NTRODUCTION

I am grateful to have had one last opportunity to sit with Missouri Supreme Court Judge Richard Teitelman at the 2016 Richard J. Childress Memorial Lecture at Saint Louis University School of Law and listen to dedicated advocates address problems and isss adiitng u5au5au5ato2016 Ric.32()2.7(4)2.6(our)3.5(2.6(our edu/childresslecture2016 [http://perma.cc/Z8UV-8AUZ]. All had insightful views on the problems facing indigent defendants in Missouri.

2. State ex rel. Amrine v. Roper, 102 S.W.3d 541, 543

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expressed concerns that high turnover results in new attorneys handling a significant caseload of serious cases for which they were simply not ready.[9] This produces "a crop of attorneys faced with crushing caseloads who 'do not know what effective representation is' due to a crippling lack of experience and supervision."[10] Defenders described a system of triage in which some clients were neglected in order to adequately defend others.[11] Violations of performance and ethical standards were institutionalized; the practice 8.9(t)a3(el)3h56ds38.2(s8.2(s8

him on his postconviction motion.[20] Amrine himself came perilously close to execution because of similar neglect by Ossman and public defenders who represented him in subsequent state-postconviction proceedings.

One of the obstacles facing people in Joe Amrine's situation is the lack of teeth in the Strickland v. Washington[21] standard for proving that trial counsel was constitutionally ineffective. The late Professor Welsh S. White noted that under Strickland, it has become "increasingly clear that defense attorneys' representation of capital defendants was sometimes shockingly inadequate."[22] The American Bar Association found that Strickland failed to protect against widespread problems with legal services for indigent defendants, even in death penalty cases.[23] Professor White criticized Strickland for permitting courts to affirm unjust convictions and sentences based on trial counsel's weak claims of "trial strategy," and for allowing subjective determinations that the prisoner has not met his burden of proving that he was prejudiced by trial counsel's deficient performance.[24] Another major obstacle to enforcing the right to competent counsel is the lack of effective postconviction counsel to investigate and develop claims of ineffective assistance of trial counsel.[25] See id. Joe Amrine's burden of proving that Ossman's performance was constitutionally deficient was formidable, notwithstanding Ossman's abysmal track record.

Ossman's conduct of Amrine's defense is consistent in every way with Spangenberg's description of a system in crisis. What little investigation he conducted was untimely. Ossman interviewed defense witnesses for the first time in the hallway during the trial with the jury waiting in the box.[26] He did

20. Zeitvogel v. Delo, 84 F.3d 276, 278, 281 (8th Cir. 1996) (refusing habeas corpus review because "the blame for Zeitvogel's procedural default falls squarely on Zeitvogel's postconviction counsel").

21. 466 U.S. 668, 688 (1984).

22. WHITE, DEFENSE ATTORNEYS, supra note 17, at 3. Professor White found cases in which trial counsel who were in the parking lot while the key prosecution witness was on the stand, who referred to an African-American client as "nigger," or who stipulated to all of the elements of first degree murder plus two aggravating circumstances were constitutionally adequate under Strickland. Id.

23. See Ira P. Robbins, Toward a More Just and Effective System of Review in State Death Penalty Cases, 40 AM. U. L. REV. 13, 16 (1990).

24. WHITE, DEFENSE ATTORNEYS, supra note 17, at 17–19.

25. Coleman v. Thompson, 501 U.S. 722, 750 (1991); Cullen v. Pinholster, 563 U.S. 170, 174, 185 (2011); cf. Martinez v. Ryan, 132 S. Ct. 1309, 1315 (2012).

26. When defense witness Brian Strothers came to court, Ossman asked the trial court to wait while he told Strothers why he was subpoenaed to the courthouse. Ossman admitted, "I never talked to this guy before." Transcript of Record at 627, Amrine v. Ossman, No. 08AC CC00340, at 627 (Cole Cty., Nov. 5, 2012).

not object to Amrine being displayed to the jury in shackles and leg irons.[27] Ossman did not object when State's witness Terry Russell blurted out, falsely, that he had passed a polygraph test.[28] He failed to cross-examine jailhouse informants about glaring inconsistencies in their stories.[29] He did nothing to prepare for the penalty phase of trial; Joe Amrine's mother first learne

of counsel claim because failure to do so would result in a "fundamental miscarriage of justice."[48]

Judge Hamilton noted that in Schlup itself, the Supreme Court characterized witness testimony as "'new statements,' even though the information in those statements was available at the time of trial and could have been discovered in the exercise of due diligence."[49] Thus, the outcome in Schlup itself would have been different if the Eighth Circuit standard was correct. Because the Court clearly intended actual innocence to prevent legal technicalities from obstructing remedies for constitutional violations that render a conviction unworthy of confidence, no other circuit in the county follows the Eighth Circuit's Amrine standard.[50]

