

Innocence in Missouri: Searching for a New Avenue Forward

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Introduction

In 2021, Missouri garnered national attention for its continued incarceration of Kevin Strickland, a man sentenced to life in prison whom both the Midwest Innocence Project and the local Jackson County prosecutor claimed was innocent.¹ The prosecutor’s office even went so far as to file an amicus curiae brief in Strickland’s case, but the Missouri Supreme Court still denied his most recent habeas corpus petition.² Because Strickland’s post-conviction relief odyssey spans decades,³ it cleanly exposes the flaws in each step of Missouri’s post-conviction legal system. In fact, the denial of Strickland’s last habeas corpus petition revealed the unfairness of Missouri’s habeas jurisprudence. In Missouri, someone asserting a freestanding claim of innocence who was sentenced to death may have habeas granted and be freed, while someone like Kevin Strickland asserting the exact same claim but sentenced to life imprisonment cannot have state habeas granted and must serve their life sentence.⁴ This distinction, “where proving your innocence

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1. Angie Ricono & Cyndi Farhlander, *Innocence Doesn’t Mean Freedom for Missouri Inmates, Senate Bill Could Help Change That*, KCTV (Apr. 4, 2022), <https://www.kctv5.com/2022/04/04/innocence-doesnt-mean-freedom-missouri-inmates-senate-bill-could-help-change-that/> [<https://perma.cc/CAU9-XDEZ>].

2. *State ex rel. Strickland v. Brewer*, No. SC99096, 2021 Mo. LEXIS 203 (June 1, 2021).

3. *Strickland v. State*, 512 S.W.3d 858, 859–60 (Mo. Ct. App. 2017) (“The substance of Strickland’s 2015 PCR motion is nothing more than an attempt to piecemeal allegedly ‘new’ arguments for ‘old’ claims that have previously been asserted by Strickland in his PCR motion odyssey that has now spanned over two decades.”).

4. *Wrongfully Convicted People in Missouri Need Access to Justice*, INNOCENCE PROJECT, <https://innocenceproject.org/petitions/missouri-actual-innocence/> [<https://perma.cc/7SJX-2QA3>] (“In Missouri, innocent people sentenced to death can present a claim of innocence to a court but those with any other sentence—even life

isn't enough unless you are sentenced to death," has been described by one former Missouri Supreme Court Justice as a nightmare.⁵ Yet habeas is just one procedure of the many legal nightmares that Strickland had to endure.

This Article explores Missouri's post-conviction relief framework using Strickland's case as an example and suggests reforms intended to make relief for claims of innocence more accessible. Part I summarizes the facts of Strickland's case and examines Missouri statutes, court rules, and case law that serve as avenues to bring innocence claims. Part II analyzes the shortcomings of Missouri's avenues of relief for innocence claims. Specifically, Part II evaluates the limitations of the relevant statutes, court rules, and case law, and proposes three viable solutions. First, this Note proposes amending Mo. Rev. Stat. § 547.031 to limit the Attorney General's ability to intervene to oppose the release of wrongfully convicted people. Second, it proposes amending Missouri court rule 29.11 to waive the strict timeline for filing cases in which newly discovered evidence suggests a wrongful conviction has occurred. The third and final suggestion is for the Missouri General Assembly to pass Senate Bill 1201 to expand habeas corpus relief to freestanding claims of innocence for those sentenced to life without parole.

I. Background

A. *Strickland v. State: A Post-Conviction Relief Odyssey*⁶

On April 25, 1978, four men entered a home and shot four people.⁷ Only one person survived the shooting, Cynthia Douglas.⁸ Douglas identified two of the four men in her first interview with detectives, never mentioning Kevin Strickland.⁹ After Douglas's first interview with detectives, she discussed the events with a friend who suggested Strickland was involved because of his

without parole—cannot unless they can *also* show there was a constitutional violation at their trial due to police or prosecutorial misconduct.”).

5. Ricono & Farhlander, *supra* note 1.

6. *Strickland*, 512 S.W.3d at 859–60.

7. Ken Otterbourg, *Kevin Strickland*, NAT'L REGISTRY OF EXONERATIONS (Apr. 12, 2023), <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=6081> [https://perma.cc/D8HB-DB9V]

8. *Id.*

9. Suggestions in Support of Petition for a Writ of Habeas Corpus at 13–14, *State ex rel. Strickland v. Brewer*, No. SC99096, 2021 Mo. LEXIS 203 (May 10, 2021).

relationship with the two other men she had identified.¹⁰ After this suggestion, Douglas gave a second interview identifying Strickland as one of the four men who committed the shooting.¹¹ The discrepancy between Douglas's first and second interviews was explained in the police report as a result of her condition after being shot, as well as her use of marijuana and consumption of alcohol.¹² The detectives then conducted a lineup of four men and Strickland, requesting that Ms. Douglas identify which one was Strickland, "as opposed to asking her to identify the perpetrator with the shotgun."¹³ She had no trouble identifying Strickland because she had known him for two years, even though before it was suggested to her she had never thought he was a perpetrator of the offense.¹⁴

As a result of Douglas's identification, Strickland was charged with murder despite his alibi that at the time of the offense he was at home with multiple other witnesses.¹⁵ Strickland's defense consisted of testimony from his older and younger brothers as well as his girlfriend corroborating his alibi.¹⁶ The two men Douglas had identified were also charged as co-defendants.¹⁷ The jury's sole Black member voted for acquittal, and Strickland's first trial ended in a mistrial.¹⁸ Strickland was tried again and convicted by an all-white jury of one count of capital murder and two counts of second-degree murder¹⁹ after only one hour of deliberation.²⁰ He was sentenced to life in prison without the possibility of parole for fifty years and an additional ten years for each second-degree murder count.²¹ Two of Strickland's co-defendants pleaded guilty, and one testified during his allocution that Strickland was not involved in the murder.²² The co-defendant that testified to Strickland's innocence "maintained his support for Strickland's innocence up to

10. *Id.* at 16.

11. *Id.* at 17.

12. *Id.*

13. *Id.*

14. *Id.*

15. Suggestions in Support *supra* note 9, at 11–13.

16. *Id.* at 21.

17. *Id.* at 24.

18. *Id.* at 18.

19. *Id.* at 22.

20. Otterbourg, *supra* note 7; see generally EQUAL JUST. INITIATIVE, *Race and the Jury: Illegal Discrimination in Jury Selection* (2021), <https://eji.org/report/race-and-the-jury/> [<https://perma.cc/ZCR4-7QLD>] ("Compared to representative juries, . . . all-white juries spend less time deliberating, consider fewer perspectives, and make more mistakes.")

21. Suggestions in Support, *supra* note 9, at 22.

22. *Id.* at 22–23.

the time of his death in January 2021.”²³ Nonetheless, Strickland’s conviction stood.

In 2009, Douglas contacted the Midwest Innocence Project via email, stating that Strickland was wrongfully accused.²⁴ However, this was not the first time she had attempted to inform someone of her doubts; in fact, immediately after hearing Strickland’s co-defendant testify to his innocence, she went to the prosecution team to inform them of her mistake but was “warned against saying anything more.”²⁵

Strickland vehemently maintained his innocence for decades, filing “five federal habeas petitions, five additional post-conviction motions, two motions to recall mandates, and a motion to modify or qualify the sentence.”²⁶ Strickland’s claim of innocence finally gained traction in 2020, when the Jackson County Conviction Integrity Unit (CIU), at the request of the Midwest Innocence Project, re-examined the case.²⁷ On May 8, 2021, the CIU issued a report supporting Strickland’s innocence.²⁸ However, a major obstacle remained: the CIU had no available remedy to pursue to free Strickland, so it filed an amicus curiae brief²⁹ in support of his petition for habeas corpus relief. Strickland’s habeas petition alleged a freestanding claim of innocence, among other constitutional violations.³⁰ The Missouri Supreme Court denied Strickland’s habeas petition,³¹ and Missouri Governor Mike Parson refused to grant Strickland clemency.³² At that point, Strickland’s avenues of state legal relief were exhausted. But days before Missouri’s legislative session ended, the Missouri General Assembly passed a statute that enables a prosecuting attorney with information of a wrongful conviction to file a motion to vacate or set

23. *Id.* at 37.

24. *Id.* at 42.

25. *Id.* at 26.

26. *Id.* at 25.

