Missouri Law Review

Volume 85 | Issue 1 Article 10

Winter 2020

Deconstructing the Paradox of the Constitutional Incarceration of Innocent Citizens

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NOTE

Deconstructing the Paradox of the Constitutional Incarceration of Innocent Citizens

In re Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. 2016) transfer denied.

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I. INTRODUCTION

Missouri is not sure whether it is a manifest injustice or a violation of due process to continue incarcerating an innocent person, even for life.[1] This is a shocking notion for average citizens who expect the criminal justice system to exact justice accurately and fairly. Much of judicial precedent is not entirely intuitive to ordinary citizens, and yet lawful incarceration of innocents is a paradox that moves beyond unintuitive to alarming. Rodney Lincoln's story epitomizes many of the most alarming aspects of this paradox.

In 1985, Rodney Lincoln was convicted of the brutal assault of two young girls and the murder and assault of their mother.[2] In the more than thirty years following his convictions, the already feeble evidence used to incarcerate Mr. Lincoln crumbled.[3] With no evidence remaining to support his conviction, Mr. Lincoln petitioned for a writ of habeas corpus to challenge his continued detention.[4] He was unsuccessful.[5] The Missouri Court of Appeals for the Western District denied Mr. Lincoln's petition, perpetuating the convoluted and flawed precedent that governs the legal procedures of habeas corpus.[6]

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1. *See In re* Lincoln v. Cassady, 517 S.W.3d 11, 22 (Mo. Ct. App. 2016).
2. *Id.* at 15.
3. *Id.* at 15–16.
4. *Id.* at 16.
5. *Id.* at 15.
6. *Id.* at 23.

Habeas corpus is a procedural safeguard that allows an individual detained by a government to challenge the legitimacy of his detention.[7] While the exact parameters of habeas corpus vary across jurisdictions, its common underlying premise provides for release of a detainee when his detention violates the law.[8] No court binding the Missouri Court of Appeals has ever determined that the incarceration of an innocent person is unlawful.

While plenty of precedent exists to conclude that such a detention violates fundamental fairness, the Western District in *In re Lincoln v. Cassady* was unwilling to make such a finding without the prior blessing of the Supreme Court of Missouri.[9] As a result, there is no procedural pathway for a convicted and incarcerated person sentenced to anything short of death to convincingly demonstrate his innocence and obtain relief under Missouri law. For Mr. Lincoln, who received two consecutive life sentences plus fifteen years, this lack of a procedural pathway made the absence of evidence remaining to support his conviction irrelevant.[10]

Courts upholding the position that habeas corpus cannot remedy the incarceration of an innocent person flaunt finality as a compelling justification for denying relief.[11] Respect for the finality of judgments and convictions lends stability, efficiency, and legitimacy to the courts. But finality is an unconvincing justification for affirming a conviction when the convicted is ready and able to prove his innocence. Courts also rely on executive clemency to clean up the injustice that results from this position. As the chief executives of their jurisdictions, governors have statutory authority to grant pardons and commute sentences through clemency. But clemency is an ineffective solution when examined critically against the massive injustice that results from wrongful convictions left undisturbed.

Part II of this Note explains the facts and procedural background of Rodney Lincoln's convictions for manslaughter and two counts of first-degree assault. Part III outlines the legal background relevant to the court's ruling, including the expansion of habeas corpus to freestanding claims of actual innocence and the inapplicability of that expansion to non-death penalty cases. Part IV details the court's ruling in Mr. Lincoln's case, which acknowledged Mr. Lincoln's compelling case of innocence but could not grant habeas relief due to procedural barriers. Part V explains the insufficiency of finality as a justification for perpetuating the procedural barriers to habeas relief and the inadequacy of the court-endorsed remedy of executive clemency to cure the consequences of those barriers. It then offers concrete solutions to the

7. *Id.* at 16 (citing State *ex rel* Amrine v Roper, 102 S.W.3d 541, 545–46 (Mo. 2003) (en banc)).

8. *Habeas Corpus*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/habeas_corpus# [perma.cc/6VNM-R73K] (last visited Dec. 15, 2019). In this context, "the law" encompasses constitutional, statutory, and common law.

9. *Lincoln*, 517 S.W.3d at 23.

10. *Id.*

11. *Id.* at 16.

procedural gap that allows innocents to be lawfully and constitutionally detained, even for life.

II. FACTS AND HOLDING

On the night of April 27, 1982, a man entered the home of JoAnn Tate.[12] The man assaulted and murdered Ms. Tate before he turned his attention to her two daughters, Melissa, age seven, and Renee, age four.[13] The "bad man," as Melissa would later call him, sexually assaulted and repeatedly stabbed both girls before he left.[14] Concerned that no one had heard from her the morning after the assault, JoAnn's brother and boyfriend both set out to check on her.[15] Upon arriving at her apartment, the two men discovered the horrific crime scene.[16] That morning, Melissa told them the man who committed the assaults had also worked on her mother's car recently.[17] She called him "Bill."[18] She also told authorities the man drove a white Volkswagen.[19]

As investigators attempted to identify a suspect for the crimes, they repeatedly asked Melissa for additional information about her assailant.[20] Eventually, law enforcement created a composite drawing of a suspect based on Melissa's descriptions.[21] A few of JoAnn's relatives thought the composite resembled one of JoAnn's old romantic interests, Rodney Lincoln.[22] A detective met with both girls to view a photographic lineup and a live lineup that included Lincoln.[23] Both the lineups were conducted in a highly suggestive manner using techniques that are considered unreliable today.[24] The detective told the girls that he had a magic door the "bad man" was

12. J. Malcom Garcia, *Reasonable Doubt*, LATTERLY (March 29, 2018), https://latterly.org/reasonable-doubt/ [perma.cc/FDF3-KLYM].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 16 (Mo. Ct. App. 2016); *Affidavit of Melissa DeBoer*, MIDWEST INNOCENCE PROJECT, 3–4 (Nov. 30, 2015), https://themip.org/wp-content/uploads/2016/12/M.D.-Letter-Requesting-Clemency-for-Rodney-Lincoln-redacted.pdf [perma.cc/J39N-JJGC].

20. *Affidavit of Melissa DeBoer*, *supra* note 19, at 2–3.

21. *Id.*

22. Garcia, *supra* note 12.

23. *Id.*

24. *See Eyewitness Identification: A Policy Review*, THE JUST. PROJECT, https://web.williams.edu/Psychology/Faculty/Kassin/files/Justice%20Project%20-%20on%20ET.pdf [perma.cc/9FY8-NAFA]. "The Special Master also found that '[a] witness's age . . . bears on the reliability of an identification.' A meta-analysis has shown that children between the ages of nine and thirteen who view target-absent lineups are more likely to make incorrect identifications than adults." State v. Henderson, 27 A.3d 872, 906 (N.J. 2011).

behind.[25] He also told them the "bad man" was in one of the pictures and emphasized that it was important to pick a photo so the "bad man" would not go free.[26] The photographic lineup contained only two photos: an outdated mugshot of Mr. Lincoln and one of the girls' relatives, who was another person of interest.[27] At only four years old, Renee would not look at the photos.[28] Seven-year-old Melissa picked Mr. Lincoln.[29] Later the same day, Melissa was presented with a live lineup of four individuals – Mr. Lincoln and three men who looked remarkably unlike him.[30] Mr. Lincoln was the shortest in the lineup and was thinner than his co-suspects.[31] His hair was short and clean cut while the others had longer, shaggy haircuts.[32] All of the men had varying facial hair.[33] Melissa identified Mr. Lincoln just as she had in the photographic lineup.[34]

At trial, when Melissa was called to testify, she smiled at Mr. Lincoln and even moved towards him on her way to the witness stand.[35] This behavior discredited the notion that Mr. Lincoln was the perpetrator of a violent assault on the little girl and contributed in large part to a hung jury.[36] Before the retrial, prosecutors and social workers coached Melissa extensively on her

25. Garcia, *supra* note 12. Lineups should be completed in a double-blind manner. *Eyewitness Identification*, *supra* note 24, at 7–8.

