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A Contrast of State and Federal Court Authority to Grant Habeas Relief

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A CONTRAST OF STATE AND FEDERAL COURT AUTHORITY TO GRANT HABEAS RELIEF

Honorable Laura Denvir Stith*

I. INTRODUCTION

Reviewing petitions for writs of habeas corpus has always been one of the duties of members of the Supreme Court of Missouri. It was not, however, until two cases were argued in the first few months of 2003 that those duties required the Court to directly determine whether the authority of state high courts to grant habeas relief was broader than that of their counterparts on the federal bench.

On February 24, 2003, the case of *State ex rel. Amrine v. Roper*[1] was argued to the Supreme Court of Missouri.[2] The key issue was whether Joseph Amrine was entitled to have his claim of actual innocence heard by the Missouri courts by way of a writ of habeas corpus, even though he had already seemingly exhausted his rights to direct and post-conviction relief. The State asserted in its brief, and in oral argument, that Mr. Amrine had no right to additional review, whatever the nature of his current claims and whatever the strength of the evidence supporting them. I, therefore, asked the Assistant Attorney General arguing the case, "Are you suggesting, ... even if we find that Mr. Amrine is actually innocent, he should be executed?"[3] The Assistant Attorney General answered: "That's correct, your honor."[4]

While some later commentators were shocked by the answer given by the Assistant Attorney General, I was not. That was the only answer he could give in light of the legal position taken by the State of Missouri in opposing Mr. Amrine's petition for writ of habeas corpus. If a state

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1 102 S.W.3d 541 (Mo. 2003).

2 *See infra* Part II.

3 For a webcast of Supreme Court of Missouri oral arguments, see http://www.missourinet.com/gestalt/go.cfm?objectid=19BA8AD0-7077-4B92-A55E0121C058CC65. *See also* Adam Liptak, *Prosecutors See Limits to Doubt in Capital Cases*, N.Y. TIMES, Feb. 24, 2003, at A1.

4 *Id.*

high court has no authority to review a claim of actual innocence, then it follows that it is powerless to prevent the prisoner's execution.

One month before *Amrine* was argued, *State v. Whitfield*[5] was argued to the Supreme Court of Missouri.[6] The key issue was the potential application to Joseph Whitfield of the United States Supreme Court's decision in *Ring v. Arizona*,[7] holding that the Sixth Amendment to the United States Constitution requires all factual determinations required for imposition of the death penalty under state law to be made by a jury.[8] Mr. Whitfield's jury had been deadlocked in the penalty phase of his trial, and the judge ultimately had imposed the death penalty. The State argued that, even if *Ring* would have applied had Mr. Whitfield's case been on direct appeal, it did not apply to him because his conviction had already been affirmed.[9] Thus, the State argued, the federal courts would not apply *Ring* to Mr. Whitfield's case, and the State of Missouri was powerless to apply *Ring* more broadly than would the federal courts.

II. STATE AUTHORITY TO REVIEW FREESTANDING CLAIMS OF ACTUAL INNOCENCE

A. *Mr. Amrine's Direct and Post-Conviction Appeals*

As Missouri's Supreme Court has summarized the facts of *Amrine*:

> On October 18, 1985, inmate Gary Barber was stabbed to death in a recreation room at the Jefferson City Correctional Center. Officer John Noble identified inmate Terry Russell as the perpetrator. While being questioned about Barber's murder, Russell claimed that Amrine admitted that he had stabbed Barber. Amrine was charged with Barber's murder.[10]

Six inmates and a guard testified that Mr. Amrine was not near Gary Barber at the time of the stabbing; three inmates, including Terry Russell, testified that Mr. Amrine committed the murder. Mr. Amrine was

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5 107 S.W.3d 253 (Mo. 2003).
6 *See infra* Part III.
7 536 U.S. 584 (2002).
8 *Id.* at 589.
9 *Whitfield*, 107 S.W.3d at 265.
10 Amrine v. Roper, 102 S.W.3d 541, 544 (Mo. 1987).

convicted and received the death penalty. His conviction was affirmed on appeal.[11]

Mr. Amrine, like most death row prisoners, unsuccessfully sought post-conviction relief in state and federal courts based on various alleged constitutional errors in his trial. Like many prisoners, Mr. Amrine continued to maintain his innocence. Unlike most such prisoners, however, Mr. Amrine presented substantial newly discovered evidence in support of his claims.

In Missouri, initial post-conviction motions seeking relief from a conviction or sentence must be brought under Missouri Supreme Court Rule 29.15.[12] In support of his Rule 29.15 motion, Mr. Amrine presented the testimony of two of his three accusers, Terry Russell and Randy Ferguson. Mr. Russell testified that he lied at the trial and implicated Mr. Amrine to deflect suspicion from himself. Mr. Ferguson said he had lied at the trial in return for being placed in protective custody, and the dropping of a felony weapons charge. But, this still left the testimony of inmate Jerry Poe, identifying Mr. Amrine as the assailant. The state and subsequent federal courts considering Mr. Amrine's post-conviction motions found Mr. Poe's testimony an adequate basis to support the judgment, and denied Mr. Amrine's requests that his sentence be vacated and that he receive a new trial.[13]

New counsel was then able to locate Jerry Poe. In a sworn affidavit, Mr. Poe also recanted his testimony, stating he had lied originally in return for a promise to move him out of the penitentiary to protect him from sexual predators. This meant that all three persons who had identified Mr. Amrine as the murderer had recanted. The Eighth Circuit remanded for a hearing in the district court on Mr. Amrine's gateway claim of actual innocence based on the three recantations.[14]

The district court denied relief, stating that, as Mr. Russell and Mr. Ferguson had already recanted while the case was in state court, only Mr. Poe's recantation could be considered "new evidence." Thus, considered in isolation, the court found the inmate's recantation was not reliable or credible. Therefore, the federal courts could not afford Mr.

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11 State v. Amrine, 741 S.W.2d 665 (Mo. 1987).

12 Rule 29.15.

13 Amrine v. State, 785 S.W.2d 531 (Mo. 1990); Amrine v. Bowersox, No. 90-0940-CV-W-2 at 16 (Mo. Ct. App. Feb. 26, 1996).

14 Amrine v. Bowersox, 128 F.3d 1222 (8th Cir. 1997).

Amrine habeas relief. The Eighth Circuit agreed and affirmed.[15] The Supreme Court denied certiorari.[16]

B. Petition for Writ of Habeas Corpus in the Supreme Court of Missouri

It was at this point that Mr. Amrine made a final bid for habeas corpus relief directly in the Supreme Court of Missouri. He argued that, because the recantations had been made over a long period of time, and because the last of them had been made after all state direct and post-conviction review had been exhausted, no court had ever looked at the entire record to determine whether he was entitled to habeas relief. He was actually innocent of the crime, he argued.[17] This should at least provide a "gateway" for consideration of his underlying constitutional claims under *Schlup v. Delo*.[18] And, he argued, even if he could demonstrate no underlying constitutional violation, his freestanding claim of actual innocence, considered alone, should be enough to entitle him to release or a new trial where, as here, all of the inculpatory evidence from his trial had been discredited. The State of Missouri strongly disagreed with Mr. Amrine's position. Our Court found sufficient merit in these assertions to set the case for full briefing and argument.