27. Otterbourg, *supra* note 7.

28. *Id.*

29. Amicus Curiae Suggestions in Support of Petition for a Writ of Habeas Corpus, *State ex rel. Kevin Strickland v. Brewer*, No. SC99096, 2021 Mo. LEXIS 203 (May 11, 2021).

30. Petition for a Writ of Habeas Corpus at 31–32, *State ex rel. Kevin Strickland v. Brewer*, No. 21DK-CC00019 (43rd Jud. Cir. Div. II June 2, 2021).

31. *State ex rel. Strickland v. Brewer*, No. SC99096, 2021 Mo. LEXIS 203 (June 1, 2021).

32. Luke X. Martin, *Missouri Governor Does Not Pardon Kevin Strickland, Who Prosecutor Says Is Wrongfully Imprisoned*, KCUR (June 3, 2021), <https://www.kcur.org/news/2021-06-03/missouri-governor-does-not-pardon-kevin-strickland-who-prosecutor-says-is-wrongfully-imprisoned> [https://perma.cc/W789-C76M].

aside the judgment.³³ On November 23, 2021, Kevin Strickland was freed after the Jackson County prosecutor utilized this new legal avenue,³⁴ but not without lengthy delay caused by Missouri Attorney General Eric Schmitt's intervention to maintain the conviction.³⁵

B. Missouri's Avenues of Post-Conviction Relief for the Innocent are Limited

i. Missouri Supreme Court Rule 29.11: Motions for New Trial

A petitioner must take many steps before filing a habeas petition in Missouri;³⁶ thus, habeas is discussed later in Section C of this Part. The first step after trial is typically filing a motion for a new trial under Missouri Supreme Court Rule 29.11.³⁷ Under this rule, a “trial court may grant a new trial as to any or all defendants, for good cause shown.”³⁸ A defendant must file the motion within fifteen days after a verdict has been returned.³⁹ Additionally, a defendant may request an extension within that fifteen-day period, but the court may extend the time to file only by an additional ten days.⁴⁰ A defendant may not be sentenced until the time to file this motion has expired or until the motion has been ruled on.⁴¹ Perhaps most importantly, in a jury-tried case “allegations of error to be preserved for appellate review must be included in a motion for new trial.”⁴² Furthermore, a motion for a new trial based on newly discovered evidence of innocence must also meet the timely filing requirements under Rule 29.11.⁴³

33. MO. REV. STAT. § 547.031 (2021).

34. Otterbourg, *supra* note 7.

35. *Prosecutors Think Kevin Strickland Is Innocent. But He's Still Behind Bars—and Says He's “Losing Belief” in the Justice System*, CBS NEWS (Oct. 11, 2021), <https://www.cbsnews.com/news/kevin-strickland-missouri-hearing-november/> [<https://perma.cc/P7M4-QKWV>].

36. Mo. R. Crim. P. 29.11.

37. *State v. Young*, 603 S.W.3d 305, 313 (Mo. Ct. App. 2020) (“The general rule for the preservation of error is an objection stating specific grounds must be made at trial, the same grounds must be set out in the motion for new trial, and these grounds must be renewed in the appellate brief.”) (quoting *State v. Salmon*, 563 S.W.3d 725, 731–32 (Mo. App. E.D. 2018)).

38. 28 ROBERT H. DIERKER, MISSOURI CRIMINAL PRACTICE HANDBOOK, *in* MISSOURI PRACTICE SERIES § 32:3 (2023 ed.).

39. Mo. R. Crim. P. 29.11(b).

40. *Id.*

41. Mo. R. Crim. P. 29.11(c).

42. Mo. R. Crim. P. 29.11(d). *See also Young*, 603 S.W.3d at 313.

43. *State v. Manley*, 414 S.W.3d 561, 565–66 (Mo. App. E.D. 2013) (“Once the

Historically, Missouri case law carved out an exception to the time limit upon the discovery of new evidence of innocence.⁴⁴ For example, in *State v. Mooney*, the Court of Appeals acknowledged that there must be “some forum in the judicial system to present [newly discovered evidence],” and that it would be “unjust to deprive an appellant of an opportunity to present [recantation evidence] to the trial court because he did not learn of the fact that the victim’s testimony was false until after the time for filing a motion for new trial has expired.”⁴⁵ The Court of Appeals, again “cognizant of the perversion of justice which could occur if [it] were to close [its] eyes to the existence of the newly discovered evidence,” decided to “overlook the time constraints of Rule 29.11 as they relate to the newly discovered evidence” in *State v. Williams*.⁴⁶ Finally, the Missouri Supreme Court in *State v. Terry* upheld both *Mooney* and *Williams*, stating that an appellate court has the “inherent power to prevent miscarriages of justice” and remanded for the petitioner to “file a motion for a new trial based on the new evidence.”⁴⁷ Thus, these cases created an opportunity to use Rule 29.11 as a post-conviction relief motion in limited circumstances relating to innocence.

However, this exception has recently been called into question.⁴⁸ In 2021, the Circuit Attorney of the City of St. Louis filed a motion for a new trial under Rule 29.11 in an attempt to free a man believed to have been wrongfully convicted after determining that newly discovered evidence demonstrated his innocence.⁴⁹ The trial court dismissed the motion because it was filed decades after the conviction and thus fell outside of the time limit prescribed by the rule.⁵⁰

The Circuit Attorney and Attorney General litigated this motion all the way up to the Missouri Supreme Court to determine the role Rule 29.11 can play in releasing wrongfully convicted people.⁵¹

time for filing a motion for a new trial has passed, the Missouri rules have no provision for the granting of a new trial based on newly discovered evidence.”) (quoting *State v. Terry*, 304 S.W.3d 105, 109 (Mo. 2010)).

44. See *State v. Mooney*, 670 S.W.2d 510, 515 (Mo. App. 1984). See also *State v. Williams*, 673 S.W.2d 847, 848 (Mo. App. 1984).

45. *Mooney*, 670 S.W.2d at 515.

46. *Williams*, 673 S.W.2d at 848.

47. *Terry*, 304 S.W.3d at 110, 112 (Mo. 2010) (quoting *Mooney*, 670 S.W.2d at 515–16).

48. See *State v. Johnson*, 617 S.W.3d 439, 439 (Mo. 2021).

49. *Johnson*, 617 S.W.3d at 440.

50. *Id.* at 450.

51. *Id.* at 441 (explaining that the Missouri Attorney General was appointed by

The Missouri Supreme Court in *State v. Johnson* decided that the prosecuting attorney had no authority to appeal the circuit court's dismissal of her motion for a new trial.⁵² The court specifically stated that the case was "not about . . . whether there exists a remedy for someone who is innocent."⁵³ Rather, the court emphasized that the case was about "only the issue of whether there is any authority to appeal the dismissal of a motion for a new trial filed decades after a criminal conviction became final."⁵⁴ The court in *Johnson* hedged its decision on a procedural technicality,⁵⁵ essentially depriving CIUs from utilizing a motion for a new trial as a post-conviction remedy consistent with the *Mooney*, *Williams*, and *Terry* cases. Furthermore, the *Johnson* decision occurred as efforts were underway to free Strickland, foreclosing yet another avenue of relief for innocence claims and leaving advocates scrambling for alternatives.

ii. Rule 29.15 of Missouri Rules of Criminal Procedure: An 'Exclusive Post-Conviction Remedy'

The next available avenue of relief is a post-conviction motion made under Rule 29.15.⁵⁶ This rule "constitutes the exclusive post-conviction remedy available to persons convicted of a felony after a trial."⁵⁷ Under this rule, every motion filed must include "every ground known to the movant for vacating, setting aside or correcting the conviction or sentence [unless the ground is] deemed waived."⁵⁸ Such grounds are typically claims that the conviction violates the federal or state constitution, such as ineffective assistance of counsel or prosecutorial misconduct.⁵⁹ This motion must also be filed within ninety days after the appellate court issues a mandate.⁶⁰ However, for the innocent and wrongfully convicted, this Rule provides limited relief because the Missouri Supreme

the circuit court *sua sponte* "to appear on the State's behalf.").

52. *Id.* at 445.

53. *Johnson*, 617 S.W.3d at 445.

54. *Id.*

55. *Id.* at 443–45.