26. *Affidavit of Melissa DeBoer*, *supra* note 19, at 2.

27. *Id.* Photographic lineups should include at least 5 fillers and live lineups should include at least 4 fillers. *Eyewitness Identification*, *supra* note 24, at 3. Photographic lineups should also be presented sequentially. *Id.*

28. *Id.*

29. J. Malcom Garcia, *Reasonable Doubt*, LATTERLY (March 29, 2018), https://latterly.org/reasonable-doubt/ [https://perma.cc/FDF3-KLYM].

30. *Affidavit of Melissa DeBoer*, *supra* note 19, at 3. Ms. DeBoer's affidavit contains a photo of the lineup. *Id.* at 4. Fillers should always resemble the witness's prior descriptions. *Eyewitness Identification*, *supra* note 24, at 3. Furthermore, the suspects should all look as similar as possible so that no one suspect stands out. *Eyewitness Identification*, *supra* note 24, at 3. The other three men looked remarkably different from Mr. Lincoln. *Affidavit of Melissa DeBoer*, *supra* note 19, at 4. A vital element of reliable lineup procedures requires that the witness be told the actual perpetrator may not be in the lineup. *Eyewitness Identification*, *supra* note 24, at 3; *see also* State v. Henderson, 27 A.3d 872, 913 (N.J. 2011).

31. *Affidavit of Melissa DeBoer*, *supra* note 19, at 4.

32. *Id.*

33. *Id.*

34. *Affidavit of Melissa DeBoer*, *supra* note 19, at 3. Viewing a suspect more than once during an investigation can affect the reliability of the later identification. State v. Henderson, 27 A.3d 872, 900 (N.J. 2011). "The problem, as the Special Master found, is that successive views of the same person can make it difficult to know whether the later identification stems from a memory of the original event or a memory of the earlier identification procedure." *Id.*

35. Garcia, *supra* note 12.

36. *Id.*

testimony.[37] Department of Family Service ("DFS") records would later reveal that following her attack, Melissa identified most men in her life as the "bad man."[38] Melissa remembers that she was coached to stop saying her attacker was "Bill" and to identify Mr. Lincoln instead.[39] She received so much coaching that Mr. Lincoln was the "bad man" that she now believes her memory was altered.[40]

At the second trial, the substantive evidence against Mr. Lincoln consisted of Melissa's more polished eye witness identification and expert testimony concerning a pubic hair found on a blanket in JoAnn's room.[41] The expert testified that the hair "matched" Mr. Lincoln's.[42] While hair testimony of this nature was once acceptable in a court proceeding, the "science" of hair matching has been debunked so extensively that expert testimony concerning hair "matches" is no longer admissible evidence at trials.[43] At the close of the second trial, the jury convicted Mr. Lincoln of manslaughter and two counts of first-degree assault.[44] He was sentenced to fifteen years on the manslaughter count and life imprisonment on each assault count, with each term to run consecutively.[45]

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37. *Rodney Lincoln*, MIDWEST INNOCENCE PROJECT, https://themip.org/clients/rodney-lincoln/ [perma.cc/B6UT-X4HX] (last visited Dec. 15, 2019).

38. Petitioner's Motion to Transfer at 5, *In re* Lincoln v. Cassady, 517 S.W.3d 11 (Mo. Ct. App. 2016) (No. WD79854).

39. Letter from Melissa DeBoer to Jeremiah Nixon, Governor of Mo., & Members of the Bd. of Prob. and Parole, (Dec. 5, 2016), https://themip.org/wp-content/uploads/2016/12/M.D.-Letter-Requesting-Clemency-for-Rodney-Lincoln-redacted.pdf [perma.cc/J39N-JJGC].

40. *Id.*

41. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 18 (Mo. Ct. App. 2016).

42. *Id.* at 15.

43. Jane Campbell Moriarty & Michael J. Saks, *Forensic Science: Grand Goals, Tragic Flaws, and Judicial Gatekeeping*, 44 JUDGES' J. 16, 20–21 (2005). It is not possible to say with any degree of scientific integrity that two sets of hairs came from the same person. *Id.* at 20. Even findings that hairs are similar have a substantial rate of error. *Id.* In fact, in 2015, the FBI formally acknowledged the problems with hair matching, stating that twenty-six out of twenty-eight examiners overstated hair findings ninety-five percent of the time over two decades. Spencer S. Hsu, *After FBI Admits Overstating Forensic Hair Matches, Focus Turns to Cases*, WASH. POST (Apr. 20, 2015), https://www.washingtonpost.com/local/crime/after-fbi-admits-overstating-forensic-hair-matches-focus-turns-to-cases/2015/04/20/a846aca8-e766-11e4-9a6a-c1ab95a0600b_story.html. [perma.cc/DH78-CN89]. As a result, the FBI began reviewing cases containing unfounded expert testimony concerning hair that undoubtedly has contributed to a significant number of wrongful convictions. *Id.*

44. *Lincoln*, 517 S.W.3d at 15.

45. *Id.* Consecutive sentences mean the jail sentences run back to back rather than at the same time (concurrently). *Consecutive Sentence*, LEG. INFO. INST., https://www.law.cornell.edu/wex/consecutive_sentence#. [perma.cc/98P5-TMBQ].

On direct appeal to the Western District, Mr. Lincoln argued the trial court abused its discretion when it found Melissa competent to testify.[46] To determine Melissa's competency, the trial court applied a four-part test to discern whether she possessed:

> (1) [a] present understanding of or intelligence to understand, on instructions, an obligation to speak the truth; (2) [the] mental capacity at the time of the occurrence in question truly to observe and to register such occurrence; (3) memory sufficient to retain an independent recollection of the observations made; and (4) capacity truly to translate into words the memory of such observation.[47]

Mr. Lincoln's argument rested on the notion than an eight-year-old (Melissa's age at the time of trial) could not retain an independent recollection of her observations of an incident.[48] The Western District noted the trial court correctly implemented the four-part test to determine Melissa's competency to testify.[49] Because the trial court applied the correct test, the Western District granted deference to the trial court's finding without further explanation.[50] Mr. Lincoln's conviction could not be disturbed, as the trial court's finding of competency was not an abuse of discretion.[51]

In 2012, thirty years after the original crime, Mr. Lincoln secured DNA testing of the pubic hair identified as a "match" to him at trial.[52] The DNA tests proved conclusively that the hair did not belong to Mr. Lincoln.[53] However, the court reviewing the DNA results (the "DNA court") concluded the pubic hair was not the "determinative factor" in Mr. Lincoln's conviction.[54] Because the court viewed Melissa's eyewitness testimony as the linchpin in the convictions, it found the DNA test did not establish Mr. Lincoln's innocence.[55] His request to be released was denied.[56]

In 2015, after viewing a *Crime Watch Daily* episode about her mother's murder and the assaults on her and her sister,[57] Melissa recanted her

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46. State v. Lincoln, 705 S.W.2d 576, 577 (Mo. Ct. App. 1986). Mr. Lincoln also argued that testimony of Renee's behavior at the photo lineup was wrongly admitted into evidence. *Id.* The appellate court found that this testimony was cumulative and therefore not prejudicial to the defendant. *Id.* at 579.

47. *Id.* at 578 (citing Hildreth v. Key, 341 S.W.2d 601, 609 (Mo. Ct. App. 1960)).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Lincoln v. State, 457 S.W.3d 800, 803 (Mo. Ct. App. 2014).