The State took the position in its brief that we, as Missouri's highest court, had no authority even to hear Mr. Amrine's petition, much less to grant him habeas relief. First, the State argued, Mr. Amrine was collaterally estopped from arguing that the original trial testimony of the three recanting witnesses was not credible or that their recantations were credible, as he had lost those arguments when the recantations were considered seriatim at earlier stages. Therefore, we were without authority to grant him relief, even if we would have found that the three recantations, considered together, undermined our confidence in the validity of the underlying judgment against Mr. Amrine.

Second, the State argued, even if collateral estoppel did not apply, unless he could prove that there was an underlying constitutional violation—and it quickly became evident that he would not be able to do

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15 Amrine v. Bowersox, 238 F.3d 1023 (8th Cir. 2001). See *infra* text accompanying notes 31-35 for a discussion of the meaning of the term "gateway claims."

16 Amrine v. Luebbers, 534 U.S. 963 (2001).

17 Amrine v. Roper, 102 S.W.3d 541, 545 (Mo. 1987).

18 513 U.S. 298 (1995).

so—the Missouri courts were again powerless to grant Mr. Amrine any relief. In support, the State cited *Herrera v. Collins*[19] and *Schlup*.[20]

In *Herrera*, because of his difficulty in making a claim of either cause and prejudice or an underlying constitutional violation, Mr. Herrera asserted (among other arguments) that he was entitled to habeas corpus relief if he made a showing of newly discovered evidence of his innocence, even if he were not able to show an underlying constitutional violation.[21] Chief Justice Rehnquist addressed this argument at length in a discussion that has variously been characterized as holding or *dicta*.[22]

The Chief Justice explained the reasons why the federal courts should not grant relief for a freestanding claim of actual innocence:

> [O]ne could say that as far as our system of justice is concerned, the innocent defendant's claim of innocence has been extinguished, that he has had all the process that is due him. Found guilty, and his conviction now final, he is guilty in the only relevant sense we need consider: a fair procedure determined that he is guilty.[23]

If the petitioner alleges that he did not receive a full and fair trial due to constitutional error, then habeas review is available in the federal courts. But, if the state trial was constitutionally adequate, then, *Herrera* suggested, federal habeas relief is not available unless federal courts are to become yet another forum for appeal of factual determinations made by state courts. This is a role to which they are not suited, for:

> [F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution—not to correct errors of fact. . . .
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> . . . "Federal courts are not forums in which to relitigate state trials." *Barefoot v. Estelle*. . . . Few rulings

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19 506 U.S. 390 (1993).

20 513 U.S. 298 (1995).

21 *Herrera*, 506 U.S. at 396.

22 *Id.* at 398-416; *see also* George C. Thomas III, Gordon G. Young, Keith Sharfman & Kate B. Briscoe, *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. PITT. L. REV. 263, 285 (2003) ("Though some have treated the constitutional status of a free-standing claim of innocence as settled by *Herrera*, [footnote omitted] we think *Herrera* did not go that far.").

23 Thomas, *supra* note 22, at 264; *see also Herrera*, 506 U.S. at 399-400.

> would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence.[24]

For this reason, *Herrera* suggests further that:

> [A] claim of "actual innocence" is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.
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> . . . The fundamental miscarriage of justice exception is available "only where the prisoner *supplements* his constitutional claim with a colorable showing of factual innocence."[25]

Chief Justice Rehnquist, thus, would inquire only whether the petitioner were entitled to due process review, and if there were no claimed underlying constitutional error, he would never reach the question whether the petitioner were in fact innocent.[26] He said a truly innocent petitioner must rely on state clemency proceedings for relief.[27]

In seeming self-contradiction, Chief Justice Rehnquist then said:

> We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim.[28]

Then, in keeping with his concern for avoiding undue interference with state courts, the Chief Justice continued:

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24 *Herrera*, 506 U.S. at 400-01 (citations omitted).
25 *Id.* at 404 (emphasis added) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986)).
26 *Id.* at 408 n.6.
27 *Id.* at 416-17.
28 *Id.* at 417.

> But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold.[29]

"[T]he dual principles of federalism and finality served as recurring themes throughout Chief Justice Rehnquist's [plurality] opinion."[30] Habeas actions are not simply a supplemental part of the state appellate process, but rather are original actions intended to protect the federal constitutional rights of the petitioner. Therefore, *Herrera* teaches, in the interest of comity, so as to show proper deference to and respect for the judgments of state courts and to avoid undue disruption of the criminal justice systems in the states, such relief should be given only where underlying constitutional error is also present.

Two years after *Herrera*, the United States Supreme Court addressed a situation in which a Missouri petitioner claimed underlying constitutional error deprived him of evidence that would have established his innocence.[31] For the Supreme Court, this was a key difference:

> As a preliminary matter, it is important to explain the difference between Schlup's claim of actual innocence and the claim of actual innocence asserted in *Herrera v. Collins*. In *Herrera*, the petitioner advanced his claim of innocence to support a novel substantive constitutional claim, namely, that the execution of an innocent person would violate the Eighth Amendment. . . .[32]
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> . . . .

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29 *Id.*

30 Arleen Anderson, *Responding to the Challenge of Actual Innocence Claims After* Herrera v. Collins, 71 TEMP. L. REV. 489, 494 (1998).

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

32 *Id.* at 313-14 (citation omitted).

> Schlup, in contrast, accompanies his claim of innocence with an assertion of constitutional error at trial. For that reason, Schlup's conviction may not be entitled to the same degree of respect as one, such as Herrera's, that is the product of an error free trial. . . . *[I]f a petitioner such as Schlup presents evidence of innocence* so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, *the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims.*[33]

Thus, if a petitioner has an underlying federal constitutional claim, then a claim of innocence will serve as a "gateway" through which the petitioner can pass and receive consideration of his otherwise defaulted constitutional claim.[34] Alternatively, if a petitioner presents evidence of cause for the failure to raise the constitutional error earlier, and prejudice resulting from it, then this can also serve as a "gateway" for consideration of his underlying federal constitutional claim.[35]

In the abstract, *Schlup*'s demarcation of the limits of federal habeas corpus jurisprudence would not necessarily have any application to how Missouri or other states applied the writ. As noted by Judge Ronnie L. White in his dissenting opinion in *Clay v. Dormire*,[36] Missouri historically has granted habeas relief in the case of "manifest injustice," and has found manifest injustice in situations in which the reasons for the prisoner's failure to timely raise his claim on direct appeal or in his original post-conviction motion did not arise from his own lack of diligence.[37] Until *Clay*, Missouri had never required a showing of innocence as a gateway to reach the petitioner's underlying claim.[38]

The majority in *Clay*, in an opinion authored by Judge Stephen N. Limbaugh, adopted the *Schlup* standard for *federal court* review of habeas corpus claims in cases in which the petitioner makes an otherwise untimely claim that his conviction resulted from a constitutionally

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33 *Id.* at 316 (emphasis added).

