murderers and thieves are not far behind.

Id. at 1383. He advised prosecutors, “[i]f you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informer, get back out in the field and go back to work.” *Id.* at 1425. The Mississippi Supreme Court in *McNeal v. State*, 551 So.2d 151, 158 (Miss. 1989), decried the “unholy alliance between con-artist convicts who want to get out of their own cases, law enforcement [and] prosecutors who are taking what appears to be the easy route, rather than really putting their cases together with solid evidence.”

The Department of Justice has reported that DNA technology reveals a disturbingly high error rate in our criminal justice system. In commentary accompanying the report, Peter Neufeld and Barry Scheck note how often the police focus on the wrong suspect:

Every year since 1989, in about 25 percent of the sexual assault cases referred to the FBI where results could be obtained . . . the primary suspect has been excluded by forensic DNA testing. . . . The fact that these percentages have remained constant for 7 years, and that the National Institute of Justice’s informal survey of private laboratories reveals a strikingly similar 26 percent exclusion rate, strongly suggests . . . underlying systemic problems that generate erroneous accusations and convictions.

E. CONNORS ET AL., CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL, U.S. DEPT. OF JUSTICE RESEARCH REPORT, June 1996, at xxviii• ix.^[9] The American Bar Association has concluded that such evidence demands that capital cases be given the most careful attention that the legal system can provide if the death penalty is to continue at all. REPORT IN SUPPORT OF AMERICAN BAR ASSOCIATION RESOLUTION CALLING FOR A MORATORIUM ON EXECUTIONS, submitted by the Section on Individual Rights and Responsibilities (1997) (the resolution was passed by the ABA’s House of Delegates on Feb. 3, 1997). Two Justices of the Supreme Court have echoed those concerns.

Ginsburg Backs Moratorium; Europeans Do, Too, ASSOCIATED PRESS, April 9, 2001; *O’Connor Questions Death*

Penalty, ASSOCIATED PRESS, July 2, 2001.

The failure of the courts to achieve a just and reliable result presents a compelling justification for the exercise of the Governor's power to grant pardons. As the United States Supreme Court explained:

Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex Parte Grossman, 267 U.S. 87, 120-21 (1925). This is such a case.

Joseph Amrine's conviction rests on the most unreliable testimony imaginable. The trial prosecutor, Tom Brown, admits that, without the testimony of the three inmates who now admit they committed perjury at trial, "we would not have had a case," and charges would have had to be dismissed or the court would have had to direct a verdict of acquittal. (Hrg. Tr. 10). Risking prosecutions for perjury, all those inmates and former inmates now admit that they lied against Amrine to save themselves. The recantations are now corroborated by polygraph test results. The only neutral and objective evidence is the testimony of John Noble pointing to Terry Russell as the actual killer. In spite of the overwhelming evidence that the wrong man was convicted in the murder of Gary Barber, Missouri stands poised to execute an innocent man. The Governor should use his inherent constitutional authority to correct this injustice.

For the foregoing reasons, we urge Governor Holden to pardon Mr. Amrine in the murder of Gary Barber.

Respectfully submitted,

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[1] See Leslie Sebba, *The Pardoning Power—A World Survey*, 68 J.CRIM.L. & CRIMINOLOGY, 83, 85-110 (1997).

[2] Id.

[3] Russell testified at trial that the inmate's name was Harry Hurd. (Trial Tr. 282). Russell later testified that the inmate was Johnny Hurd. (29.15 Tr. 35; Hrg. Tr. 38). The discrepancy in first names may be the result of scrivener's error, as the transcript of state proceedings is full of obvious mistakes in name references. Russell himself testified that he consistently referred to "Johnny" Heard. The discrepancy is immaterial to Ossman's duty to investigate; investigation of either name would have produced evidence that Russell lied.