53. *Id.* at 804.

54. *Id.* at 808.

55. *Id.* The finding of the motion court was affirmed on appeal. *Id.*

56. *Id.*

57. *Rodney Lincoln Case: Crime Writer Challenges Decades-Old Conviction*, TRUE CRIME DAILY (Nov. 23, 2015 10:39 AM),

eyewitness identification of Mr. Lincoln.[58] The documentary identified an alternative perpetrator, a serial killer named Tommy Lynn Sells.[59] Sells claimed to have committed his first murder at age sixteen[60] and went on to kill over seventy more people across the country before he was finally caught in Texas.[61] At least four people, including Lincoln, were convicted and subsequently released for murders that Sells committed.[62] Sells' pattern consisted of breaking into a random house, typically around four a.m., and using a knife from the kitchen to stab and assault his victims.[63] Sells was in St. Louis working for a relative who owned a Volkswagen repair shop near Ms. Tate's home at the time of her murder and the girls' assaults.[64] Melissa says she recognized Sells as her true attacker when she saw him on the *Crime Watch Daily* episode.[65] Given her identification of Sells as her attacker, Melissa began working diligently for Mr. Lincoln's exoneration and release, believing him to be innocent.[66]

After Melissa's recantation, none of the evidence used to convict Mr. Lincoln remained intact. It was now clear that Mr. Lincoln was, in fact, innocent. Mr. Lincoln petitioned the state court for a writ of habeas corpus asserting his innocence and claiming that he was denied a constitutionally

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https://truecrimedaily.com/2015/11/23/does-dna-prove-wrong-man-behind-bars-in-decades-old-murder/ [perma.cc/PSZ5-VY3G].

58. Garcia, *supra* note 12.

59. *Rodney Lincoln Case*, *supra* note 57; Garcia, *supra* note 12. Sells was executed in Texas in 2014 for the murder of a thirteen-year-old girl. Garcia, *supra* note 12. During this attack, Sells assaulted and stabbed the thirteen-year-old girl as well as her ten-year-old friend, slashing both of their throats before leaving. *Id.* The ten-year-old survived the attack. *Id*.

60. MICHAEL NEWTON, ENCYCLOPEDIA OF SERIAL KILLERS 235 (2d ed. 2006).

61. *Id.* at 237. Texas authorities announced on February 7, 2001 that they believed Sells was responsible for approximately seventy murders across the United States. *Id.*

62. *See Julie Rea*, BLUHM LEG. CLINIC: CTR. ON WRONGFUL CONVICTIONS, http://www.law.northwestern.edu/legalclinic/wrongfulconvictions/exonerations/il/julie-rea.html [perma.cc/PM6B-2XVG] (last visited Dec. 16, 2019); Jennifer S. Mann, *Victim Recants ID That Put Man in Prison for Mother's Murder in St. Louis in 1982*, ST. LOUIS POST-DISPATCH (Dec. 1, 2015), https://www.stltoday.com/news/local/crime-and-courts/victim-recants-id-that-put-man-in-prison-for-mother/article_503a9500-b913-5a2f-b655-ff822f62f917.html [perma.cc/GXN7-DT4D]. Because his crimes lasted decades and spanned the country, there are bound to be more innocent individuals serving time for Sells' crimes.

63. *Rodney Lincoln Case*, *supra* note 57; Mann, *supra* note 62.

64. *Rodney Lincoln Case*, *supra* note 57.

65. Letter from Melissa DeBoer to Jeremiah Nixon, *supra* note 39; *see also Rodney Lincoln Case*, *supra* note 57.

66. Garcia, *supra* note 12.

adequate trial.[67] The trial court denied his petition.[68] Mr. Lincoln then petitioned the Western District for a writ of habeas corpus on the same grounds.[69] The court first addressed Mr. Lincoln's alleged constitutional violations.[70] Finding none, the court denied all claims depending on a constitutional violation to prevail.[71] Mr. Lincoln's petition for a writ of habeas corpus would have to rest on a freestanding claim of actual innocence.[72] Even though none of the evidence used to convict Mr. Lincoln remained, the court denied his freestanding claim of actual innocence on a procedural technicality – a freestanding claim is exclusively reserved for defendants facing a death sentence.[73] Even when an incarcerated defendant not on death row illustrates a compelling case of actual innocence, innocence alone is insufficient to grant a writ of habeas corpus.[74]

III. LEGAL BACKGROUND

The general purpose of habeas corpus is to give detainees of a government the right to challenge their detention as unlawful in court.[75] Habeas corpus has been a foundational principle of criminal justice since the Magna Carta was signed in 1215.[76] At the United States' inception, the Founders drafted the Suspension Clause into the Constitution which states, "The Privileges of the Writ of Habeas Corpus shall not be suspended unless when in Cases of Rebellion of Invasion the public Safety may require it."[77] While the Suspension Clause prevents suspension of habeas corpus rights, it does not *create* an individual right to habeas corpus relief.[78] Federal and state statutes create the right for citizens to petition for a writ of habeas corpus.[79] Because the right to habeas corpus derives from distinct sources at the state and federal level, the right varies from state to state as well as from state to federal courts.[80] In the case of criminal convictions, courts granting habeas

67. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 16–18 (Mo. Ct. App. 2016). He alleged three constitutional violations: *Brady* violations, ineffective assistance of counsel, and a violation of due process. *Id.* at 17–18.

68. *Id.* at 16.

69. *Id.*

70. *Id.* at 17.

71. *Id.* at 18.

72. *Id.* at 15–16.

73. *Id.* at 20–24.

74. *Id.* at 23.

75. *Habeas Corpus*, *supra* note 8.

76. *Id.*

77. U.S. CONST. art. I, § 9, cl. 2.

78. *Habeas Corpus*, *supra* note 8.

79. *Id.*

80. *Id.*

relief vacate the conviction of the petitioning defendant.[81] Because the conviction is vacated, defendants are released from custody.[82]

In Missouri, the right to petition for a writ of habeas corpus is granted by Missouri Supreme Court Rule 91.01(b), which states, "Any person restrained of liberty within this state may petition for a writ of habeas corpus to inquire into the cause of such restraint."[83] The Missouri Constitution delineates an unqualified suspension clause, which states, "[T]he privilege of the writ of habeas corpus shall never be suspended."[84] Missouri's common law provides three avenues for habeas relief: (1) on the basis of a jurisdictional issue, (2) upon demonstration of "cause and prejudice," or (3) when a "manifest injustice" would result unless habeas relief is granted.[85] The "manifest injustice" prong is grounded in the notion that the continued detention of a citizen would be a manifest injustice when a constitutional violation contributed to the detention.[86]

Prior to *State ex rel Amrine v. Roper*, Missouri jurisprudence provided only for "gateway" claims to permit review of alleged constitutional violations under the "cause and prejudice" and "manifest injustice" prongs of habeas corpus.[87] A "gateway" entitles a petitioner to "review on the merits of . . . otherwise defaulted constitutional claim[s]."[88] Without proof of a qualifying gateway, even a meritorious constitutional violation is insufficient to constitute a manifest injustice warranting habeas relief.[89] So, in order to establish the right to habeas relief, the petitioner must demonstrate both the gateway itself as well as a constitutional violation – neither alone provide a path to habeas relief.

There are two "gateways" that permit a court to consider the underlying constitutional violation: (1) "actual innocence" under the manifest injustice prong and (2) the "cause and prejudice" prong itself.[90] If a defendant can demonstrate his innocence, the gateway is opened for the court to review alleged constitutional violations that occurred at trial.[91] The burden pertaining to innocence does not require the negation of all evidence that supported the conviction at trial.[92] Instead, the defendant must show "it is more likely than

81. *Id.*

82. *Id.*

83. MO. SUP. CT. R. 91.01(b)

84. MO. CONST. art. I, § 12.

85. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 16 (Mo. Ct. App. 2016), *transfer denied*, (citing State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 546 (Mo. 2003) (en banc)).