34 *Id.* at 315.

35 *Id.* at 314-15.

36 37 S.W.3d 214, 219-22 (Mo. 2000) (White, J., dissenting) (Judge White has since become Chief Judge).

37 *Id.* at 219-20 (White, J., dissenting).

38 *Id.* at 220-21 (White, J., dissenting).

inadequate trial.[39] The majority did not specifically analyze why that standard would effectively preempt Missouri's more traditional application of habeas corpus. Rather, it pointed out that the United States Supreme Court had adopted the *Schlup* standard because it believed that:

> "[E]xplicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" These interests, excluding comity, of course, justify the same approach in Missouri. Indeed, the actual innocence component is all the more appropriate for Missouri cases given 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.[40]

At least some other state courts have also adopted the *Schlup* standard for similar reasons.[41]

The facts of the case before it did not require *Clay* to address whether cause and prejudice also provided a basis for habeas relief in Missouri. Later, in *Brown v. State*,[42] the State argued that Missouri should not recognize a cause-and-prejudice exception to the time limitations for post-conviction relief set out in the Missouri Supreme Court Rules.[43] The court rejected this argument in *Brown* and in *State* ex rel. *Nixon v. Jaynes*,[44] holding that either a showing of probable innocence or a showing of cause and prejudice suffice as a "gateway" permitting review

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39 *Id.* at 217.

40 *Id.* at 217–18 (citations omitted) (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

41 *See, e.g.*, People v. Smith, 794 N.E.2d 367 (Ill. App. Ct. 2003); State v. Redcrow, 980 P.2d 622 (Mont. 1999); Pelligrini v. State, 34 P.3d 519 (Nev. 2001); *Ex parte* Elizondo, 947 S.W.2d 202, 209 (Tex. Crim. App. 1996).

42 66 S.W.3d 721 (Mo. 2002).

43 *Id.* at 723. At the time Whitfield brought his motion under Rule 29.15; that time limit was ninety days from the date that the mandate affirming his conviction was issued. Effective January 1, 2003, a petitioner now has 180 days to bring such a motion. *See also* Rule 24.035.

44 63 S.W.3d 210, 214 (Mo. 2001).

of petitioner's otherwise procedurally defaulted claims of constitutional error.[45]

Amrine presented the first occasion for Missouri courts to address whether they would also adopt Chief Justice Rehnquist's approach in *Herrera* as to freestanding claims of actual innocence. The State argued that Missouri should do so. Quoting *Herrera*, it noted that the Eighth Circuit had held in cases such as *Mansfield v. Dormire*[46] that, under *Herrera*, a claim of actual innocence can act only as a gateway to consideration of other constitutional error, and cannot in itself provide a basis for habeas corpus relief.

The Missouri courts, the State then argued, had no more authority to grant habeas relief than did the federal courts. Therefore, even if Mr. Amrine made a substantial claim of actual innocence, he simply was not entitled to relief in the courts of Missouri. His remedy, if one was available, was solely by a petition to the Governor for clemency.

Although the State did not cite to any case in support of this position, simply taking it as a given that the state courts could not have more authority than the federal courts in this area, it might have cited *State v. Watson*.[47] After interpreting *Herrera* as holding that a freestanding claim of actual innocence is simply not cognizable in federal courts, *Watson* held:

> Since the United States Supreme Court has not recognized actual innocence as a constitutional right, we also refuse to judicially create such a constitutional right. The trial court did not err in dismissing appellant's claim of actual innocence because his claim fails to raise "a denial or infringement of [appellant's] rights under the Ohio Constitution or the Constitution of the United States."[48]

Similarly, the appellate court in *Hays v. State*[49] simply assumed that it could not recognize a freestanding claim of actual innocence if the federal courts would not do so, stating that, because petitioner did not

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45 *Brown*, 66 S.W.3d at 731.
46 202 F.3d 1018 (8th Cir. 2000).
47 710 N.E.2d 340 (Ohio Ct. App. 1998).
48 *Id.* at 345.
49 975 P.2d 1181 (Idaho Ct. App. 1999).

allege an underlying constitutional violation, his claim was one of a violation of substantive rather than procedural due process, and was procedurally barred because not timely raised under *Schlup*.[50]

The State reaffirmed its position at oral argument that no state avenue of relief was available to consider Mr. Amrine's claims of innocence. But, neither in its briefs nor in its argument did it directly acknowledge the necessary consequence of this argument: even for persons, such as Mr. Amrine, who could present substantial evidence of their innocence, such evidence could not be considered as a basis for habeas relief from a death sentence. I, therefore, put the question to the Assistant Attorney General arguing on behalf of the State, "Are you suggesting, . . . even if we find that Mr. Amrine is actually innocent, he should be executed?"[51] A few minutes later, Judge Michael A. Wolff asked, "To make sure we are clear on this, . . . if we find in a particular case that DNA evidence absolutely excludes somebody as the murderer, then we must execute them anyway if we can't find an underlying constitutional violation at their trial?"[52]

To both questions, the Assistant Attorney General answered in the affirmative. Given the position taken by the State in its brief, there was no other answer he could give. If a state court were not free to consider a freestanding claim of actual innocence, and if that is the only claim Mr. Amrine had to make, then that meant that the court system was powerless to stop his execution even in the face of a persuasive showing of innocence.

C. *Missouri Recognizes Power of State Courts to Grant Habeas Relief for Freestanding Claims of Actual Innocence*

The Supreme Court of Missouri issued its decision in *Amrine* in a 4-3 decision authored by Judge Richard B. Teitelman. The Court rejected the position taken by the State. It held that, even if *Herrera* could be interpreted to generally foreclose relief in the federal courts for such freestanding claims of innocence, *Herrera* implicitly recognized the authority of state courts to grant such relief more broadly, for it stated that it would assume for the sake of argument that, "in a capital case a truly persuasive demonstration of actual innocence made after trial

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50 *Id.* at 1185.

51 *See supra* note 3 and accompanying text.