56. This Article focuses on post-conviction avenues of relief and thus will not address direct appeals. However, a direct appeal is typically taken before a post-conviction motion is made under Rule 29.15, and the filing of a direct appeal can affect the timeline for filing a motion for post-conviction relief. *See* *Dougan v. State*, 118 S.W.3d 593, 595 (Mo. 2003).

57. 27 DONALD L. WOLFF, SUSAN SHERBERG KISTER & RICHARD H. SINDEL, CRIMINAL PRACTICE FORMS, *in* MISSOURI PRACTICE SERIES § 10.4 (2d ed. 2023).

58. *Id.*

59. *Id.*

60. Mo. R. Crim. P. 29.15(b).

court has held that claims of newly discovered evidence cannot be litigated under a proceeding initiated under this rule.⁶¹ For example, Strickland filed a motion for post-conviction relief under this rule, seeking to introduce the newly discovered evidence of his innocence, but it was denied.⁶² As mentioned above, *Johnson* requires that newly discovered evidence be timely brought in a motion for a new trial.⁶³ Consequently, both Rules 29.15 and 29.11 provide a circuitous pretense of relief for innocence claims based on newly discovered evidence.⁶⁴

iii. Petition for a Writ of Habeas Corpus: The “Last Judicial Inquiry”

One of the final steps in the state post-conviction process is filing a petition for a writ of habeas corpus.⁶⁵ “Habeas corpus is the last judicial inquiry into the validity of a criminal conviction and serves as a bulwark against convictions that violate fundamental fairness.”⁶⁶ Historically, habeas has been “[c]onsidered the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action.”⁶⁷ Missouri Supreme Court Rule 91.01(b) grants the right to petition for a writ of habeas corpus for “[a]ny person restrained of liberty within this state”⁶⁸ The Missouri Constitution further specifies “[t]hat the privilege of the writ of habeas corpus shall never be suspended.”⁶⁹ “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

61. *Ferguson v. State*, 325 S.W.3d 400, 406 (Mo. App. W.D. 2010) (quoting *Wilson v. State*, 813 S.W.2d 833, 834 (Mo. 1991)).

62. *Strickland v. State*, 726 S.W.2d 341, 342 (Mo. App. W.D. 1987). Strickland’s post-conviction motion was filed pursuant to Rule 27.26, which has been replaced by Rule 29.15.

63. *State v. Johnson*, 617 S.W.3d 439, 445 (Mo. 2021).

64. Newly discovered evidence encompasses mistaken eyewitness identification and recantations such as that of Douglas and others in Strickland’s case. In fact, mistaken eyewitness identification was found to be a contributing factor in 26% of all exonerations. See % *Exonerations by Contributing Factor*, NAT’L REGISTRY OF EXONERATIONS (Oct. 5, 2023), <https://www.law.umich.edu/special/exoneration/Pages/ExonerationsContribFactorsByCrime.aspx> [https://perma.cc/8XQR-A46T].

65. KAREN L. SCHULTZ, 39 AM. JUR. 2D HABEAS CORPUS § 1 (2nd ed. 2023) (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010)).

66. *Id.* (quoting *State ex rel. Engel v. Dormire*, 304 S.W.3d 120 (Mo. 2010)).

67. *Id.* (quoting *Harris v. Nelson*, 394 U.S. 286 (1969)).

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

69. MO. CONST. art. I, § 12.

unless habeas relief is granted.”⁷⁰ If newly discovered evidence, by a preponderance of the evidence, establishes actual innocence, then it may be brought under the “manifest injustice” avenue.⁷¹

Gateway Innocence Claims: Excusing Procedural Default

Both the “cause and prejudice” and “manifest injustice” avenues are gateway claims through which a case can be reviewed on the merits regardless of the underlying constitutional error being procedurally defaulted.⁷² The “manifest injustice” avenue is regularly referred to as a gateway claim of actual innocence.⁷³ “To establish a gateway claim of actual innocence, the petitioner must show it would be manifestly unjust to restrain the petitioner because newly-discovered evidence demonstrates actual innocence by a preponderance of the evidence.”⁷⁴ An important requirement is that the evidence of innocence be “new”, meaning that it was “not available at trial and could not have been discovered earlier through the exercise of due diligence.”⁷⁵

The “cause and prejudice” gateway requires a petitioner to establish a valid cause for failing to preserve the issue in a timely manner and that prejudice resulted from that failure.⁷⁶ Such a valid cause must be “some objective factor external to the defense [that] impeded counsel’s efforts to comply with the State’s procedural rule.”⁷⁷ However, what constitutes an “objective factor external to the defense” for purposes of this requirement is not what a layperson might expect.⁷⁸ For example, if a retained attorney

70. Rebecca Charles, *Deconstructing the Paradox of the Constitutional Incarceration of Innocent Citizens*, 85 MO. L. REV. 247, 255 (2020) (quoting *In re Lincoln v. Cassady*, 517 S.W.3d 11, 16 (Mo. Ct. App. 2016)).

71. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. 2003) (quoting *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. 2000)).

72. Gateway innocence claims were developed in federal court in *Schlup v. Delo*, 513 U.S. 298 (1995). See also Leah Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 423 n.10 (2018) (“Innocence serves as a ‘gateway’ when it allows defendants to bypass procedural restrictions.”).

73. See *Marshall v. Lewis*, No. 1:19-CV-00083 SRC, 2021 WL 1597921 at *3 (E.D. Mo. Apr. 23, 2021), *recons. denied*, No. 1:19-CV-00083 SRC, 2021 WL 4504425 (E.D. Mo. Oct. 1, 2021) (explaining that a gateway claim of actual innocence must show manifest injustice).

74. *Id.* (quoting *Lincoln*, 517 S.W.3d at 17 (Mo. Ct. App. 2016)).

75. *Id.* (citing *State ex rel. Nixon v. Sheffield*, 272 S.W.3d 277, 284 (Mo. Ct. App. 2008)).

76. Charles, *supra* note 70, at 256 (“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.”).

77. *Lincoln*, 517 S.W.3d at 17 (quoting *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 215 (Mo. 2001)).

78. *Sheffield*, 272 S.W.3d at 281.

“admit[s] candidly, completely, and without excuse” that she “simply misse[d] a filing deadline,” that would not constitute cause because the client “bears the burden of [that] error.”⁷⁹ In other words, because there is no constitutional right to counsel in post-conviction proceedings, a post-conviction movant has no right to *effective* assistance of counsel.⁸⁰ Moreover, to establish prejudice the petitioner must show that the errors caused an “actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.”⁸¹

Both “manifest injustice” and “cause and prejudice” claims must have an accompanying constitutional violation alleged, because a gateway claim standing alone does not warrant habeas relief.⁸² Additionally, a constitutional violation that has been procedurally defaulted, even if meritorious, does not warrant habeas relief without a gateway claim to permit review.⁸³

*Freestanding Innocence Claims: Missouri’s Nightmare
Distinction*

Unlike gateway claims, a freestanding innocence⁸⁴ claim warrants habeas relief “independent of any constitutional violation”⁸⁵ Missouri first recognized a freestanding claim of innocence in *State ex rel. Amrine v. Roper*.⁸⁶ The court in *Amrine* established that a freestanding claim of innocence requires that “the evidence . . . be strong enough to undermine the basis for the conviction so as to make the petitioner’s continued incarceration and eventual execution manifestly unjust even though the conviction was otherwise the product of a fair trial.”⁸⁷ Because there is an assumption that there was no constitutional violation in a freestanding innocence claim, the court decided that the standard

79. *Id.*

80. *Id.* at 284 (emphasis added) (citing *State v. Lyons*, 129 S.W.3d 873, 874 (Mo. 2004)). *But see* *State ex rel. Peete v. Moore*, 283 S.W.3d 818, 821–22 (Mo. Ct. App. 2009) (finding that the defendant’s attorney abandoning him constituted cause for the “cause and prejudice” gateway).

81. *Jaynes*, 63 S.W.3d at 215–16 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)), *overruled on other grounds by* *State ex rel. Zinna v. Steele*, 301 S.W.3d 510 (Mo. 2010).

82. *Lincoln*, 517 S.W.3d at 17.

83. *Id.*

84. Litman, *supra* note 72, at 423 n.10 (“Innocence serves as a ‘freestanding’ claim when it warrants issuance of a writ of habeas corpus.”).

85. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 547 (Mo. 2000).