86. *Id.* at 16–17.

87. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 546 (Mo. 2003) (en banc).

88. *Lincoln*, 517 S.W.3d at 17 (quoting State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 546 (Mo. 2003) (en banc)).

89. *Id.* (citing Clay v. Dormire, 37 S.W.3d 214, 217 (Mo. 2000) (en banc)).

90. *Id.* at 16–17.

91. *Id.* at 17.

92. *Id.*

not that no reasonable juror would have convicted the defendant."[93] The "actual innocence" gateway is based on the premise that it would be a manifest injustice not to review the constitutionality of a trial if the defendant is innocent.[94] The gateway of "cause and prejudice" requires both a valid cause for failing to raise an issue in a timely manner and a showing of prejudice as a result of that failure.[95] In other words, if the defendant can show that he or she was not responsible for missing the original habeas corpus deadline but his or her claims of constitutional violations are valid, the gateway is open for the court to review those claims.[96] Because gateway claims require both the presence of the gateway and a constitutional violation, defendants who are able to establish their innocence but not a constitutional violation at trial do not qualify for habeas relief.

The Supreme Court of Missouri first recognized a freestanding claim for habeas relief when it decided *Amrine.*[97] In 2003, Joseph Amrine's execution date was already set when the Supreme Court of Missouri requested a hearing concerning Mr. Amrine's motion for a stay of execution.[98] Mr. Amrine's trial did not contain constitutional deficiencies that contributed to his incarceration.[99] Rather, Mr. Amrine was convicted based on the testimony of three jailhouse informants, all of whom later recanted their testimony and cited compelling reasons for their original perjury.[100] Two additional facts reinforced Mr. Amrine's innocence: (1) no physical evidence tied Mr. Amrine to the crime, and (2) circumstantial evidence showed Mr. Amrine could not possibly have committed the murder.[101] The problem for Mr. Amrine was that no judicial procedure existed for him to establish his innocence in court and secure his freedom.[102] Because he could not show a constitutional violation adversely affected his trial, habeas relief was unavailable to Mr. Amrine.[103]

The Supreme Court of Missouri responded to considerable political pressure by scheduling a hearing in Mr. Amrine's case.[104] In its subsequent opinion, the court expanded habeas corpus relief to include a freestanding

93. *Id.* (quoting Schlup v. Delo, 513 U.S. 298, 332 (1995) (Connor, J., concurring)).

94. *Id.*

95. *Id.*

96. *Id.*

97. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 543 (Mo. 2003)

98. Alexandra Gross, *Joseph Amrine*, NAT'L REGISTRY OF EXONERATIONS (Jul. 23, 2015), https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2993 [perma.cc/4ZSH-F3UW].

99. *Amrine*, 102 S.W.3d at 545–46.

100. *Id.* at 544–45.

101. *Id.* at 548–49.

102. *Id.* at 547.

103. *Id.* at 546–47.

104. Gross, *supra* note 98.

claim of actual innocence.[105] The court recognized the urgency the execution of an innocent person warrants saying, "[I]t is incumbent upon the courts of this state to provide judicial recourse to an individual who . . . is able to produce sufficient evidence of innocence to undermine . . . confidence in the underlying judgment that resulted in defendant's conviction and sentence of death."[106] The court emphasized the execution of an innocent person would be a manifest injustice and reversed Mr. Amrine's conviction.[107] The court delineated that a freestanding claim of actual innocence dispenses with the two-step "gateway" and "constitutional violation" analysis and declares that innocence itself is enough to show that continued detention would be a manifest injustice warranting habeas relief.[108] Innocence is established when no credible evidence remains to support the original conviction.[109] In *Lincoln*, however, the Western District held that the freestanding claim of actual innocence is only available when the petitioner has been sentenced to death.[110] In non-death penalty cases, innocence is limited to serving as a gateway to review of otherwise procedurally barred claims of constitutional violations at trial.[111] Even though an incarcerated person may have demonstrated his actual innocence, his continued detention is not legally considered a manifest injustice warranting habeas relief on its own.[112]

IV. INSTANT DECISION

In his petition to the Western District, Mr. Lincoln argued three distinct grounds for habeas corpus relief: (1) a gateway claim of actual innocence, (2) a gateway claim of "cause and prejudice," and (3) a freestanding claim of actual innocence.[113] To support his claim of innocence, Mr. Lincoln emphasized that no evidence remained to support his conviction.[114] At trial, the two pieces of substantive evidence used to convict Mr. Lincoln consisted of the pubic hair "match" and Melissa's eyewitness identification.[115] Because DNA evidence conclusively rebutted the hair "match" and Melissa recanted her testimony, none of the evidence used to convict Mr. Lincoln remained. The lack of evidence against him combined with affirmative evidence of his

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

106. *Id.*

107. *Id.* at 547–49. Before Mr. Amrine could be released, the prosecutor insisted on testing "blood" evidence that it previously claimed had been destroyed. *See* Amrine v. State, 785 S.W.2d 531, 535 (Mo. 1990) (en banc). The DNA tests came back negative altogether – the substance wasn't blood at all. It was paint.

108. *Id.* at 546–47.

109. *Id.* at 548–49.

110. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 15 (Mo. Ct. App. 2016).

111. *Id.* at 20–23.

112. *Id.*

113. *Id.* at 16.

114. *Id.*

115. *Id.* at 15.

innocence[116] was more than sufficient to support Mr. Lincoln's assertion of actual innocence.

Mr. Lincoln argued three separate constitutional violations occurred at his trial.[117] Mr. Lincoln alleged *Brady* violations,[118] in particular suppression of the DFS records concerning Melissa's uncertainty in her identification of Mr. Lincoln and detailing extensive coaching of Melissa prior to her testimony at trial.[119] He alleged a constitutional violation via ineffective assistance of counsel stemming from failure to fully impeach Melissa's trial testimony and failure to acquire the DFS records.[120] He also argued the faulty forensic evidence based on the hair "match" constituted a due process violation.[121] The court was not convinced by any of these claims.

To establish a *Brady* violation, a defendant must show the prosecution suppressed favorable evidence resulting in prejudice to the defendant.[122] While the information in question was undoubtedly favorable to Mr. Lincoln's case, the suppression and prejudice elements were disputed.[123] The court found the alleged *Brady* material to be cumulative of information already available to the defense, specifically that Melissa originally identified her assailant as "Bill."[124] The court also found that Melissa was extensively cross-examined concerning the inconsistency of her identification.[125] Because Mr. Lincoln already knew and used the information at trial, the court reasoned he could not have been prejudiced by suppression of the DFS records.[126] On both the alleged *Brady* violation and the claim of ineffective assistance of counsel, the court found no constitutional violations.[127]

The court also held Mr. Lincoln did not meet his burden to establish a due process violation as a result of faulty forensic evidence, citing the DNA court's finding that the hair "match" was not the linchpin of his conviction.[128] Without a constitutional violation, both of Mr. Lincoln's gateway claims for

116. Mr. Lincoln had a solid alibi verifiable by many witnesses. Garcia, *supra* note 12.

117. *Lincoln*, 517 S.W.3d at 17–18.

118. Brady v. Maryland, 373 U.S. 83 (1963)

119. *Lincoln*, 517 S.W.3d at 17–18.

120. *Id.* at 18.

121. *Id.* at 17.