52 *Id.*

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.*"[53]

As *Amrine* later noted, two conclusions can be drawn from the quoted language. First, the United States Constitution may grant the federal courts the authority to intervene in the extreme case in which a state insists on executing a clearly innocent person. Second, the Supreme Court recognized that state courts can intervene upon a lesser showing, for, as *Amrine* stated the point:

> [E]ven if a federal court were found not to have jurisdiction to review a state conviction and sentence in the absence of a federal constitutional issue, this would not deprive a state court from reviewing the conviction and sentence if its own state habeas law so permitted. The issue now before this Court, then, is whether, in the words of *Herrera*, Missouri has left a "state avenue open to process such a claim."[54]

Amrine then determined that Missouri has left a "state avenue [of relief] open" to process claims of actual innocence.[55] First, it noted, our prior cases have recognized that habeas corpus relief is available to prevent manifest injustice.[56] Second, section 565.035.3[57] provides that, in reviewing death sentences, this Court is to examine not merely the sufficiency but also "the strength of the evidence."[58] *Amrine* then stated, "It is difficult to imagine a more manifestly unjust and unconstitutional result than permitting the execution of an innocent person."[59] Because a person, like Mr. Amrine, who has been convicted in a constitutionally adequate trial no longer enjoys the presumption of innocence, however, *Amrine* placed the burden of proof on Mr. Amrine to "make a clear and

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53 Amrine v. Roper, 102 S.W.3d 541, 546 (Mo. 1987) (emphasis added) (citing Herrera v. Collins, 506 U.S. 390, 417 (1993)).

54 *Id.* at 546-47 (quoting *Herrera*, 506 U.S. at 417).

55 *Id.* at 547.

56 *Id.* at 546 (citing State *ex rel.* Nixon v. Jaynes, 63 S.W.3d 210, 215 (Mo. 2001); State *ex rel.* Simmons v. White, 866 S.W.2d 443, 446 (Mo. 1993) (en banc)).

57 MO. REV. STAT. § 565.035.3 (2000).

58 *Amrine*, 102 S.W.3d at 547.

59 *Id.*

convincing showing of actual innocence that undermines confidence in the correctness of the judgment."[60]

Finding that Mr. Amrine made such a showing, in April of 2003, the Court reversed Mr. Amrine's conviction and ordered his conditional discharge unless the State elected within thirty days to file new charges.[61] The State initially did file such charges, but a few months later dropped them and released Mr. Amrine—nearly eighteen years after the murder of which he had once been convicted.

D. *Other State Decisions Recognizing Power of State Courts to Grant Habeas Relief Based on Freestanding Claims of Actual Innocence*

Amrine was by no means the first state decision to recognize a freestanding claim of actual innocence. The California Supreme Court addressed this issue as early as 1993, the year that *Herrera* was decided, in *In re Clark*.[62] *Clark* focused on the seeming inconsistency between the lengthy discussion by Chief Justice Rehnquist of the lack of authority of the federal courts to grant relief based on actual innocence in the absence of a constitutional violation, and the Court's grudging recognition that it might be constitutionally required to grant relief if a truly persuasive showing of innocence were made and the state courts denied any avenue of relief, stating:

> A refusal to consider a claim of factual innocence based on newly discovered evidence would be constitutionally suspect in a capital case. A majority of the justices of the United States Supreme Court have expressed a belief that the Eighth and Fourteenth Amendments preclude execution of an innocent person. Their statements imply that in a capital case a claim of actual innocence of the crime of which the petitioner stands convicted must be considered regardless of when it is raised or if constitutional error affected the verdict.[63]

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60 *Id.* at 548.

61 *Id.* at 550. In his dissent, Judge Duane Benton did not disagree that Missouri courts had jurisdiction to grant relief; rather, he argued that a master should review the evidence and pass on its credibility before deciding whether a jury should be permitted to hear it. *Id.* at 550 (Benton, J., dissenting).

62 855 P.2d 729 (Cal. 1993).

63 *Id.* at 760.

The *Clark* court concluded that it was, therefore, "persuaded by those views that such claims should be considered regardless of delay or failure to include the claim in a prior petition and irrespective of whether constitutional error contributed to the verdict."[64] Indeed, it said that, "*Since this court is not limited, as the federal courts are, to granting relief only on the basis of constitutional error,*"[65] it would also consider claims that the petitioner was innocent of the death penalty[66] and, in an appropriate case, grant relief even in the absence of an underlying constitutional violation.[67]

The following year, in *Summerville v. Warden, State Prison*,[68] the Supreme Court of Connecticut also expressly recognized "that a substantial claim of actual innocence is cognizable by way of a petition for a writ of habeas corpus, even in the absence of proof by the petitioner of an antecedent constitutional violation that affected the result of his criminal trial."[69] Later Connecticut cases have reaffirmed the viability in Connecticut of freestanding claims of actual innocence, holding that:

> [T]he proper standard for evaluating a freestanding claim . . . is twofold. First, the petitioner must establish by clear and convincing evidence that, taking into account all of the evidence—both the evidence adduced at the original criminal trial and . . . at the habeas corpus trial—he is actually innocent of the crime of which he stands convicted. Second, the petitioner must also establish that, after considering all of that evidence and the inferences drawn therefrom as the habeas court did,

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64 *Id.*

65 *Id.* (emphasis added).

66 That is, although he committed the murder, he is ineligible for the death penalty.

67 *Clark*, 855 P.2d at 760.

68 641 A.2d 1356 (Conn. 1994).

69 *Id.* at 1369. *Summerville* cites *Jones v. State*, 591 So. 2d 911, 915 (Fla. 1992), as adopting a similar standard prior to *Herrera*. *Jones* does hold that claims of newly discovered evidence may be raised after the time for filing a motion for new trial has otherwise expired, if the evidence is "of such nature that it would probably produce an acquittal on retrial." The court did not address the issue in terms of freestanding claims of actual innocence, however, and expressly found that its approach was in accord with that taken by federal courts. *Jones*, 591 So. 2d at 915.

> no reasonable fact finder would find the petitioner guilty of the crime.[70]

Texas also recognized the right of a person sentenced to death for a crime the petitioner alleges he did not commit to petition for relief under state constitutional law in *State ex rel. Holmes v. Court of Appeals.*[71] *Holmes* held that "execution of an innocent person would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution."[72] In 1997, Texas held that its constitution also forbade "not just the execution, but the incarceration as well of an innocent person."[73] Like Connecticut, and like Missouri would later hold in *Amrine*, Texas held that proof of actual innocence must be made by clear and convincing evidence.[74]

Illinois has similarly upheld the right of state courts to recognize freestanding claims of actual innocence, even if the federal courts choose not to do so, in *People v. Washington.*[75] As had *Elizondo*, *Washington* addressed whether freestanding claims of actual innocence would be recognized in a case in which a defendant did not receive the death penalty. In *Washington*, the court stated:

> It is no criticism to read *Herrera* as a conflicted decision. As Justice O'Connor said, claims of innocence—even those in noncapital cases—present troubling issues. We are, of course, bound by the Supreme Court's interpretation of the United States Constitution. Conflicted or not, at least for noncapital cases, *Herrera* clearly states . . . that a freestanding claim of innocence is not cognizable as a fourteenth amendment due process claim.[76]

Washington then recognized the petitioner's right to raise a freestanding claim of actual innocence under the Illinois Constitution's due process clause, stating, "*we labor under no self-imposed constraint to*

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70 Correia v. Rowland, 820 A.2d 1009, 1022–23 (Conn. 2003) (quoting Miller v. Comm'r of Corr., 700 A.2d 1108 (1997)) (footnotes omitted).