86. *Id.*

87. *Id.* at 547.

of proof should be higher than that of a gateway innocence claim.⁸⁸ The court held that a petitioner must “make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment.”⁸⁹ Ultimately, the court found that there was clear and convincing evidence of the petitioner’s innocence and granted habeas relief.⁹⁰

A Missouri appellate court has since interpreted *Amrine* as extending freestanding claims of innocence only to petitioners who have been sentenced to death.⁹¹ The Missouri Court of Appeals for the Western District held that it had “no authority to presume that Missouri’s habeas jurisprudence permits [a freestanding claim of innocence] in a non-death penalty case” and would not do so “[u]ntil the Supreme Court announces that [such a claim] is a recognized basis for securing habeas relief because *either* the continued incarceration *or* eventual execution of an actually innocent person violates principles of due process”⁹² In reaching this conclusion, the court deviated from the “manifest injustice” requirement discussed in *Amrine*, and inserted a requirement of a violation of “principles of due process.”⁹³ It did so while acknowledging that “*Amrine* expressly declined to determine whether the continued incarceration and eventual execution of a person who clearly and convincingly establishes actual innocence violates the due process clause of the constitution, resulting in a manifest injustice warranting habeas relief.”⁹⁴

The Missouri Supreme Court has yet to clarify the distinction between habeas for freestanding claims of innocence and capital sentences drawn by the appellate courts.⁹⁵ Neither has the Missouri Supreme Court clarified the new due process requirement developed by the appellate court.⁹⁶ However, the court had a chance to do so when Strickland’s counsel filed his habeas petition in

88. *Id.* at 548.

89. *Id.* at 548 (citing *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996), *superseded by statute in Ex parte Blue*, 230 S.W.3d 151 (Tex. Crim. App. 2007)).

90. *Id.* at 548–49.

91. *Lincoln*, 517 S.W.3d at 22.

92. *Id.* at 23 (emphasis in original); *see also* *Marshall v. Lewis*, No. 1:19-CV-00083 SRC, 2021 WL 1597921 at *3 (E.D. Mo. Apr. 23, 2021) (“Missouri law does not recognize freestanding claims of actual innocence except in capital cases.”).

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

94. *Id.* at 22 (quoting *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 n.3 (Mo. 2000)).

95. Counsel in *Lincoln* filed a motion to transfer to the Missouri Supreme Court, which was denied. *Id.* at 11.

96. *Id.*

2021.⁹⁷ In fact, Strickland’s counsel specifically stated that they “asked [the Missouri Supreme Court] to take the case to resolve this issue of whether or not innocence is a claim if you’re not sentenced to death”⁹⁸ Regardless, the court denied his petition and the issue remains unresolved.⁹⁹

iv. Clemency: The “Fail Safe” of the Criminal Justice System¹⁰⁰

When habeas is denied, the next step is seeking clemency from the governor.¹⁰¹ The Missouri Governor’s authority to grant clemency is derived from Article IV, Section 7 of the Missouri Constitution.¹⁰² A Missouri statute further provides that the Governor “may grant [clemency], with such conditions and under such restriction as he may think proper.”¹⁰³ Also, an application for clemency must be submitted to the Missouri Parole Board, which conducts an investigation and then submits to the governor a report with “any recommendations the board deems proper to make.”¹⁰⁴

Current Missouri Governor Mike Parson indicated through a statement released by his office that he has “used his state constitutional authority to grant pardons to individuals who demonstrate a changed life-style, commitment to rehabilitation, contrition and contribution to their communities”¹⁰⁵ Additionally, the Governor’s chief general legal counsel has

97. State *ex rel.* Strickland v. Brewer, No. SC99096, 2021 Mo. LEXIS 203 (June 1, 2021).

98. Ricono & Farhlander, *supra* note 1.

99. State *ex rel.* Strickland v. Brewer, No. SC99096, 2021 Mo. LEXIS 203 (June 1, 2021); Ricono & Farhlander, *supra* note 1.

100. *Herrera v. Collins*, 506 U.S. 390, 415 (1993) (“Executive clemency has provided the ‘fail safe’ in our criminal justice system.”).

101. *Lincoln*, 517 S.W.3d at 23–24 n.12 (quoting *Herrera*, 506 U.S. at 417) (“History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency.”). *See also* State v. Parker, 208 S.W.3d 331, 334 n.4 (Mo. Ct. App. 2006) (“The only formally authorized means by which a defendant with an untimely motion for new trial based on newly discovered evidence may present new claims is to seek relief by application to the governor for executive clemency or pardon pursuant to the Missouri Constitution.”).

102. MO. CONST. art. IV, § 7.

103. MO. REV. STAT. § 217.800.1 (1995).

104. MO. REV. STAT. § 217.800.2 (1995); Missouri Department of Corrections, *Executive Clemency*, <https://doc.mo.gov/divisions/probation-parole/executive-clemency> [<https://perma.cc/XQD9-73GE>].

105. Jason Hancock, *Missouri Gov. Mike Parson Doesn’t Plan to Issue Blanket Pardons for Marijuana Offenses*, NPR (Oct. 7, 2022), <https://www.kcur.org/politics-elections-and-government/2022-10-07/missouri-gov-mike-parson-doesnt-plan-to-issue-blanket-pardons-for-marijuana-offenses> [<https://perma.cc/N3ET-5J84>].

suggested that “family life, age and the severity of [the] offense” are also factors the Governor considers in granting clemency.¹⁰⁶ In his tenure, Governor Parson has become the “most prolific pardoner in the state in more than 40 years.”¹⁰⁷

Despite this reputation, very few clemency applications are actually granted, and typically for convictions of minor offenses.¹⁰⁸ Nonetheless, Kevin Strickland met some of the factors listed by the Governor’s chief legal counsel.¹⁰⁹ For example, Strickland’s older age, desire to be with his dying mother,¹¹⁰ and innocence all weighed in favor of clemency. But Governor Parson refused to grant Strickland clemency while simultaneously granting a pardon to the McCloskeys, a married couple in St. Louis that attracted national attention for brandishing firearms at peaceful protesters.¹¹¹ Governor Parson’s decision to pardon the McCloskeys was criticized by some on grounds that “men stuck behind bars should have been prioritized over a couple who faced no jail time.”¹¹² Regardless, Governor Parson’s refusal marked the complete exhaustion of Strickland’s state remedies.¹¹³

106. Missouri News Network, *Gov. Parson plows through requests for clemency*, COURIER TRIB. (Sept. 15, 2023), https://www.mycouriertribune.com/gov-parson-plows-through-requests-for-clemency/article_1220b0ea-182b-11ed-8263-f34888da09c5.html [https://perma.cc/4GJ7-JUY7].

107. *Missouri Restoration of Rights & Record Relief, Collateral Consequences*, RESTORATION OF RIGHTS PROJECT, <https://ccresourcecenter.org/state-restoration-profiles/missouri-restoration-of-rights-pardon-expungement-sealing/> [https://perma.cc/ZBG3-BJXH] (last visited Jan. 13, 2023).

108. *Id.*; see Press Release, Missouri Governor Michael L. Parson, Governor Parson Grants 21 Pardons, Commutes Two Sentences for Month of December (Dec. 30, 2022), <https://governor.mo.gov/press-releases/archive/governor-parson-grants-21-pardons-commutes-two-sentences-month-december> [https://perma.cc/XG3L-XXCP].

109. Strickland was unable to join his family at his mother’s deathbed. She died more than 100 days after the motion under the new law was filed in Strickland’s case. See Luke Nozicka, ‘A Travesty’: Kevin Strickland’s mother laid to rest as he remains in Missouri prison, KAN. CITY STAR, <https://www.kansascity.com/news/local/article253947793.html> [https://perma.cc/LR86-ZZJC].

110. *Id.*

111. Martin, *supra* note 32. See also Meryl Cornfield, *Missouri Governor Pardons Mark and Patricia McCloskey, Who Pointed Guns at Protesters*, WASH. POST (Aug. 3, 2021), <https://www.washingtonpost.com/nation/2021/08/03/mccloskey-pardon/> [https://perma.cc/66T5-E4PY].