Judge Hamilton's warning has come to fruition in subsequent cases in which the Eighth Circuit has allowed trial counsel's ineffectiveness to defeat a gateway innocence claim where actual innocence is asserted to reach a procedurally barred claim of ineffective assistance of counsel. Ricky Kidd alleged that his Missouri public defender was ineffective for failing to investigate and present evidence that he was innocent; public defenders assigned to represent him on appeal and post-conviction did not investigate Mr. Kidd's innocence, and abandoned Mr. Kidd's ineffective assistance of counsel claim. The only path to prove that Missouri violated Kidd's constitutional right to counsel was through Schlup's innocence gateway—a door that the Eighth Circuit firmly slammed shut in Kidd's face.[51]

Kidd was charged with the homicides of George Bryant and Oscar Bridges that occurred in broad daylight and was witnessed by neighbors who saw three men get in a new, white Oldsmobile and flee the scene.[52] The police investigation produced air fare, hotel and car rental records showing that three

48. Reasonover v. Washington, 60 F. Supp. 2d 937, 949 n.8 (E.D. Mo. 1999) (internal citations omitted). Ellen Reasonover was freed after sixteen years of wrongful imprisonment because she invoked the Schlup gateway to reach a defaulted claim that the Missouri concealed exonerating evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Ellen Reasonover, THE NATIONAL REGISTRY OF EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3564 [https://perma.cc/YL8P-YVY9].

49. Reasonover, 60 F. Supp. 2d at 948-49. Fortunately for Ellen Reasonover, "[t]he evidence which was available, but not presented at trial, strengthens, but is not essential to, Petitioner's successful showing of actual innocence." Id., at 950.

50. Gomez v. Jaimet, 350 F.3d 673, 679 (7th Cir. 2003) ("[I]t would defy-3.3(o-3..)Tjl3o(,)-10labk7(o,)3.6151]TJ 0.6>BDC -2

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took the bus home from work that day, or her brother gave her a ride.[65] Another witness who was not interviewed for a year was questioned how she could possibly remember the date a year later.[66] Frustrated that his lawyer was not preserving his alibi, Kidd called witnesses himself from the county jail, and those witnesses were challenged for colluding with Kidd.[67] The prosecutor claimed the sheriff's gun permit could have been received by mail.[68] The case is a compelling demonstration of the inability of an overburdened public defender system to develop and present a truthful defense. Even if Kidd's family and his sister's coworkers were telling the truth, their credibility could not withstand the attacks occasioned by the public defender's delay. In essence, Missouri prosecutions may be a per se bar if the defendant is represented by an overburdened public defender.

Kidd's habeas counsel developed significant evidence to support a claim of actual innocence as a gateway to Kidd's claim of ineffective assistance of trial counsel that was procedurally barred when his post-conviction lawyers did no investigation. The testimony of the deputy who processed Kidd's gun permit "confirmed Kidd's application was received the same day as the shootings."[69] He also developed substantial evidence impeaching Richard Harris, the only

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his guilt to prevent his impending execution in Texas. Unlike Schlup, all of Herrera's constitutional issues had been ruled against him; innocence was all he had left. Herrera was scheduled to be executed February 19, 1992,[79] and Schlup was scheduled to be executed in March 1992.[80] Schlup's stay of execution came from the lower courts to sort out his gateway claim of innocence, and Herrera's stay came after the Supreme Court granted certiorari to decide whether it violated the Eighth Amendment to execute an innocent person.[81] Herrera's claim of innocence was not as strong as Schlup's, but it was nevertheless plausible.[82] Since the rejection of Herrera's claims of ineffective assistance of counsel and other trial error had already been rejected, the viability of his innocence claim was the sole remaining issue.

The Court did not look kindly upon Herrera's innocence evidence, but did not close the door on a sufficiently meritorious innocence claim in the future. No single rationale carried a majority of the Court. Justice Blackmun, joined by Justices Stevens and Souter, would have remanded the case for a hearing on whether Herrera could "show that he probably is innocent."[83] Justice White would grant relief in such cases if the prisoner's evidence shows that "no rational trier of fact could [find] proof of guilt beyond a reasonable doubt."[84] Justice Rehnquist, joined by Justices Scalia and Thomas, disagreed, asserting that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[85]

Somewhere in the middle of this three-to-one-to-three division, Justice O'Connor, joined by Justice Kennedy, acknowledged that "the execution of a legally and factually innocent person would be a constitutionally intolerable event[;]" however, Herrera was "not innocent, in any sense of the word."[86] Therefore, she concluded:

> [T]he Court has no reason to pass on, and appropriately reserves, the question whether federal courts may entertain convincing claims of actual innocence.

79. Herrera v. Collins, 954 F.2d 1029, 1030 (5th Cir. 1992).

80. Sean O'Brien, Mothers and Sons: The Lloyd Schlup Story, 77 UMKC L. REV. 1021, 1031–9(ot)17()Tj 0.0.6.166 T4.1( )06(.166 T4m.5(F60)0.5(C)14(0)0.t38 0 Td d 0.70414(0)0.56(.166 T14(0)0. 0.704he Tf -0.0

The Missouri Attorney's General argument in Amrine was grounded in Rehnquist's concurring opinion in Herrera. Noting that much of Herrera's reasoning was driven by the federalism concerns that limit the jurisdiction of federal courts, the Missouri Supreme Court in an opinion authored by the late Honorable Rick Teitelman, declined to follow Herrera in determining the reach of Missouri's habeas corpus remedy:

> In other words, as Herrera