71 885 S.W.2d 389 (Tex. Crim. App. 1994).

72 *Id.* at 397.

73 *Ex parte* Elizondo, 947 S.W.2d 202, 204 (Tex. Crim. App. 1997).

74 *Id.* at 209.

75 665 N.E.2d 1330 (Ill. 1996).

76 *Id.* at 1335.

follow federal precedent in 'lockstep' in defining Illinois' due process protection."[77] The court found that procedural due process required it to recognize such a claim, for to ignore a claim of actual innocence would be "fundamentally unfair."[78]

Further, as a matter of substantive due process, *Washington* found that, "[i]mprisonment of the innocent would also be so conscience shocking as to trigger operation of substantive due process" under the Illinois Constitution.[79] More specifically, it explained, while the presumption of innocence no longer applies once a person is convicted in a trial free of constitutional error, and thus he must be viewed as guilty, the presumption of guilt should not be irrebuttable in the face of a truly persuasive showing of actual innocence. Such a showing of innocence "would, in hindsight, undermine the legal construct precluding a substantive due process analysis"[80]—that is, undermine the assumption of guilt that applies once direct appeals are exhausted. The Supreme Court of Illinois then concluded: "We therefore hold 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."[81]

These cases recognize that the authority of state courts to recognize freestanding claims of actual innocence is not derivative of the recognition of such claims in federal courts. Federal courts must be concerned with issues of comity and deference to state courts and state policies. If a state statute or state case law is in conflict with the federal constitution, if a state fails to recognize a right that is granted by the federal constitution, or if a conviction is affirmed despite an underlying constitutional violation in the trial, then the federal courts may grant relief if the petitioner shows cause and prejudice for the failure to timely raise his claims or makes a gateway showing of actual innocence. But,

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77 *Id.* (citation omitted) (emphasis added).

78 *Id.* at 1336.

79 *Id.*

80 *Id.*

81 *Id.* at 1337; *see also* State v. Conway, 816 So. 2d 290, 291 (La. 2002) (assuming that Louisiana would follow *Summerville, Washington,* and similar cases in recognizing a freestanding claim of actual innocence, but finding the showing made in such a case would not meet the "extraordinarily high" standard of proof that would be required for such a claim).

beginning with *Wainwright v. Sykes*,[82] the United States Supreme Court has narrowed the basis of federal habeas review and made federalism an increasingly dominant factor in its decision making.[83] In *Herrera* and *Schlup*, it made clear that, in the absence of an underlying constitutional violation, it would hold that principles of comity and deference preclude a federal court from interfering with the judgment in a constitutionally adequate trial.[84]

This does not mean that the federal courts can never provide relief in the face of a freestanding claim of actual innocence. It simply means that, in order to set aside the conviction, the Supreme Court would have to find the execution of a truly innocent petitioner constitutes a constitutional violation (a proposition it has not as yet directly had to confront and decide). This seems to be why the Chief Justice said that he assumed, for purposes of the case, and Justice O'Connor said in her concurring opinion, that it would be unconstitutional to execute a person once a truly persuasive showing of actual innocence were made, if the state truly refused to provide a remedy.[85]

But, state courts can and, as is evident, often do provide a remedy for such injustices under their state law, pursuant to their authority under their state constitutions to grant writs of habeas corpus in cases of actual innocence. Indeed, as other commentators have noted:

> The states must recognize that since *Herrera*, they shoulder most of the responsibility for providing review of post-conviction claims of actual innocence, especially in non-capital cases. This is particularly true since the passage of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which, for example, denies a federal habeas court jurisdiction in a capital case if the petitioner fails to raise his claim in state court, even if the claim depends on an assertion of actual innocence.[86]

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82 433 U.S. 72 (1977).

83 Anderson, *supra* note 30, at 496.

84 *Id.* at 494-95; Eli Paul Mazur, *"I'm Innocent": Addressing Freestanding Claims of Actual Innocence in State and Federal Courts*, 25 N.C. CENT. L.J. 197, 224-25 (2003); Thomas, *supra* note 22, at 288.

85 Herrera v. Collins, 506 U.S. 390, 416, 419 (1993).

86 Anderson, *supra* note 30, at 498 (footnotes omitted).

Moreover, even if federal courts were to broaden their scope of review of state habeas claims of innocence, this would not lessen the obligation of state courts to provide their own procedures for ensuring that there is a forum in their own justice system for truly persuasive showings of actual innocence.

III. THE BROAD AUTHORITY OF STATE COURTS TO GIVE RETROACTIVE APPLICATION TO FEDERAL CONSTITUTIONAL RIGHTS

The Supreme Court of Missouri handed down *State v. Whitfield*[87] two months after its decision in *Amrine*. In *Whitfield*, the court further explicated its authority, as a state court of last resort, to grant post-conviction relief based on state law and principles, even where such relief is not available under the more limited review procedures followed by federal courts in reviewing habeas claims based on state criminal convictions.

In 1994, a jury convicted Mr. Whitfield of first-degree murder. A separate penalty phase followed.[88] Missouri penalty-phase criminal procedure requires jurors to go through four steps, and provides that they must assess punishment at life imprisonment, rather than death, unless they determine all four steps against the defendant. These steps require the jurors to unanimously find beyond a reasonable doubt the existence of a statutory aggravating factor; that the evidence in aggravation warrants imposing a death sentence; that mitigating evidence does not outweigh that in aggravation; and that "under all of the circumstances" the juror believes he or she should assess punishment as death.[89]

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87 107 S.W.3d 253 (Mo. 2003).

88 *Id.* at 256.

89 *Id.* at 258. Specifically, at the time of Mr. Whitfield's trial, section 565.030.4 stated:

> The trier shall assess and declare the punishment at life imprisonment without eligibility for probation, parole, or release except by act of the governor:
>
> (1) If the trier does not find beyond a reasonable doubt at least one of the statutory aggravating circumstances set out in subsection 2 of section 565.032; or
>
> (2) If the trier does not find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating circumstances listed in subsection 2 of section 565.032, warrants imposing the death sentence; or
>
> (3) If the trier concludes that there is evidence in mitigation of punishment, including but not limited to evidence supporting the

In Mr. Whitfield's case, the jury deadlocked 11-to-1 in favor of life imprisonment. Although Missouri requires jurors to specify which statutory aggravating factor(s) they find, it does not otherwise require the jury to specify how they voted on each of the four steps set out in the statute. Therefore, nothing in the verdict form itself allowed the trial or appellate courts to determine at what point the jury had deadlocked.[90] Pursuant to section 565.030.4,[91] the trial judge, therefore, himself made independent findings as to each of the four steps set out in the statute. He resolved each step against the defendant, and imposed the death penalty.[92] Mr. Whitfield's conviction and sentence of death were affirmed on appeal, and post-conviction relief was denied.[93]