112. Cornfield, *supra* note 111.

113. *Lincoln*, 517 S.W.3d at 23–24 n.12 (quoting *Herrera v. Collins*, 506 U.S. 390, 417 (1993)).

v. Missouri's New Statute: Mo. Rev. Stat. § 547.031

Prior to August 28, 2021, Strickland's denial of clemency marked the final exhaustion of his viable post-conviction relief avenues. However, the court's decision in *Johnson*, and its emphasis on the need for a statute, put the legislature on notice that prosecutors needed a statutory procedure for innocence cases.¹¹⁴ Thus, acknowledging the injustice of the continued incarceration of an innocent man, lawmakers with "input from prosecutors, defense attorneys, law enforcement officers and representatives from groups that work to free prisoners" drafted what became § 547.031.¹¹⁵ Notably, this entire statute was a last-minute amendment added to Senate Bill 53 during the last few days of the legislative session.¹¹⁶

The statute provides a prosecuting attorney the ability to file a motion to set aside or vacate a judgment "at any time if he or she has information that the convicted person may be innocent or may have been erroneously convicted."¹¹⁷ Furthermore, the statute empowers prosecutors to fulfill their ethical duties prescribed by the Model Rules of Professional Conduct "to correct a miscarriage of justice that has resulted in the incarceration of an innocent person."¹¹⁸ Yet, the statute also enables the Attorney General to intervene, perhaps mimicking the circuit court's *sua sponte* appointment of the Attorney General in *Johnson*.¹¹⁹ Jackson County's prosecutor filed the first motion under this new statute for Strickland in August 2021.¹²⁰

Despite the statute being passed precisely for cases like Strickland's, the Attorney General fought his release under the statute for months.¹²¹ Strickland lamented that "the delays and the roadblocks that are being put up seem to be endless."¹²² That

114. *Johnson*, 617 S.W.3d at 443. See also *EXPLAINER: the Missouri Law that Led to Strickland Decision*, U.S. NEWS (Nov. 23, 2021), <https://www.usnews.com/news/us/articles/2021-11-23/explainer-the-missouri-law-that-led-to-strickland-decision> [https://perma.cc/SBZ3-VU9M].

115. U.S. NEWS, *supra* note 114.

116. SB 53, 101st Assembly, 1st Regular Sess. § 547.031 (Mo. 2021), <https://house.mo.gov/Bill.aspx?bill=SB53&year=2021&code=R&cal=1> [https://perma.cc/Z96T-WL4X].

117. MO. REV. STAT. § 547.031.1 (2021).

118. Brief of Legal Post-Conviction Scholars Amici Curia in Support of the Circuit Attorney's Motion for New Trial, *State v. Johnson*, No. SC98303 (Mo. Feb. 10, 2020) (citing MODEL RULES OF PRO. CONDUCT r. 3.8(g), (h)).

119. MO. REV. STAT. §547.031.4 (2021); *Johnson*, 617 S.W.3d at 441.

120. U.S. NEWS, *supra* note 114.

121. *Id.*

122. *Prosecutors Think Kevin Strickland Is Innocent. But He's Still Behind Bars* –

Strickland would be “losing belief in . . . the system” is hardly surprising after exhausting every post-conviction avenue of relief described above.¹²³ If the system worked, then perhaps an innocent man wouldn’t have languished in prison for forty-three years.¹²⁴

II. Analysis

Kevin Strickland’s case should serve as a harbinger of innocence reform in Missouri. His incarceration is the longest wrongful conviction in Missouri and one of the longest in the country.¹²⁵ All currently available avenues of relief in Missouri failed him. The changing federal legal landscape and resulting emphasis placed on state law, as well as the intersection of doctrines such as procedural default, heighten the need for state innocence reform. This section examines the limitations of Mo. Rev. Stat. § 547.031, Rule 29.11, and habeas relief for claims of innocence and proposes various amendments to each.

The first proposal is amending Mo. Rev. Stat. § 547.031 to limit the Attorney General’s ability to intervene. This amendment may receive the least opposition because it would not offend notions of finality, and the Attorney General’s intervention in wrongful conviction relief merely to uphold convictions runs the risk of violating ethical obligations.¹²⁶ Second, it proposes amending Rule 29.11 to waive the strict timeline for filing cases in which newly discovered evidence suggests a wrongful conviction has occurred. However, this proposal may incur opposition from those that value finality in convictions. The final proposal is to expand habeas corpus relief to freestanding claims of innocence for those sentenced to life without parole by passing Senate Bill 1201.

and Says He’s “Losing Belief” in the Justice System, CBS NEWS (Oct. 11, 2021), <https://www.cbsnews.com/news/kevin-strickland-missouri-hearing-november/> [<https://perma.cc/LS8D-WVGG>].

123. *Id.*

124. Heidi Schmidt & Tia Johnson, *Kevin Strickland Speaks After Being Released from Missouri Prison 43 Years Later*, FOX4 (Nov. 23, 2021), <https://fox4kc.com/news/missouri-judge-orders-immediate-release-of-kevin-strickland/> [<https://perma.cc/89ZP-CZL3>].

125. Timothy Bella, *Kevin Strickland Exonerated After 43 Years in One of the Longest Wrongful-Conviction Cases in U.S. History*, WASH. POST (Nov. 23, 2021, 1:30 PM), <https://www.washingtonpost.com/nation/2021/11/23/kevin-strickland-murder-exoneration/> [<https://perma.cc/96TC-8ENQ>].

126. Luke X. Martin, Brian Ellison, Danie Alexander & Zach Wilson, *County Prosecutor Accuses Missouri Attorney General of Malpractice for Fighting Kevin Strickland’s Release*, KCUR (Nov. 24, 2021) <https://www.kcur.org/news/2021-11-24/county-prosecutor-accuses-missouri-attorney-general-of-malpractice-for-fighting-kevin-stricklands-release> [<https://perma.cc/27ZE-ZLZ8>].

A. *Missouri Should Amend Mo. Rev. Stat. § 547.031*

Missouri's new statute, § 547.031, did not afford a straightforward avenue of relief for Kevin Strickland and should be amended. Former Missouri Attorney General Eric Schmitt used the provision in Mo. Rev. Stat. § 547.031 that enabled his office to intervene in Strickland's case to oppose the CIU's motion to free Strickland.¹²⁷ While the Attorney General *may* intervene under the new law, it is not a requirement. Even with substantial evidence of Strickland's innocence, the Attorney General intervened to argue that all of it was hearsay, unreliable, and inadmissible.¹²⁸ He also attacked the credibility of the email that Douglas sent to the Midwest Innocence Project.¹²⁹ In making these arguments, the Attorney General delayed the release of Strickland for months and consumed court time and resources. Strickland's case, as the first to utilize this law, might have been an inaccurate representation of the law's efficacy, but subsequent cases dispel any doubt.¹³⁰ The Attorney General again mounted vehement opposition to a motion filed in Lamar Johnson's case under the new law¹³¹—paradoxical, considering the law was passed for Johnson after the Missouri Supreme Court's decision in his case.¹³²

The Missouri Attorney General described the power to intervene as “a check to the [local] prosecutor's extraordinary new power” that the Missouri legislature intended,¹³³ though no legislative history exists to corroborate this statement.¹³⁴

127. Rebecca Rivas, *Prosecutors' Biggest Roadblock in Wrongful Conviction Cases? Missouri's Attorney General*, MO. INDEP. (Oct. 6, 2022), <https://missouriindependent.com/2022/10/06/prosecutors-biggest-roadblock-in-wrongful-conviction-cases-missouris-attorney-general/> [<https://perma.cc/9CHH-HF8T>]; Otterbourg, *supra* note 7.

128. Otterbourg, *supra* note 7.

129. *Id.*

130. The attorney general is also opposing a motion filed under the new law in Michael Politte's case, a man already released on parole but whom a CIU says is innocent and for whom the CIU is trying to reverse the conviction. See Rebecca Rivas, *Missouri Supreme Court Hears AG's Opposition to Prosecutor's Jurisdiction in Michael Politte Appeal Attempt*, FOX 2 (Jan. 24, 2023), <https://fox2now.com/news/missouri/missouri-supreme-court-hears-ags-opposition-to-prosecutors-jurisdiction-in-michael-politte-appeal-attempt/> [<https://perma.cc/7P6N-JS4V>]; Rebecca Rivas, *Missouri Attorney General is Taking an Outsized Role in Opposing Innocence Cases*, KCUR (Dec. 23, 2022), <https://www.kcur.org/politics-elections-and-government/2022-12-23/missouri-attorney-general-is-taking-an-outsized-role-in-opposing-innocence-cases> [<https://perma.cc/C9TX-4FV7>].