122. *Id.* at 18. Favorable evidence can be either exculpatory or impeachment evidence. *Id.* Suppression need not be willful. *Id.* Prejudice requires a showing that suppression of the favorable evidence undermines the validity of the verdict. *Id.* at 19 (quoting State *ex rel.* Woodworth v. Denney, 396 S.W.3d 330, 338 (Mo. 2013) (en banc)).

123. *Id.* at 19.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 19–20.

128. *Id.* at 18.

habeas corpus relief failed.[129] His only remaining argument was the freestanding claim of actual innocence, which does not require a constitutional violation but instead rests on the premise that it is a manifest injustice to continue incarcerating a person who has demonstrated his innocence.[130]

In denying Mr. Lincoln's petition for habeas relief, the *Lincoln* court completed an extensive evaluation of *Amrine*.[131] The court noted that *Amrine* emphasized the manifest injustice that would occur if the state executed an innocent person.[132] However, *Amrine* did not address whether it is a manifest injustice to merely incarcerate an innocent person for life.[133] *Amrine* also failed to address whether either punishment, e.g., execution or incarceration of an innocent person, would violate the Missouri Constitution.[134] As a result, the *Lincoln* court determined that whether or not a due process violation occurs when an innocent is executed or incarcerated is unresolved altogether: "It thus remains an open and unanswered question whether either the continued incarceration or execution of a person who clearly and convincingly establishes his actual innocence after a constitutionally adequate trial violates due process, warranting habeas relief . . . ."[135] Because these questions went unaddressed in *Amrine*, the *Lincoln* court found that the freestanding claim of actual innocence established by *Amrine* was limited to capital cases stating, "*Amrine* cannot be read . . . to have broadly recognized a freestanding claim of actual innocence in non-death penalty cases."[136]

Applying the law as established by *Amrine*, the court denied Lincoln's freestanding claim for habeas relief.[137] Habeas corpus relief is available when the detention in question amounts to a violation of the constitution or laws of the state or federal government.[138] The court noted that Mr. Lincoln's incarceration as a person having demonstrated actual innocence did not violate a current state or federal statute because no law prohibits the continued incarceration of an innocent if he was convicted at a trial void of constitutional violations.[139] Without a written law explicitly prohibiting his continued detention, the only remaining, possibly viable argument was Mr. Lincoln's assertion that his incarceration constituted a due process violation.[140] The court's narrow construction of *Amrine* as having left unanswered whether incarceration or even execution of an innocent person is a due process

129. *Id.* at 20.
130. *Id.*
131. *Id.* at 20–23.
132. *Id.* at 21.
133. *Id.* at 22.
134. *Id.*
135. *Id.* (emphasis excluded).
136. *Id.*
137. *Id.* at 23.
138. *Id.* at 16.
139. *Id.* at 23.
140. *Id.*

violation was dispositive of Mr. Lincoln's argument.[141] According to the court, the Supreme Court of Missouri has not determined the incarceration of an innocent is a due process violation, and therefore the court could not find that Mr. Lincoln's incarceration was a violation of due process either.[142] While recognizing the strength of Mr. Lincoln's claim of innocence, the court stated it did not have the authority to extend the application of *Amrine* to non-capital cases: "In short, no matter how compelling [Lincoln's] argument may be, we are constrained to afford habeas relief only as authorized."[143]

In a footnote, the court advised that Mr. Lincoln could seek clemency from the governor as a remedy for his incarceration as an innocent person – that is, petition the governor for a pardon or commutation of his sentence.[144] Citing *Herrera v. Collins*,[145] it recognized executive clemency as the traditional remedy when new evidence is discovered too late for relief through the courts.[146] The court seemingly accepted that Mr. Lincoln was innocent but took a limited view of *Amrine*, refusing to grant relief to an innocent person in a non-death penalty case. The court ultimately found *Amrine* did not establish precedent from the Supreme Court of Missouri that incarceration of an innocent person is either a manifest injustice or a constitutional due process violation.[147]

V. COMMENT

Time and again, the Supreme Court of Missouri has lauded that "[h]abeas corpus is the last judicial inquiry into the validity of a criminal conviction[,]"[148] and it serves as "a bulwark against convictions that violate

141. *Id.* at 22.

142. *Id.* at 23.

143. *Id.*

144. *Id.* at 24 n.12.

145. 506 U.S. 390, 417 (1993).

146. *Lincoln*, 517 S.W.3d at 24 n.12.

147. *Id.* at 23. The Supreme Court of Missouri denied Mr. Lincoln's request for transfers. In 2018, Governor Greitens commuted Mr. Lincoln's sentence to time served. Rachel Rice, *A Week of Freedom: Rodney Lincoln, His Murder Sentence Commuted, Adjusts to Lie After 36 Years Behind Bars*, ST. LOUIS POST-DISPATCH (Jun. 13, 2018), https://www.stltoday.com/news/local/crime-and-courts/a-week-of-freedom-rodney-lincoln-his-murder-sentence-commuted/article_cde8c8d7-90a9-5053-a0bc-27e0536377ff.html [perma.cc/C5B8-NYF0]. Greitens released a statement saying, "Rodney Lincoln was wrongly convicted of capital murder and has served 34 years in prison for a crime he did not commit. DNA evidence and one eyewitness were used to convict him. Now, we know the DNA evidence was wrong and the eyewitness – the daughter of the victim – says he is innocent and wants him to be free." Joe Millitzer, *Gov. Greitens Announces Pardons and Clemency Decisions Before Resignation*, FOX2 NOW: ST. LOUIS (Jun. 1, 2018), https://fox2now.com/2018/06/01/gov-greitens-announces-pardons-and-clemency-decisions-before-resignation/ [perma.cc/N6F6JA24].

148. State *ex rel.* Carr v. Wallace, 527 S.W.3d 55, 59 (Mo. 2017) (en banc).

fundamental fairness."[149] The "bulwark against . . . fundamental fairness" language originated with the Supreme Court of the United States,[150] where the concept of fundamental fairness has a robust history.[151] Fundamental fairness incorporates protections into due process, even when they are not explicitly stated in the text.[152] "The standard query in such cases is whether the challenged practice or policy violates 'a fundamental principle of liberty and justice which inheres in the very idea of a free government and is the inalienable right of a citizen of such government.'"[153] The requirement that the prosecution prove its case beyond a reasonable doubt is one such requirement created under the doctrine of fundamental fairness.[154] Under the umbrella of fundamental fairness, the Supreme Court of the United States has extended the protection of due process to remedy unfair sentencing schemes, faulty jury instructions, and rules that keep a defendant from wearing non-prison clothing in front of a jury.[155] All of these causes are worthy of the attention and protection they have received, but their holdings beg the question: if due process can protect a defendant from wearing prison orange in front of a jury, how does it *not* protect an innocent person from a life sentence? According to both the Supreme Court of the United States and the Supreme Court of Missouri, finality is the reason for limiting habeas corpus so stringently, and executive clemency alone is the remedy for innocent persons who find no relief in the courts.[156]

A. Finality is an Inadequate Justification

Courts often describe the government's interest in finality as vital to the integrity of the judicial system.[157] Finality contributes to efficiency in the court system, enhances the quality of judicial rulings, and preserves the balance between state and federal power.[158] Finality is also said to increase

149. State *ex rel.* Woodworth v. Denney, 396 S.W.3d 330, 337 (Mo. 2013) (en banc); s*ee also* State *ex rel.* Clemons v. Larkins, 475 S.W.3d 60, 76 (Mo. 2015) (en banc); State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 545 (Mo. 2003) (en banc).

150. Engle v. Isaac, 456 U.S. 107, 126 (1982) (quoting Wainwright v. Sykes, 443 U.S. 72, 97 (1977) (Stevens, J., concurring)) (internal quotations omitted).