Then, in 2002, the United States Supreme Court held in *Ring v. Arizona*[94] that the Sixth Amendment to the United States Constitution entitles "[c]apital defendants . . . to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[95] The only exception generally recognized is where the statutory aggravating factor is a prior conviction; as a prior conviction is a matter of record, a judge rather than a jury can determine it.[96]

Mr. Whitfield argued that, in section 565.030,[97] Missouri's legislature had conditioned the imposition of the death penalty on a finding against the defendant on each of the four steps set out in the statute. In Mr. Whitfield's case, prior convictions for manslaughter and second-degree murder were the statutory aggravating factors, and thus, those were not required to be found by the jury. But, he argued, steps 2 and 3 also required factual findings by the jury, or mixed findings of fact and opinion. Therefore, even if the trial judge could make the finding against the defendant on step 1 based on his prior convictions, the judge could

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> statutory mitigating circumstances listed in subsection 3 of section 565.032, which is sufficient to outweigh the evidence in aggravation of punishment found by the trier; or
> (4) If the trier decides under all of the circumstances not to assess and declare the punishment at death.

MO. REV. STAT. § 565.030.4 (1994).

90 *Whitfield*, 107 S.W.3d at 262-63.

91 MO. REV. STAT. § 565.030.4.

92 *Whitfield*, 107 S.W.3d at 261-62.

93 State v. Whitfield, 939 S.W.2d 361 (Mo. 1997), *cert. denied*, 522 U.S. 831 (1997).

94 536 U.S. 584 (2002).

95 *Id.* at 589.

96 *Id.* at 585.

97 MO. REV. STAT. § 565.030 (2000).

not do so on steps 2 or 3. And, because Missouri instructions did not require jurors to reveal at what step they deadlocked, a reviewing court could not presume that the jurors had found all the facts required by steps 1, 2, and 3 against the defendant.[98]

While the judge in Mr. Whitfield's case later did find all of these steps against Mr. Whitfield, *Ring* requires the jury to determine all facts on which capital punishment is based, not the judge. Therefore, Mr. Whitfield argued, under *Ring*, his death sentence had to be reversed and a sentence of life imprisonment entered in its stead.[99]

In its decision, the Supreme Court of Missouri rejected the State's countervailing argument and held that *Ring* did indeed preclude a judge from making the factual findings required under the statute before a death sentence could be imposed.[100] The question then arose whether Mr. Whitfield was entitled to the benefit of *Ring* since his conviction was not pending on direct appeal at the time that *Ring* was decided.

The State argued that *Ring* could not be applied to Mr. Whitfield or to *any* case on collateral review, asserting:

> In *Griffith* [*v. Kentucky*, 479 U.S. 413 (1987)], the Supreme Court held that a new rule for the conduct for criminal prosecutions is to be applied retroactively only to cases, state or federal, pending on direct review or not yet final. Since appellant's appeal was not pending on direct review and it was final in June 2002, *Ring* does not apply retroactively to appellant's case.[101]

In other words, as in *Amrine*, the State took the position that, if the federal courts would not recognize petitioner's right to relief, then Missouri and other state courts of last resort were powerless to grant such relief either.

The Supreme Court of Missouri rejected the approach advocated by the State, stating:

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98 State v. Whitfield, 107 S.W.3d 253, 270-71 (Mo. 2003).

99 *Id.* at 256.

100 *Id.*

101 *Id.* at 265-66 (citation omitted).

> The State's argument too narrowly construes both the law applicable in federal courts governing retroactive application of newly stated federal procedural rules and this Court's duty and authority to apply federal constitutional law retroactively.
>
> As to the first concern, *Griffith* did not set a limit, or ceiling, on when new procedural rules will be applied to other cases, but rather a floor. It set out when new procedural rules *must* be applied to other cases, stating, "a new rule for conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, *pending on direct review or not yet final*. . . ." *Griffith*, 479 U.S. at 328 (emphasis added). *Griffith* at no point said that a state *cannot* apply new criminal procedural rules to cases on collateral review—indeed, that issue was not before it, as *Griffith* was a direct appeal.[102]

Whitfield then discussed the changing nature of the test applied by the United States Supreme Court to determine whether to grant retroactive application to constitutional principles it recognized to state cases on *collateral review*.[103] From 1967 until 1989, the Supreme Court required federal courts to apply the subjective standard set out in the cases of *Linkletter v. Walker*[104] and *Stovall v. Denno*.[105] The *Linkletter-Stovall* analysis required a court to evaluate three factors when determining whether retroactive application should be given to a new constitutional standard:

> (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.[106]

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102 *Id.* at 266.
103 *Id.*
104 381 U.S. 618 (1965).
105 388 U.S. 293 (1967).
106 *Id.* at 297.

In 1989, the Supreme Court narrowed the basis for federal collateral review of state convictions in *Teague v. Lane*.[107] *Whitfield* addressed the holding of *Teague* as follows:

> Under *Teague*, federal courts may not apply a new constitutional rule retroactively unless the rule is a matter of substantive law or, if procedural, it falls within one of two exceptions: (1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal lawmaking authority to proscribe[,]"[108]—for instance, proscribing the death penalty for those who were mentally retarded at the time of their crime, or (2) it establishes procedures that "implicate the fundamental fairness of the trial,"[109] "without which the likelihood of an accurate conviction is seriously diminished."[110]
>
> *Teague* narrowed the situations in which a federal court will apply a new procedural rule retroactively to cases on collateral review, setting forth a generally applicable test rather than permitting federal courts to continue to make a case-by-case determination based on the *Linkletter-Stovall* factors.[111]

But, *Whitfield* held, the fact that the federal courts have decided to narrowly apply constitutional decisions retroactively to cases on collateral review does not mean the states must also do so.[112] Indeed, to so conclude would be to ignore the very reason that the federal courts have circumscribed their application of federal constitutional principles to state courts: the desire to minimize federal interference with state criminal justice determinations. As the Supreme Court of Nevada noted in determining that it was not bound to apply *Teague* in determining the retroactivity of federal constitutional decisions:

> In *Teague*, the Supreme Court, instead of focusing on the purpose and impact of a new constitutional rule,

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107 489 U.S. 288 (1989).

108 *See id.* at 311.

109 *See id.* at 312.

110 *See id.* at 313.

111 State v. Whitfield, 107 S.W.3d 253, 266 (Mo. 2003).

112 *Id.* at 267.