131. Rivas, *supra* note 130.

132. *Id.*

133. Martin, *supra* note 32.

134. Missouri does not preserve or make available legislative history. See

Theoretically, it could be useful to have a policy in which there is a check on the local prosecutor, but the Missouri Attorney General's office has stated that its duty is "to uphold criminal convictions."¹³⁵ Such an adherence to convictions, even if the person was wrongfully convicted, does not function as a check, but rather undermines the legitimacy of procedural avenues and runs the risk of violating ethical obligations.¹³⁶ The Attorney General's self-prescribed duty to oppose requests for relief in wrongful convictions was described in a concurring opinion in *Johnson* as "misunderstand[ing] the full extent of the prosecution's role in the justice system. The United States Supreme Court has explained that the prosecutor's role is not simply one of being an adversary to the defense."¹³⁷

Moreover, other surrounding Midwestern state statutes such as those in Nebraska,¹³⁸ Iowa,¹³⁹ and Kansas¹⁴⁰ do not enable the state's Attorney General to intervene in actions filed in wrongful conviction cases. Under Illinois's state statute, the state's Attorney General may intervene but has not done so to oppose the release of those wrongfully convicted with the same regularity as Missouri's Attorney General.¹⁴¹ In fact, Missouri's Attorney General has opposed relief in nearly every wrongful conviction since 2000.¹⁴² After Eric Schmitt leaves office, there is a possibility that the change of leadership could change the way that the Attorney General's office intervenes in wrongful conviction cases.¹⁴³ Yet, the longstanding office policy to oppose relief suggests that such a change of heart is unlikely and should not be relied upon in reform considerations.

Missouri Legislative History: Legislative History, U. MO. SCH. L. (Jul. 19, 2022), <https://libraryguides.missouri.edu/c.php?g=28632&p=175352> [<https://perma.cc/32R8-7P39>] (quoting *Nixon v. Shrink Missouri Govt. PAC*, 528 U.S. 377, 393 (2000)).

135. Rivas, *supra* note 127.

136. The Attorney General's policy has been described as ideological opposition by a former Missouri Supreme Court Judge. See Rivas, *supra* note 130.

137. *State v. Johnson*, 617 S.W.3d 439, 449 (Mo. 2021). (Stith, J., concurring) (citing *United States v. Bagley*, 473 U.S. 667, 675 n.6 (1985)).

138. NEB. REV. STAT. ANN. § 29-4601 (West 2009).

139. IOWA CODE § 822.2 (2022).

140. KAN. STAT. ANN. § 60-5004 (2019) (noting that although the Kansas statute provides that a claim filed under the statute shall be served on the Attorney General, it does not provide language to intervene).

141. 735 ILL. COMP. STAT. ANN. 5/2-702 (2021).

142. Rebecca Rivas, *Pending Law to Correct Wrongful Convictions Could Depend on Missouri Attorney General*, MO. INDEP. (June 1, 2021) <https://missouriindependent.com/2021/06/01/pending-law-to-correct-wrongful-convictions-could-depend-on-missouri-attorney-general/> [<https://perma.cc/7ZAC-4MMM>].

143. Rivas, *supra* note 130.

The questioning that occurred at oral argument in front of the Missouri Supreme Court in *Amrine* is perhaps the most poignant example of the Attorney General's apparent position towards wrongful convictions. The Assistant Attorney General, when asked if Mr. Amrine should be executed even if the court found he was actually innocent, responded, "That's correct, your honor."¹⁴⁴ Given the Missouri Attorney General's longstanding policy and self-declared duty to oppose relief in wrongful conviction cases, Mo. Rev. Stat. § 547.031 should be amended to remove the Attorney General's ability to intervene. Not only would this provide more immediate relief to people wrongfully convicted, but it would save court time and the resources of both parties.¹⁴⁵ Amending the statute also might preserve the credibility of the justice system¹⁴⁶ and avoid violations of ethical obligations.¹⁴⁷

B. Missouri Should Amend Rule 29.11

As an alternative to amending Mo. Rev. Stat. § 547.031, the General Assembly should consider amending Rule 29.11 to remove the strict time limit on filing a motion for new trial for cases in which newly discovered evidence suggests that a wrongful conviction occurred. Because of the strict timeline on the motion for new trial, it is "of limited utility to the bulk of criminal defendants who, in the immediate aftermath of their convictions, might not have the resources or the good fortune to find new evidence."¹⁴⁸

144. Sean O'Brien, *Strange Justice For Victims of the Missouri Public Defender Funding Crisis: Punishing the Innocent*, ST. LOUIS UNIV. L.J. 725, 740 (2021) (quoting Laura Denvir Stith, *A Contrast of State and Federal Court Authority To Grant Habeas Relief*, 38 VAL. U. L. REV. 421, 421 (2004) and *Amrine*, 102 S.W.3d at 546 (Transcript of Oral Argument))

145. Rivas, *supra* note 127 ("The attorney general will likely 'waste' an enormous amount of taxpayer money on preventing Johnson's case from getting a hearing . . ."). Furthermore, if Missouri provided compensation for each day of wrongful incarceration like other states, the Attorney General's delay tactics would cost the state even more; Missouri only provides compensation for those exonerated through DNA so victims like Kevin Strickland receive no compensation from the government. See Otterbourg, *supra* note 7.

146. Jason Rosenbaum, *Lamar Johnson Makes the Case for His Innocence, but Missouri's Attorney General Stands in the Way*, KCUR (Dec. 17, 2022), <https://www.kcur.org/news/2022-12-17/lamar-johnson-makes-the-case-for-his-innocence-but-missouris-attorney-general-stands-in-the-way> [<https://perma.cc/RC7M-UBK4>] ("Former Missouri Supreme Court Judge Michael Wolff said cases like Johnson's are important for the credibility of the criminal justice system.")

147. Martin et al., *supra* note 126.

148. Daniel S. Medwed, *Up the River Without a Procedure: Innocent Prisoners and Newly Discovered Non-DNA Evidence in State Courts*, 47 ARIZ. L. REV. 655, 676 (2005).

Conversely, extending the timeline would create a forum to bring newly discovered evidence, and doing so would codify the judicial analysis in the *Mooney*, *Williams*, and *Terry* cases.¹⁴⁹

Furthermore, a motion for a new trial functioning as a forum to reverse wrongful convictions sends the case back to the prosecutor in the jurisdiction in which the conviction occurred, similar to § 547.031; but unlike § 547.031, it does not include a formal avenue for the Attorney General to intervene.¹⁵⁰ Thus, local prosecutors could file the motion and not be forced to exhaust the time and resources that the Attorney General's opposition caused in Strickland and Johnson's cases. Additionally, amending the rule to extend the timeline would eliminate the novelty of the motion. The Circuit Court in *Johnson* described the filing of the motion for new trial as "an unusual event" which justified the appointment of the "State's chief legal officer."¹⁵¹ Accordingly, extending the timeline for the motion in cases of newly discovered evidence of innocence removes the perceived need to *sua sponte* appoint the Attorney General.¹⁵²

However, extending the timeline to file a motion for a new trial may encroach on the finality of criminal convictions. The "Supreme Court has regularly proclaimed that finality is essential to both the retributive and deterrent functions of the criminal law and to the interests of victims of crimes in obtaining closure."¹⁵³ Finality may also be important for determining what is "enough procedure" and protecting States from the unfairness of having to re-evaluate claims years later and re-prosecute.¹⁵⁴ However, even if all post-conviction avenues of relief have been exhausted, "[F]inality has never served as an absolute bar to constitutional claims, even when they have been procedurally defaulted."¹⁵⁵ Consequently, although

149. See discussion *supra* Section I.B.i.

150. Medwed, *supra* note 148.

151. *Missouri v. Johnson*, No. 22941-03706A-01 (City of St. Louis Circuit Court 2019).

152. Order, *Missouri v. Johnson*, No. 22941-03706A-01, (City of St. Louis Circuit Court, Aug. 23, 2019). Unrelated to the legal question in the case, the Circuit Court in *Johnson* explained that it appointed the Attorney General also because it was concerned that the CIU and Midwest Innocence Project had contacted jurors in violation of local court rules and believed that the CIU reviewing the conduct of a prosecutor in its own office was a conflict of interest.

153. Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. PA. L. REV. 547, 606 (2002).