[4] 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). Ossman hurriedly interviewed him in the hallway outside the courtroom as the jury and the judge waited for him to be brought in to testify. Although this discussion took place at the bench outside the hearing of the jury, Juror Hildebrand "got the impression that when he was presenting the defense case, he was meeting his witnesses for the very first time." (Ex. 2, p. 1). The prosecutor cross-examined Strothers aggressively about his unfamiliarity with the crime scene diagram. (Trial Tr. 560-69). Juror Hildebrand states, "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." (Ex. 2, p. 1).

[5] Tom Brown, the trial prosecutor, admitted that Russell "would have had a motive [to kill Barber]" arising from their earlier fight. (Hrg. Tr. 11). Brown agreed that Officer Noble's testimony that he saw Barber chasing Terry Russell suggested that Russell was possibly the real murderer. (Id. at 12).

[6] Although the prosecution disclosed its agreement not to prosecute Randall Ferguson on a pending felony charge of possession of a concealed weapon, the jury was not told that Russell and Ferguson had been assured that they would not be charged with Barber's murder.

[7] Noble testified at the district court hearing:

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 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.

[8] See RICHARD C. DIETER, *INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT* (Death Penalty Information Center, 2000), at 10-27. Emmit v. Ricketts, 397 F.Supp 1025 (N.D. Ga. 1975) (witness received immunity from shoplifting/drug offenses to become informant). State v. Smith, 600 So.2d 1319 (La. 1992) (principal witnesses at both trials were two convicts who were given immunity and plea bargains in exchange for their testimony and were subsequently convicted in a federal trial of the original murder). People v. Burrows, 665 N.E.2d 1319 (Ill. 1996) (prosecution's two chief witnesses recanted their testimony, and one confessed to the crime). State v. Cruz, 857 P.2d 1249 (Ariz. 1993) (chief prosecution witness was a convicted burglar and former drug dealer who was given immunity for his testimony). People v. Jimerson, 652 N.E.2d 278 (Ill. 1995) (police offered to drop charges against alleged accomplice if she would implicate the defendant). Carriger v. Stewart, 132 F.3d 463 (9th Cir.

1997) (state's chief witness at trial subsequently admitted murder). Barry Beeman, Ohio conviction 1976, released 1979 (true killer was the main prosecution witness at the first trial); Joe Jackson, *Sentenced to Die Without Fair Trials*, THE VIRGINIAN-PILOT, p. A-1 (June 26, 1994). Com. v. Johnson, 429 N.E.2d 726 (Mass.App. 1982) (state's chief witness implicated as the actual killer). Brown v. State, 471 So.2d 6 (Fla. 1985) (co-defendant admitted perjury). Neil Ferber, Pennsylvania conviction 1982, released 1986 (conviction based on the perjured testimony of a jailhouse informant). People v. Cobb, 455 N.E.2d 31, 97 Ill.2d 465 (Ill. 1983) (Darby (Williams) Tillis) (assistant state attorney came forward with evidence establishing that the state's chief witness was an accomplice in the crime). Brown v. State, 515 So.2d 211 (1987) (Larry Troy) (main witness at trial was a jailhouse informant who stated before the trial that he hated both Willie Brown and Larry Troy and wanted to see both men dead, even if they were innocent). Ex Parte Brandley, 781 S.W.2d 886 (Tex.Cr.App. 1989) (actual killer testified against him and threatened other witnesses until they agreed to commit perjury). McMillian v. State, 616 So.2d 933 (Ala.Cr.App. 1993) (co-defendant received lesser sentence for false trial testimony against defendant). Smith v. State, 547 N.E.2d 817 (Ind. 1989) (co-defendant was granted immunity to testify). State v. Rivera, 350 N.C. 285, 514 S.E.2d 720 (N.C. 1999). People v. Manning, 695 N.E.2d 423 (Ill. 1998) (jailhouse informant testified against him).

[9] Although inconclusive blood evidence was used by the prosecution in this case, the destruction of the evidence bars Amrine's access to probative scientific evidence. Amrine v. State, 785 S.W.2d 531 (1990).