> looked to the function of federal habeas review, which is to ensure that state courts conscientiously follow federal constitutional standards. The Court determined that this function is met by testing state convictions against the constitutional law recognized at the time of trial and direct appellate review.... Therefore, once a conviction has become final, federal habeas courts should generally not interfere with the state courts by applying new rules retroactively.[113]

In so holding, neither *Teague* nor other Supreme Court cases have suggested that the states are prohibited from applying constitutional principles retroactively under state law. To the contrary, it has held that "[s]tates are free to provide greater protections in their criminal justice system than the Federal Constitution requires."[114] For this reason, "[t]he Supreme Court has recognized that states may apply new constitutional standards 'in a broader range of cases than is required' by the Court's decision not to apply the standards retroactively."[115]

Of course, not all states have agreed with the above cases. While none directly hold that a state court is totally without authority to apply federal constitutional principles retroactively to cases on collateral review, some cases have simply applied the current federal retroactivity standard—be it *Linkletter* or *Teague*—without apparent consideration of whether they were free to apply a different standard.[116] Some cases do

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113 Colwell v. State, 59 P.3d 463, 470 (Nev. 2002).

114 California v. Ramos, 463 U.S. 992, 1014 (1983).

115 *Colwell*, 59 P.3d at 470-71 (quoting Johnson v. New Jersey, 384 U.S. 719 (1966)). *Colwell* also held "*Teague* is not controlling on this court, other than in the minimum constitutional protections established by its two exceptions." *Id.* at 470; *see also* State v. Fair, 502 P.2d 1150, 1152 (Or. 1972) ("[W]e are free to choose the degree of retroactivity or prospectivity which we believe appropriate to the particular rule under consideration, so long as we give federal constitutional rights at least as broad a scope as the United States Supreme Court requires."). *Id.*

116 *See, e.g.*, Morgan v. State, 469 N.W.2d 419, 422-23 (Iowa 1991) (assuming without discussion that *Griffith* and *Teague* were determinative of whether it could apply a new federal constitutional rule retroactively); Meadows v. State, 849 S.W.2d 748, 754 (Tenn. 1993) (stating that it must apply *Teague*'s retroactivity analysis to federal constitutional issues on collateral review, but not to state constitutional or statutory issues); *see also* Christopher Flood, *Closing the Circle:* Case v. Nebraska *and the Future of Habeas Reform*, 27 N.Y.U. REV. L. & SOC. CHANGE 633, 659 (2001-2002).

so even though the issue before them is whether their interpretation of a state constitutional provision should be applied retroactively.[117]

Whitfield rejected the State's argument that it was required to follow the retroactivity principles set out in *Teague*. Noting that, prior to *Teague*, Missouri had applied a test based on *Linkletter-Stovall*, *Whitfield* determined that it was up to Missouri whether to continue to apply the *Linkletter-Stovall* test, to apply *Teague*, or to adopt its own test for determining retroactivity of a new federal constitutional rule to cases on collateral review.[118] So long as a state's test is not narrower than that set forth in *Teague*, it will pass constitutional muster.[119] *Whitfield* determined that:

> [A]s a matter of state law, this Court chooses not to adopt the *Teague* analysis but instead chooses to continue applying the *Linkletter-Stovall* approach to the issue of the retroactivity of *Ring*, an approach that comports better with Missouri's legal tradition. Applying the analysis set out in *Linkletter-Stovall* here, this Court must consider (1) the purpose to be served by the new rule, (2) the extent of reliance by law enforcement on the old rule, and (3) the effect on the administration of justice of retroactive application of the new standards.[120]

While Mr. Whitfield had filed his claim as a motion for this Court to recall its mandate affirming his conviction, rather than as a petition for a writ of habeas corpus, *Whitfield* noted that the same result would obtain in habeas corpus, stating:

> This Court further notes that even were a recall of mandate not available, defendant would be entitled to

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117 *See, e.g.*, State v. Neer, 795 P.2d 362, 367 (Kan. 1990) (recognizing the *Teague* analysis as applicable in deciding the retroactivity of a new state rule); Commonwealth v. Bray, 553 N.E.2d 538, 539-40 (Mass. 1990) (concluding that *Teague* governed retroactivity of decision on admissibility of mental impairment on issue of malice under state law); Palin v. Vose, 603 A.2d 738, 741-42 (R.I. 1992) (abandoning old *Linkletter* test once federal courts adopted *Teague* and applying it to determine retroactivity of state rule regarding waiver of jury trial). *But see* People v. Sexton, 580 N.W.2d 404, 411-12 (Mich. 1998) (holding that the state is free to determine retroactivity of state rule).

118 State v. Whitfield, 107 S.W.3d 253, 268 (Mo. 2003).

119 *Id.*

120 *Id.*

> the same remedy in habeas corpus. In sentencing Mr. Whitfield to death without a jury finding of factors 1, 2, and 3 against defendant, the court below imposed a sentence in excess of that permitted by law. "If a court imposes a sentence that is in excess of that authorized by law, habeas corpus is a proper remedy." *State ex rel. Osowski v. Purkett*, 908 S.W.2d 690, 691 (Mo. banc 1995), *citing*, *State ex rel. Dutton v. Sevier*, 83 S.W.2d 581, 582-83 (Mo. 1935). In such a case, the rules regarding preservation of error by raising the error on direct appeal or in authorized post-conviction motions do not apply, for "those waivers do not affect his objection that the sentence exceeds the maximum allowed by law." *Id.* Such an error is jurisdictional, and cannot be waived. *See*[,] *e.g.*[,] *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. W.D. 1995).[121]

The majority found these principles favored retroactive application, vacated the death sentence, and directed entry of a sentence of life imprisonment.[122] Missouri is not alone in recognizing that it has a choice whether to follow *Teague*. In deciding whether to apply a recent federal constitutional decision retroactively to the case before it, *Figarola v. State*[123] similarly found that while "[s]ome states have adopted *Teague* without discussing the fact that *Teague* is not binding on state courts when they are determining if their own decisions are retroactive. . . . The policy considerations behind *Teague* are not necessarily the same as those for state court post-conviction relief."[124] Florida chose to follow *Linkletter* rather than *Teague*.[125] As discussed above, Nevada similarly recognized the authority of state courts to give federal constitutional rights broader retroactive application in *Colwell v. State*.[126]

Cowell v. Leapley[127] took the same approach, noting that the lower courts erred in holding that a new United States Supreme Court decision

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121 *Id.* at 269 n.19.

122 In a dissenting opinion, Judge William Ray Price concurred that Missouri was free to, and would continue to, apply the *Linkletter-Stovall* test, but argued that the remedy should be remand for a new trial rather than entry of a life sentence.

123 841 So. 2d 576 (Fla. Dist. Ct. App. 2003).

124 *Id.* at 577 n.1.

125 *Id.* at 576-77.

126 59 P.3d 463 (Nev. 2002).