154. Larry May & Nancy Viner, *Actual Innocence and Manifest Injustice*, 49 ST. LOUIS U. L.J. 481, 489–490 (2005).

155. Kreimer & Rudovsky, *supra* note 153, at 607; see also *id.* at 607 n.247 (citing *Schlup v. Delo*, 513 U.S. 298, 318–20 (1995); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 106, 110 Stat. 1214, 1220–21, and 28

considerations of finality are important, “Obsession with finality to the exclusion of justice is at odds with the legitimate administration of [justice].”¹⁵⁶ It follows that notions of fairness necessarily “dictate that no stone be unturned,”¹⁵⁷ and to the extent that extending the timeline to file this motion offends finality, it protects against the continued incarceration of innocent people like Kevin Strickland and Lamar Johnson.

C. Missouri Should Extend Habeas to Claims of Innocence for Those Sentenced to Life Without Parole

i. Federalism Trends Support Disposition in State Courts

A habeas petition may be filed in federal court after all claims have been exhausted in state court.¹⁵⁸ However, the Antiterrorism and Effective Death Penalty Act¹⁵⁹ (AEDPA) and subsequent Supreme Court decisions have limited a petitioner’s ability to obtain relief in federal courts.¹⁶⁰ In fact, “Nowhere is AEDPA’s impact more devastating than in the context of factually innocen[t] prisoners seeking review of their wrongful convictions” because it “operated to radically restrict federal habeas review for state prisoners.”¹⁶¹ For example, AEDPA imposed a statute of limitations of one year and “substantially raised the standard of proof imposed on prisoners seeking habeas relief based on actual innocence.”¹⁶² Before AEDPA, the standard required only that “new evidence was ‘more likely than not’ to raise reasonable doubt regarding the petitioner’s guilt.”¹⁶³ After AEDPA, “[A] petitioner seeking relief must establish actual innocence by ‘clear and convincing evidence.’”¹⁶⁴ Consequently, this higher standard is believed to have virtually foreclosed federal relief for claims of innocence.¹⁶⁵

In addition to AEDPA’s limiting of federal review of innocence claims, the Supreme Court has also limited federal habeas review

U.S.C. § 2244(b)(2), which argue that finality is not an absolute bar).

156. *Id.* at 588.

157. May & Viner, *supra* note 154, at 490.

158. 28 U.S.C. § 2254.

159. *Id.*

160. *See* Brown v. Davenport, 142 S. Ct. 1517, 1517 (2022).

161. Stephanie Roberts Hartung, *Habeas Corpus for the Innocent*, 19 U. PA. J.L. & SOC. CHANGE 1, 2 (2016).

162. *Id.* at 12.

163. *Id.* at 13.

164. *Id.*

165. *Id.* AEDPA has been heavily criticized by scholars since its passing. *See id.* at 6–13 (2016) for a more thorough discussion of criticism of AEDPA.

of state innocence claims through its decisions.¹⁶⁶ For example, in *Herrera v. Collins*, the Court denied a claim that a petitioner “[was] entitled to habeas relief because newly discovered evidence show[ed] that his conviction [was] factually incorrect.”¹⁶⁷ The Court made clear that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”¹⁶⁸

The Court in *Brown v. Davenport* announced a new, higher standard of review for federal courts considering a state claim of habeas relief.¹⁶⁹ The new rule announced in *Brown* requires federal courts to apply both the “‘substantial and injurious effect or influence’ on the verdict” standard and the AEDPA standard.¹⁷⁰ The AEDPA standard requires a showing that a state court’s decision was either contrary to clearly established law or based on an unreasonable determination of the facts.¹⁷¹

A final and recent example of the Court further restricting habeas review of state claims is the decision in *Shinn v. Ramirez*.¹⁷² In this case, petitioners alleged their innocence through a claim of ineffective assistance of counsel (IAC).¹⁷³ However, the state in which the petitioners reside only allows IAC claims to be brought in post-conviction proceedings, and their post-conviction counsel failed to bring the IAC claims.¹⁷⁴ Thus, because their post-conviction counsel failed to develop the IAC claim, it was procedurally defaulted and could not be brought in federal court, effectively foreclosing any innocence claim based on the failure of defense counsel to provide constitutionally adequate representation.¹⁷⁵ In reaching this conclusion, Justice Thomas emphasized that “because

166. See *Herrera v. Collins*, 506 U.S. 390 (1993). See also *Brown v. Davenport*, 142 S. Ct. 1517, 1531 (2022), and *Shinn v. Ramirez*, 42 U.S. 1718, 1724–27 (2022) (limiting federal habeas review of state innocence claims).

167. *Herrera*, 506 U.S. at 405.

168. *Id.* at 400.

169. *Davenport*, 142 S. Ct. at 1517.

170. *Id.* at 1523 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993)).

171. 28 U.S.C. §§ 2254(d)(1)–(2).

172. See *Shinn*, 42 S. Ct. 1718.

173. *Id.*

174. *Id.* at 1736.

175. *Id.* at 1728. This foreclosure of developing ineffective assistance of counsel claims in federal court where state post-conviction counsel was ineffective will have devastating effects. See James S. Liebman, Jeffrey Fagan & Valerie West, *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839 (2000) (describing a study of capital appeals that found that one of the biggest contributors to wrongful convictions or death sentences in capital cases was ineffective defense counsel).

there is no constitutional right to counsel in state postconviction proceedings . . . a prisoner ordinarily must ‘bea[r] responsibility’ for all attorney errors during those proceedings.”¹⁷⁶ Ultimately, the Court found that state prisoners are “responsible for counsel’s negligent failure to develop the state postconviction record.”¹⁷⁷

The Court’s sentiment in these cases is palpable. *Brown* described “[g]ranting [federal] habeas relief to a state prisoner” as “intrud[ing] on state sovereignty to a degree matched by few exercises of federal judicial authority.”¹⁷⁸ *Shinn* included language describing federal habeas as “[s]erial relitigation of final convictions” which undermines finality and “encourages prisoners to ‘sandba[g]’ state courts.”¹⁷⁹

The result of AEDPA and the above referenced cases has been the reduction of “federal habeas review of state convictions.”¹⁸⁰ In fact, the Supreme Court has “only rarely granted federal habeas relief in recent years,”¹⁸¹ and “the overall success rate in all federal habeas non-capital cases—both before and after the passage of AEDPA—is decidedly low, at less than 1%.”¹⁸² Consequently, “[S]tate collateral review of a conviction now amounts to the only viable venue for constitutional review of one’s convictions.”¹⁸³

*ii. The Missouri General Assembly Should Pass Senate Bill
1201*

It is vitally important that Missouri afford habeas relief that is accessible to all that are wrongfully convicted, regardless of their

176. *Shinn*, 42 S. Ct. at 1735 (quoting *Williams v. Taylor*, 529 U.S. 420, 432 (2000)).

177. *Id.* (citing *Davila v. Davis* 582 U.S. 521, 528 (2017)).

178. *Brown v. Davenport*, 142 S. Ct. 1517, 1523 (2022) (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

179. *Shinn*, 42 S. Ct. at 1739 (quoting *Murray v. Carrier*, 477 U.S. 478, 492 (1986)). Another obvious example is the footnote in *Shinn* in which the Court acknowledges that the state had failed to raise its argument and preserve it for appeal. The Court chose to “forgive the State’s forfeiture before the District Court” while simultaneously deciding that “defendants are ‘at fault’ for the failures of their constitutionally ineffective lawyers.” *Id.* at 1750 n.1; see also Noam Biale, *Conservative Majority Hollows Out Precedent on Ineffective-Counsel Claims in Federal Court*, SCOTUSBLOG (May. 23, 2022) <https://www.scotusblog.com/2022/05/conservative-majority-hollows-out-precedent-on-ineffective-counsel-claims-in-federal-court/> [https://perma.cc/G5VQ-9HLR] (arguing that *Shinn* undermines the precedent set in *Martinez v. Ryan*).

180. Hartung, *supra* note 161 at 33.

181. *Id.* at 13.

182. *Id.* at 14 (citing John H. Blume, *AEDPA: The “Hype” and the “Bite”*, 91 CORNELL L. REV. 259, 284 (2006)).

183. *Id.* at 32.

sentence, due to the federal limiting trend of habeas petitions. Kevin Strickland's case serves as a poignant example of the need to expand habeas to freestanding claims of innocence for those sentenced to life without parole.