151. *See generally, The Principle of Fundamental Fairness*, LEG. INFO. INST. https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/generally-the-principle-of-fundamental-fairness#fn1080amd14 [perma.cc/93AB-LV46] (last visited Dec. 17, 2019).

152. *Id.*

153. *Id.* (quoting Twining v. New Jersey, 211 U.S. 78, 106 (1908)).

154. *Id.* at n.1078.

155. *Id.*

156. Herrera v. Collins, 506 U.S. 390, 417 (1993); *In re* Lincoln v. Cassady, 517 S.W.3d 11, 23 (2016).

157. Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2336 (2007).

158. Ellyde Roko, *Finality, Habeas, Innocence, and the Death Penalty: Can Justice Be Done?*, 85 WASH. L. REV. 107, 121 (2010).

public confidence in court outcomes.[159] The interest in finality is so paramount to other interests that when a court speaks of finality as relevant to the case at hand, the party seeking to disrupt the judgment almost always loses.[160] Finality has also been used with increasing frequency as a justification for limiting review of criminal judgements.[161] The result is that finality trumps fairness where habeas is concerned.[162] Not only has fairness been forced to submit to the interest of finality, the volume of precedent extolling finality has overwhelmed the reality of other public and private interests that oppose it.

Multiple significant interests of the private individual, the public, and the government weigh against the government's interest in finality. The government's interests in the integrity of the judicial system and the public perception of that integrity are both put at risk when an innocent is denied a remedy. When the plight of an incarcerated innocent reaches the public, word spreads through the news and social media as advocacy grows for the one wrongfully convicted. Skepticism of the system increases when court procedure creates barriers to commonsense justice. Finality as an objective, legal fact is not intuitive or even logical to the public, especially when an innocent is facing severe punishment.[163] As a practical matter, "[F]inality is exceptionally difficult to achieve in the face of reasonable suspicions of innocence,"[164] and even more difficult to achieve in the face of indisputable evidence of innocence. Habeas corpus procedure that does not account for the public's understandable response to the plight of an innocent is poorly calculated to protect the public and government interest in the integrity of the judicial and criminal justice systems.[165]

Not only is there strong government and public interest in disturbing a final judgment when it has been proven to be seriously flawed, there are compelling private interests in justice and liberty weighing against finality as well. The Supreme Court of the United States has acknowledged that liberty is one of the strongest private interests granted by the Constitution.[166] This interest governs common law concerning pre-trial detention and post-conviction sentencing.[167] Suddenly, this interest is forgotten when an innocent person challenges his conviction without an additional, distinct constitutional violation.[168] The Supreme Court of the United States has also

159. Pettys, *supra* note 157, at 2336–37.

160. *Id.* at 2341.

161. Roko, *supra* note 158, at 113.

162. *Id.*

163. Pettys, *supra* note 157, at 2341–42.

164. *Id.* at 2343.

165. *Id.* at 2352.

166. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 US. 833, 848 (1992); *In re* Winship, 397 U.S. 358, 362 (1970).

167. *See, e.g.*, Hicks v. Oklahoma, 447 U.S. 343 (1980); Fay v. Noia, 372 U.S. 391 (1963), *overruled in part by* Wainwright v. Sykes, 433 U.S. 72 (1977).

168. Pettys, *supra* note 157, at 2341–42.

instructed that the duty of a prosecutor, and impliedly the purpose of the criminal justice system, is not in acquiring convictions but rather in finding truth and justice.[169] This interest is also forgotten when it comes to challenges of debunked convictions.[170]

Private interests in liberty and justice are compounded when the disparity between innocents who acquire justice and those who do not is governed solely by procedure. What difference is there between an innocent whose conviction was obtained through a trial free from constitutional violations and an innocent who was convicted at a trial containing prejudicial constitutional violations? What difference is there between an innocent sentenced to death and an innocent sentenced to die in prison via a life sentence without the possibility of parole? The only real differences among them are based in legal procedure. All innocent people deserve justice from their government and the liberty afforded by the Constitution. No innocent deserves the degradation of their humanity resulting from incarceration or execution. Yet, legal procedure only offers relief to some innocents while leaving others without remedy. Legal procedures serve an important function in both the criminal justice and civil systems, but procedure should not be a barrier to justice. When it is, the Constitution and the values fundamental to liberty and democracy demand a remedy.

Given the strong government and public interests in the integrity of the judicial and criminal justice systems, as well as the private interests in liberty and justice, it is baffling that the interest in finality wins the day in the face of overwhelming evidence of innocence. The emergence of DNA testing in forensic science has forced us to confront the fact that even fair trials sometimes produce very wrong results. We now know that wrongful convictions are much more common than anyone would have guessed just thirty years ago.[171] This is true even when there is a lack of physical evidence to produce a DNA exoneration.[172] While finality might demand a high barrier to overturning a result produced by a seemingly fair trial, if the defendant can overcome that high hurdle and demonstrate convincingly, as in this case, that he is actually innocent, finality must yield to truth.

B. Clemency is an Ineffective and Unreliable Remedy

Both the Supreme Court of the United States and the Supreme Court of Missouri have suggested that executive clemency is the remedy for an

169. *See, e.g.*, Berger v. United States, 295 U.S. 78, 88 (1935).

170. Pettys, *supra* note 157, at 2327–28.

171. As of October 31, 2019, The National Registry of Exonerations has recorded 2,509 exonerations since the first DNA exoneration in 1989. *Exonerations by Year: DNA and Non-DNA*, NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx [perma.cc/5BAH-CNR7] [hereinafter *Exonerations by Year*] (last visited Dec. 17, 2019).

172. *Id.*

innocent person who finds no remedy in the courts.[173] Yet, multiple problems prevent clemency from serving as an effective remedy for incarcerated innocents – problems that are the natural result of a system never intended to handle innocence claims.[174] The power of clemency has been and continues to be a function of political expediency rather than an accessible or significant remedy for those suffering an injustice.[175] Executives grant clemency most often during their final days in office – when political consequences have evaporated and they no longer risk the accountability power of constituents at the polls.[176] As such, executives have not focused their clemency power on remedying wrongful convictions through any strategic or structured system.[177] It is naïve to believe that a power so political can be trusted to reliably guarantee justice.

In addition to this, the procedures necessary to acquire clemency are riddled with obstacles including a lack of transparency, biased boards administering the procedures, and the absence of motivation or incentive to address the injustice of wrongful convictions.[178] Defendants who apply for clemency are afforded little constitutional protection in the application process.[179] Such protection, if available at all, typically focuses on access to the application process rather than substantive standards of due process throughout application procedures, and courts have proven reluctant to interfere with even the "most troublesome" clemency procedures.[180] So, while the courts continue to laud clemency as a remedy for wrongful convictions, clemency procedures have not been adapted or reformed to become an effective corrective justice function.[181]

Clemency generally has not been an effective remedy for innocents, and that story is no different in Missouri. The Missouri governor's clemency power is derived from Missouri Constitution Article IV Section Seven which states, "The governor shall have power to grant reprieves, commutations and pardons, after conviction, for all offenses except treason and cases of impeachment, upon such conditions and with such restrictions and limitations as he may deem proper, subject to provisions of law as to the manner of applying for pardons."[182] Missouri's clemency procedures are saturated with

173. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993); *In re* Lincoln v. Cassady, 517 S.W.3d 11, 24 (2016).

174. Sarah Lucy Cooper, *The State Clemency Power and Innocence Claims: The Influence of Finality and its Implications for Innocents*, 7 CHARLOTTE L. REV. 51, 107–08 (2015).

175. *Id.*; Sarah Lucy Cooper & Daniel Gough, *The Controversy of Clemency and Innocence in America*, 51 CAL. WESTERN L. REV. 55, 72 (2014).