127 458 N.W.2d 514 (S.D. 1990).

would not be given retroactive effect just because the federal courts might not give it retroactive effect, stating that the United States "Constitution neither prohibits nor requires retrospective effect" and that "[e]ach sovereign has the right to decide how it will allow access to this extraordinary remedy."[128] *Cowell* found *Teague* too restrictive and chose not to follow it.[129]

A number of other states, after recognizing that they are free to adopt any rule so long as it is not more restrictive than *Griffith* and *Teague*, have chosen to follow the federal standards set out in those cases, noting, "our courts have always adverted to then-existing federal retroactivity standards when applying new federal constitutional rules."[130] Similarly, *State ex rel. Taylor v. Whitley*,[131] while stating "we recognize that we are not bound to adopt the *Teague* standards,"[132] did so anyway because it found the *Linkletter* test it had previously applied too vague and subjective.[133]

While merely adopting the federal test for retroactivity to cases on collateral review is certainly simpler and may ensure that the results in state habeas proceedings are consistent with the results that would be obtained on habeas review by the federal courts, this approach ignores the difference in function of state versus federal habeas review. While the United States Constitution may dictate the substantive basis of the United States Supreme Court's decisions on issues such as the right to counsel, the right to a jury determination of the facts underlying the death penalty, and so forth, the Constitution does not address when and how those decisions are to be applied to pending cases. How the federal courts will apply their decisions to pending cases on direct or collateral review has been left to court decision or statute.

In the 1960s, the United States Supreme Court determined that new constitutional decisions would be applied to cases on direct and

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128 *Id.* at 517.

129 *Id.* at 518.

130 State v. Zuniga, 444 S.E.2d 443, 446 (N.C. 1994).

131 606 So. 2d 1292 (La. 1992).

132 *Id.* at 1296.

133 *Id.* at 1296-97. *Accord* State v. Slemmer, 823 P.2d 41 (Ariz. 1991) (finding retroactivity analysis sufficiently complex that state would for simplicity follow federal approach); State v. Mohler, 694 N.W.2d 1129 (Ind. 1998).

collateral review alike.[134] In *Griffith* and *Teague*, it determined that principles of fairness required that it continue to apply its new constitutional decisions to cases still pending on direct review. However, principles of comity and finality, and the desire to avoid the tension caused by what was often seen as undue meddling of federal courts in state court jurisprudence,[135] would outweigh these fairness considerations in cases on collateral review unless the new rule fit within narrowly defined exceptions.[136]

In particular, the Supreme Court held that, "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality."[137] And, to the extent that the purpose of federal habeas review is to encourage state courts to follow federal constitutional law, then, "[i]n order to perform this deterrence function, ... the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place."[138]

In AEDPA, the legislature codified this rule in narrow form, stating that federal courts shall not grant a writ of habeas corpus to one whose claim has been adjudicated on the merits in state court "unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[139]

But, the policy concerns behind *Teague* are only "partly germane to collateral review by this and other state courts.... We share the concern that the finality of convictions not be unduly disturbed, but the need to prevent excessive interference by federal habeas courts has no application to habeas review by state courts themselves."[140]

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134 Stovall v. Denno, 388 U.S. 293 (1967); Mary C. Hutton, *Retroactivity in the States: The Impact of* Teague v. Lane *on State Postconviction Remedies*, 44 ALA. L. REV. 421, 422 (1993).

135 Flood, *supra* note 116, at 639.

136 Teague v. Lane, 489 U.S. 288, 310 (1989). The two situations in which a new constitutional rule will be applied to cases on collateral review are where the new rule: (1) places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," and (2) is "implicit in the concept of ordered liberty." *Id.* at 307.

137 *Id.* at 309.

138 *Id.* at 306.

139 Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254 (2000).

140 Colwell v. State, 59 P.3d 463, 471 (Nev. 2002).

In other words, the change in the federal approach to habeas corpus so evident in *Teague* and its progeny did not result from a change in the nature of the writ itself, but from a desire to lessen federal interference with state courts. "Thus, it would be fallacious for states to adopt the *Teague* formula under the guise of reforming habeas, when the purpose of that decision was to decrease federal interference with the states."[141] Or, as the Supreme Court of New Jersey stated the principle:

> It would be a bitter irony indeed if our [state] courts, in an attempt to accommodate the Supreme Court's retrenchment of federal habeas review, were artificially to elevate procedural rulings over substantive adjudications in post-conviction review, at a time when the Court's curtailment of [federal] habeas review forces state prisoners to rely increasingly on state post-conviction proceedings as their last resort for vindicating their state and federal constitutional rights.[142]

Judge Dennis was even more direct in dissent in *State ex rel. Taylor v. Whitley*,[143] stating, "[R]eplication of the United States Supreme Court's rule in this area does not promote the goals of federalism; instead, in self-defeating circularity, the majority [by adopting *Teague*] blindly replicates the very federal habeas rule by which the High Court attempts to accord comity to our state laws and decisions."[144]

IV. CONCLUSION

While the underpinning of federal habeas review is to ensure that the states recognize and apply federal statutory and constitutional principles to cases tried in their courts, state courts are not so limited. Even in the absence of an underlying federal constitutional violation in a criminal defendant's trial, state courts and legislatures are free to develop procedures by which a criminal defendant, such as Mr. Amrine, can bring claims of actual innocence.

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141 Hutton, *supra* note 134, at 449.

142 State v. Preciose, 609 A.2d 1280, 1294 (N.J. 1992). As one commentator stated the concern, "Federal procedural default rules are predicated on notions of comity and respect for state court rules; state courts cannot rely on the same logic to justify procedural defaults. Yet the state procedural bars have clearly been enacted to echo the retrenchment of federal habeas." Flood, *supra* note 116, at 659.

143 606 So. 2d 1292 (La. 1992).

144 *Id.* at 1303 (Dennis, J., dissenting).

State courts are also free to apply their own notions of retroactivity in determining the application of constitutional principles to cases on collateral review, such as *Whitfield*. They are not required to, and should not, act in lockstep with the federal courts on issues that are, at heart, matters of state rather than federal law, for state application of federal constitutional rules is not limited by principles of comity. Therefore, the fact that the federal courts have retrenched on their oversight of state criminal jurisprudence does not require similar retrenchment on the part of state courts.[145] To the contrary, "[w]hile the substance of what is to be applied is a federal constitutional matter, the decision on what criteria to use to determine prospective or retroactive application is a nonconstitutional state decision."[146]

The Missouri Constitution preserves to Missouri citizens the right to petition for habeas corpus.[147] Other state constitutions also recognize this writ. Except in the narrow class of cases to which the United States Supreme Court has stated its constitutional pronouncements must apply, state courts are free to determine the extent of the retroactive application of new constitutional rules to cases on collateral review in their state. Missouri has followed this path in its recent decisions in *Amrine* and *Whitfield*. In those cases, Missouri chose to permit broader review. Other states, in light of their own concerns and jurisprudence, may more narrowly interpret the right to habeas review under state law. But, these are decisions each state is free to make based on its own application of principles of finality and due process, without being limited by concerns of federalism and comity.

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145 "Regardless of whether one agrees that federalism and comity should be pursued to such extreme lengths by the United States Supreme Court, there is no justification for a state supreme court to imitate the High Court in this respect." *Id.* (Dennis, J., dissenting).

146 Cowell v. Leapley, 458 N.W.2d 514, 517 (S.D. 1990).

147 "That the privilege of the writ of habeas corpus shall never be suspended." MO. CONST. art. 1, § 12.