Many attempts were made via litigation to prompt the Missouri Supreme Court to articulate whether there is a distinction between death penalty and life without parole sentences and what impact different sentences have on the granting of habeas.¹⁸⁴ For example, in *State ex rel. Koster v. McElwain*, the court declined to address whether a freestanding claim of innocence applied in cases where the "death penalty was not opposed" and upheld the granting of habeas on other grounds.¹⁸⁵ A freestanding claim of innocence was also brought in *Ferguson v. Dormire*, but the court resolved the case based on a different claim without addressing the merits of the freestanding innocence claim.¹⁸⁶ The Missouri Supreme Court in *State ex rel. Woodworth v. Denney* similarly declined to reach the freestanding innocence claim and decided the case on other grounds.¹⁸⁷

The Court of Appeals in *McKim v. Cassady* did address a freestanding claim of innocence on the merits but made clear in a footnote that its discussion of the freestanding innocence claim "should not be read to presume that such a claim is even cognizable in a non-capital case, a question that is unresolved in Missouri."¹⁸⁸ Lastly, the Missouri Supreme Court denied transfer in *Lincoln*,¹⁸⁹ which had asked the court specifically to "extend Amrine's holding to prisoners condemned to die in prison of natural causes."¹⁹⁰ Consequently, the "question remains whether Missouri Courts have the power to correct a manifest injustice when it becomes apparent," although it "is difficult to imagine a free society in which it is not considered a manifest injustice to imprison an innocent person."¹⁹¹

Because the Missouri Supreme Court has declined to resolve this question thus far, the Missouri legislature should pass proposed Senate Bill 1201. The Bill Summary promulgated by the Missouri Senate states that:

184. Ricono & Farhlander, *supra* note 1.

185. *State ex rel. Koster v. McElwain* 340 S.W.3d 221, 230 n.9 (Mo. Ct. App. 2011).

186. *Ferguson v. Dormire*, 413 S.W.3d 40, 73–74 (Mo. Ct. App. 2013)

187. *State ex rel. Woodworth v. Denney* 396 S.W.3d 330, 337 n.5 (Mo. 2013).

188. *McKim v. Cassady*, 457 S.W.3d 831, 847 n.27 (Mo. Ct. App. 2015).

189. *In re Lincoln v. Cassady*, 517 S.W.3d 11 (Mo. Ct. App. May 2016), *transfer denied* (May 30, 2017).

190. O'Brien, *supra* note 144 at 743 (citing Motion for Transfer at 9, 12, *State ex rel. Lincoln v. Cassady*, No. SC96083 (Mo. Dec. 7, 2016)).

191. *Id.* at 743–44.

This act provides that a person may assert a claim of actual innocence as part of his or her habeas corpus proceeding if he or she establishes by clear and convincing evidence that there exists newly discovered, admissible evidence that could not have been previously discovered through the exercise of due diligence and that no reasonable factfinder would have found the petitioner guilty of the offense or offenses.¹⁹²

This language makes clear that there is no requirement that the person asserting a claim of actual innocence be sentenced to death. Supporters of the bill include the Executive Director of the Midwest Innocence Project and former Missouri Supreme Court Justice Michael Wolff, both of whom testified to their support in a Senate Judiciary Committee meeting.¹⁹³

If passed, the bill would catch Missouri up to surrounding states which have already extended habeas to freestanding claims of innocence to those sentenced to life without parole, or never made that distinction in the first place. For example, Illinois announced in 1996 that it recognized “freestanding innocence claims based upon newly discovered evidence” and made no distinction between death penalty or life without parole sentences.¹⁹⁴

Similarly, Texas in 1996 held that a freestanding claim of innocence could be a basis for habeas relief.¹⁹⁵ In doing so, the Court emphasized that “the incarceration of an innocent person is as much a violation of the Due Process Clause as is the execution of such a person.”¹⁹⁶ Missouri too should abolish this distinction between sentences by adopting Senate Bill 1201, which would enable a person to seek habeas relief through a freestanding claim of innocence regardless of their sentence.¹⁹⁷

192. *Current Bill Summary*, MO. SENATE, https://www.senate.mo.gov/22info/BTS_Web/Bill.aspx?SessionType=R&BillID=77167925 [<https://perma.cc/HNL7-3UQ2>].

193. Ricono & Farhlander, *supra* note 1.

194. *People v. Washington*, 171 Ill. 2d 475, 489 (1996). Although Illinois recognized that a freestanding claim of innocence could be brought under its Post-Conviction Hearing Act, rather than habeas, the procedure is essentially the same as habeas as shown by the court’s description of its decision as aligning “Illinois with other jurisdictions likewise recognizing, primarily as a matter of state *habeas corpus* jurisprudence, a basis to raise such claims under the rubric of due process” *Id.* Iowa similarly made no distinction between life without parole and death sentences as a criterion for asserting a freestanding claim of innocence. *Schmidt v. State*, 909 N.W.2d 778, 795 (Iowa 2018) (“[F]reestanding claims of actual innocence permitted by the Iowa Constitution are available to applicants even though they pled guilty.”).

195. *Ex parte Elizondo*, 947 S.W.2d 202, 210–11 (Tex. Crim. App. 1996).

196. *Id.* at 205.

197. See e.g., *Wrongfully Convicted People in Missouri Need Access to Justice*, INNOCENCE PROJECT, <https://innocenceproject.org/petitions/missouri-actual-innocence/> [<https://perma.cc/A7MZ-2PE7>] (“Missouri lawmakers should pass House Bill 2885/Senate Bill 1201 to ensure that wrongfully convicted people with evidence

Opponents of Senate Bill 1201 may suggest that the law is unnecessary because Mo. Rev. Stat. § 547.031 provides an adequate remedy to those that are alleging actual innocence and sentenced to life without parole instead of death. However, this view overlooks any future case that is denied review by a CIU or any case in a jurisdiction which does not have a CIU. Kevin Strickland and Lamar Johnson's cases were fortuitously located in the most urban counties in the state, which have CIUs.¹⁹⁸ The prosecutors in these CIUs were fierce advocates for Strickland and Johnson, but so were their post-conviction counsel who had made the same arguments for years.

Mo. Rev. Stat. § 547.031 only allows for the "prosecuting or circuit attorney, in the jurisdiction in which the person was convicted of an offense" to file the motion to exonerate a wrongfully convicted person.¹⁹⁹ This restriction could be a huge impediment to the utilization of the statute because most Missouri prosecutor offices do not have CIUs to investigate innocence claims²⁰⁰ nor the time, funding, and resources to fight the Attorney General's opposition in these cases. Expanding habeas to freestanding claims of innocence for those sentenced to life without parole would provide an opportunity for advocates other than the prosecuting or circuit attorneys to exonerate wrongfully convicted people and afford protection to those wrongfully convicted in rural counties without resources to investigate wrongful convictions.

Conclusion

Kevin Strickland exhausted all legal avenues of relief available. Time and time again the legal avenues as currently constructed in Missouri failed him. To avoid perpetuating an unjust system, Missouri should reform its post-conviction relief, starting with limiting the Attorney General's involvement in Mo. Rev. Stat. § 547.031, loosening the time restriction on Rule 29.11 motions, and

of their innocence are able to seek exoneration through the courts regardless of their sentence.").

198. Lamar Johnson's case is being litigated in St. Louis County, and Kevin Strickland's was litigated in Jackson County. St. Louis County is the most populous county in Missouri, and Jackson County is the second most populous. See *County Population, MO. ECON. RSCHS & INFO. CTR.*, <https://meric.mo.gov/data/population/county-population> [https://perma.cc/8BD2-VSTF] (using data from 2018).

199. Mo. Rev. Stat. § 547.031 (2021).

200. There are only two conviction integrity units registered in the whole state of Missouri. See *Conviction Integrity Units*, NAT'L REGISTRY EXONERATIONS (June 14, 2022), <https://www.law.umich.edu/special/exoneration/Pages/Conviction-Integrity-Units.aspx>. [https://perma.cc/Z386-YGXJ].

expanding habeas by adopting Senate Bill 1201. Having several avenues “might achieve a satisfactory balance between finality and efficiency, on the one hand, and justice for the actually innocent on the other.”²⁰¹

201. Medwed, *supra* note 148 at 687.