176. *See* Cooper, *supra* note 174, at 92–93.

177. Cooper & Gough, *supra* note 175, at 109.

178. Cooper, *supra* note 174, at 107–08.

179. Cooper & Gough, *supra* note 175, at 109–10.

180. *Id.*

181. Cooper, *supra* note 174, at 108.

182. MO. CONST. art. IV, § 7.

the same problems outlined above. First, Missouri's clemency is limited in several ways. For example, a person who has been denied executive clemency within the past three years is barred from submitting a clemency application again.[183] A clemency board within the Department of Corrections investigates clemency applications and forms recommendations, which are relayed to the governor.[184] This process is neither free from bias nor entirely transparent. The governor also retains full discretion concerning to whom and when he will grant executive clemency, perpetuating the political expediency that prevents clemency from being a reliable remedy to wrongful convictions.[185]

Not only is clemency difficult to acquire through the unpredictable and biased process, clemency is an imperfect solution even when it is granted. After losing in the courts, Mr. Lincoln turned his attention and efforts to clemency. Mr. Lincoln was denied clemency by Governor Nixon.[186] Fortunately for Mr. Lincoln, while mired in scandal, Missouri's fifty-sixth Governor left office after only sixteen months.[187] On his final day in office, Governor Greitens commuted Mr. Lincoln's sentence to time served.[188] Mr. Lincoln spent nearly two additional years in prison after the Western District denied his habeas corpus claim before he was finally granted relief.[189] If Governor Greitens had not been relieved of the political pressure to appeal to his constituents as a result of political scandal, Mr. Lincoln might still be incarcerated.

In his statement announcing several pardons and commutations, Greitens cited Mr. Lincoln's innocence as the reason for the commutation, stating that Mr. Lincoln was wrongfully convicted.[190] If Mr. Lincoln had been granted habeas corpus relief, his conviction would have been reversed.[191] However, because Governor Greitens merely commuted Mr. Lincoln's sentence, he has not been legally exonerated for the heinous crimes.[192] His conviction still stands and appears on his criminal record.[193] Because the conviction still stands, so do all of the collateral consequences of a felony

183. MO. BD. OF PROBATION & PAROLE, *The Executive Clemency Process in Missouri*, MO. DEP'T OF CORRECTIONS, https://doc.mo.gov/sites/doc/files/2018-01/Clemency_Brochure.pdf [perma.cc/E4FX-3Z69] (last visited Dec. 18, 2019).

184. *Id.*

185. *Id.*

186. *Rodney Lincoln*, *supra* note 37.

187. *Id.*

188. *Id.*

189. The Western District issued its ruling denying Mr. Lincoln's habeas corpus petition on October 11, 2016. Governor Greitens commuted Mr. Lincoln's sentence on June 1, 2018.

190. Millitzer, *supra* note 147.

191. The state could still choose to re-prosecute him. After thirty-four years and a total lack of evidence, it's unlikely the state would take that route and even more unlikely he would be convicted if the state did re-prosecute.

192. *See supra* note 190.

193. *Rodney Lincoln*, *supra* note 37.

record.[194] He is also ineligible for any sort of compensation for his wrongful conviction.[195] A commutation does not come close to restoring a person to the position they were in prior to conviction by the mere fact that it does not reverse or expunge the conviction from the innocent's record, let alone its failure to address the physical, mental, and emotional toll a wrongful conviction and incarceration exacts on an innocent, his loved ones, and his community.

C. Real Remedies for the Constitutional Paradox

The *Lincoln* court believed its hands were tied regarding the justice it could provide Mr. Lincoln, but were its options really so limited? The court read *Amrine* in a very narrow manner, finding that the freestanding claim of actual innocence was available only for those facing the death penalty.[196] But *Amrine* could just as easily have been read more broadly. *Amrine* extolled the virtues of habeas corpus as a stop gap to detentions that violate fundamental fairness.[197] The opening paragraph to the majority opinion in *Amrine* states:

> *Because the continued imprisonment and eventual execution of an innocent person is a manifest injustice*, a habeas petitioner under a sentence of death may obtain relief from a judgment of conviction and sentence of death upon a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.[198]

Given the opening clause to this holding sentence, it is illogical and arbitrary to assert that even though continued imprisonment of an innocent person is a manifest injustice, habeas relief is available only to those sentenced to death.

Furthermore, when the *Amrine* court addressed the insufficiency of preexisting remedies warranting the expansion of habeas relief to freestanding claims of actual innocence, it noted precedent failed to account for compelling cases of actual innocence independent of constitutional violations at trial.[199] The court said this failure was "all the more true" in death penalty cases but not exclusive to death penalty cases.[200] As Judge Michael A. Wolff stated in his concurring opinion to *Amrine*, "Both the principal opinion and the dissents

194. *See generally* Colleen F. Shanahan, *Significant Entanglement: A Framework for the Civil Consequences of Criminal Convictions*, 49 AM. CRIM. L. REV. 1387 (2012).

195. *See, e.g.*, Ariel Rothfield, *Missouri Man Freed from Prison May Not Receive Any Compensation*, KSHB 41 (Aug. 15, 2019), https://www.kshb.com/news/local-news/missouri-man-freed-from-prison-may-not-receive-any-compensation [perma.cc/87R6-HANX].

196. *In re* Lincoln v. Cassady, 517 S.W.3d 11, 22 (Mo. Ct. App. 2016).

197. State *ex rel.* Amrine v. Roper, 102 S.W.3d 541, 543 (Mo. 2003) (en banc).

198. *Id.* (emphasis added)

199. *Id.* at 547.

200. *Id.*

recognize that the state court's writ of habeas corpus is the appropriate remedy in cases of actual innocence."[201] The concurring and dissenting judges in *Amrine* did not disagree with the majority opinion concerning the availability of habeas corpus for the actually innocent but rather on the form and extent of the remedy and on factual issues in Mr. Amrine's case.[202] When all of the *Amrine* opinions are read thoroughly, they convey an obvious message: the Supreme Court of Missouri believes continued detention of innocents is a manifest injustice for which there should be a state court remedy.

Special Master for the Supreme Court of Missouri, Darrel E. Missey, recently weighed in on the Western District's opinion.[203] The Supreme Court appointed Judge Missey to evaluate a habeas corpus petition that included a freestanding claim of actual innocence for a defendant not on death row.[204] In his report to the court, Judge Missey carefully detailed his interpretation of *Amrine* and its applicability to non-death penalty defendants.[205] In the end, Judge Missey respectfully disagreed with the *Lincoln* court:

> There is no reasonable argument that an innocent petitioner's incarceration for life does not qualify as a 'manifest injustice.' Only the most tortured logic could yield the conclusion that [a non-death penalty defendant] must continue to serve a life sentence but would [walk] free if only he had been sentenced to death. There is no basis in law or reason for such a distinction to be made.[206]

Judge Missey concluded that the petitioning defendant should be eligible for a freestanding claim of actual innocence.[207] He also found that constitutional violations at the defendant's trial qualified him for gateway claims.[208] The Supreme Court agreed with Judge Missey that constitutional violations established a gateway claim for habeas relief and ruled solely on these grounds.[209] As a result, the court did not adopt or address Judge Missey's recommendation for the availability of the freestanding claim for non-death penalty defendants.[210]

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201. *Id.* at 549 (Wolff, J., concurring).

202. E.g., whether to order a new trial, appoint a special master, or order Mr. Amrine be released. *Id.* at 549–52 (Wolff, J., concurring; Benton, J., and Price, J., dissenting).

203. *See* Master's Report to the Supreme Court of Missouri and Findings of Fact and Conclusions of Law, *In re* Robinson v. Cassady (2018) (No. SC95892).

204. *Id.* at 3.

205. *Id.* at 73–74.

206. *Id.* at 74.

207. *Id.* at 90.

208. *Id.*

209. *See* Kathy Sweeney, *Sikeston, MO Man Released, Charges Dismissed Nearly 18 Years After Murder Conviction*, KFVS.COM (Aug. 14, 2018), https://www.kfvs12.com/story/38087260/sikeston-mo-man-released-charges-dismissed-nearly-18-years-after-murder-conviction/ [perma.cc/22ZA-UGB2].

210. *Id.*

In addition to the language of the Supreme Court of Missouri is Supreme Court of the United States precedent regarding fundamental fairness. Remember, fundamental fairness is violated when jury instructions are faulty and when a defendant is forced to wear prison garb in front of the jury.[211] The *Lincoln* court could have employed this broader view of fundamental fairness, relative to the incarceration of an innocent person, to reach the commonsense conclusion that it *is in fact* a violation of fundamental fairness and as such, a violation of due process to continue to detain an innocent person. The only risk of so holding would have been that the Supreme Court of Missouri accepted transfer and reversed.[212] The overwhelming benefit would have been filling a significant gap in legal procedure that is a barrier to justice for innocents. While the *Lincoln* court failed to fill this gap, it continues to be an option available to state courts in Missouri.

Not only is this remedy available to Missouri courts, at least seven states permit review of freestanding claims of actual innocence for all defendants as a matter of common law precedent.[213] Connecticut, Texas, Illinois, Florida, and South Dakota have all extended the freestanding claim of actual innocence to capital and non-capital defendants alike, holding that it would be a constitutional violation of due process to deny a procedural avenue for innocents to challenge their incarceration or execution.[214] The Supreme Court of Connecticut held extension of habeas relief to freestanding claims was required to bring habeas corpus procedures in line with the demands of law and justice.[215] The Supreme Court of Connecticut went on to say that even the interest in finality is not a strong enough government interest to defeat a claim of actual innocence because the continued incarceration of innocents

211. *See supra* note 155 and accompanying text.

212. In a law review article following Amrine's decision, Missouri Supreme Court Judge Laura Denvir Stith argued that states are not beholden to follow federal habeas corpus precedent. Honorable Laura Denvir Stith, *A Contrast of State and Federal Court Authority to Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 432 (2004). She made the case that state courts are free to broaden habeas relief to freestanding claims of actual innocence. *Id.* She recognized that Missouri created the freestanding claim for capital defendants, but she did not address why it has not applied more broadly to any defendant that can demonstrate innocence. *Id.* "[O]ur prior cases have recognized that habeas corpus relief is available to prevent manifest injustice. . . . *Amrine* then stated, 'It is difficult to imagine a more manifestly unjust and unconstitutional result than permitting the execution of an innocent person.'" *Id.*

213. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in the New York in the Aftermath of CPL § 440.10(1)(G-1)?*, 76 ALB. L. REV. 1453, 1471–81 (2013).

214. Engesser v. Young, 856 N.W.2d 471, 481–82 (2014); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996); *Ex parte* Elizondo, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996) (en banc); Summerville v. Warden, State Prison, 641 A.2d 1356, 1368 (Conn. 1994); Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

215. *Summerville*, 641 A.2d at 1369.

would be a fundamental miscarriage of justice demanding a remedy.[216] The Supreme Court of Illinois has held that remedies should be available under habeas corpus as a matter of due process, regardless of the punishment imposed.[217]

The Supreme Court of Texas found that any punishment would implicate federal constitutional violations for innocents saying, "We think it clear . . . the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person. . . . In either case, such claims raise issues of federal constitutional magnitude."[218] The Supreme Court of Texas arrived at this conclusion by reading the dicta of *Herrera v. Collins* closely and concluding that all nine justices of the Supreme Court of the United States (five in the majority and four in the dissent) believe the difference in sentence should not change the avenues of relief.[219] Both the justices who joined the majority opinion and those who joined the dissenting opinion of *Herrera* endorsed comments in those opinions that argue treating defendants differently based on the sentence imposed would be nonsensical.[220] The Supreme Court of Texas latched on to this dicta to justify its expansion of habeas corpus relief to all innocents regardless of their sentence.[221]

Iowa and New Mexico have both adopted the freestanding claim of actual innocence, even though the death penalty is not imposed in their states.[222] The Supreme Court of Iowa did not mince words when it recognized the freestanding claim of actual innocence stating, "What kind of system of justice do we have if we permit actually innocent people to remain in prison? . . . It is time that we refuse to perpetuate a system of justice that allows actually innocent people to remain in prison . . . ."[223] The Supreme Court of Iowa also acknowledged the individual's interest in liberty and "remaining free from underserved punishment" because "[h]olding a person who has committed no crime in prison strikes the very essence of the constitutional guarantee of substantive due process."[224] The states that still impose the death penalty but have adopted a freestanding claim of actual innocence for all defendants have come to the commonsense conclusion that a differentiation

216. *Id.*

217. *Washington*, 665 N.E.2d at 1337.

218. *Elizondo*, 947 S.W.2d at 205.

219. *Id.*

220. "It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison." Herrera v. Collins, 506 U.S. 390, 405 (1993).

221. *Elizondo*, 947 S.W.2d at 205.

222. Schmidt v. State, 909 N.W.2d 778, 790 (Iowa 2018); Montoya v. Ulibarria, 142 P.3d 476, 484 (N.M. 2007).

223. *Schmidt*, 909 N.W.2d at 790.

224. *Id.* at 793; *see also* Engesser v. Young, 856 N.W.2d 471, 481–82 (S.D. 2014).

based on the sentence is arbitrary and unjustified.[225] All of these states have recognized the serious constitutional implications of continuing to incarcerate defendants who demonstrate their innocence and responded accordingly. Missouri must do the same.

While it is well within the discretion of courts to expand habeas corpus procedure to freestanding claims of actual innocence, Missouri need not wait for courts to respond to this grave injustice. The Missouri legislature is just as capable of exacting a cure as the Supreme Court of Missouri. The alternative remedies to the paradoxical notion that it is lawful and constitutional to enforce a life sentence against an innocent person are sewn into the foundation of habeas corpus relief. If habeas corpus relief is a check on a detention that violates the constitution and laws of the state, the logical cure is to pass a statute that makes it unlawful to detain or execute a person who can demonstrate his innocence post-conviction. This statute could be a simple statement to that effect or more tailored to habeas corpus relief in particular. A statute geared at habeas corpus would specifically expand relief to freestanding claims of actual innocence regardless of whether the detainee is subject to execution, a life sentence, or a term-of-years sentence. The most important takeaway is that the law must be amended, either by common law or statutory law, to address the procedural gap that currently exists in habeas corpus and allows for such a grave injustice to be perpetuated against innocents.

VI. CONCLUSION

The innocence movement has seen over 2400 exonerations since 1980.[226] This number does not include individuals who have attempted to exonerate themselves but failed due to inadequate evidence or procedural technicalities such as the one highlighted in this Note. Given the ever-rising number of exonerations, the importance of efficient but accurate habeas relief cannot be understated. The interests that justify maintaining the status quo of habeas relief, namely finality, do not survive careful scrutiny. The judicially relied upon remedy of clemency, while somewhat successful for Mr. Lincoln, is not a trustworthy friend to innocents and left Mr. Lincoln only partially restored. For these reasons, it is incumbent upon the state that habeas reform includes a pathway for freestanding claims of actual innocence regardless of the sentence associated with the conviction.

225. *See also Montoya*, 142 P.3d at 484; Jones v. State, 591 So.2d 911, 915 (Fla. 1991).

226. *See Exonerations by Year*, *supra* note 171.