IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

STATE OF MISSOURI, *ex rel.* RYAN FERGUSON,	)	
Petitioner,	)	
v.	)	CASE NO. WD 76058
DAVE DORMIRE, Superintendent, Jefferson City Correctional Center,	)	
Respondent.	)	

SUGGESTIONS OF AMICUS CURIAE
THE MIDWEST INNOCENCE PROJECT
IN SUPPORT OF PETITIONER RYAN FERGUSON

PROFESSOR SEAN D. O'BRIEN
UMKC SCHOOL OF LAW
500 E. 52ND STREET
KANSAS CITY, MO 64110-2467
(816) 235-6152
(816) 235-5276 (FACSIMILE)

AMICUS COUNSEL IN SUPPORT OF PETITIONER

PROFESSOR LAURA E. O'SULLIVAN
UMKC SCHOOL OF LAW
LEGAL DIRECTOR MIDWEST INNOCENCE PROJECT
500 E. 52ND STREET
KANSAS CITY, MO 64110-2467
(816) 235-1006
(816) 235-5276 (FACSIMILE)

AMICUS COUNSEL IN SUPPORT OF PETITIONER

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The Midwest Innocence Project (MIP) is a non-profit legal services organization formed for the purpose of screening, investigating and litigating prisoner claims of actual innocence. MIP is part of a national network of Innocence Projects established to respond to the growing awareness that innocent people are convicted of serious crimes and sentenced to prison in spite of constitutional and procedural protections designed to prevent such miscarriages of justice. Since 1989, researchers at the Innocence Projects at Northwestern University and Michigan University law schools have identified 1,080 cases in which prisoners convicted of serious crimes have subsequently been found innocent by judges, juries, or prosecutors and released from prison. National Registry of Exonerations, University of Michigan Law School, http://www.law.umich.edu/special/exoneration/Pages/about.aspx. On average, more than three times a month, somewhere in America, a person is released from prison or death row because new evidence has proven him or her to be innocent of the crime for which he or she was convicted. Although state and federal courts must provide legal counsel to prisoners at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963), and on direct appeal, *Evitts v. Lucy,* 469 U.S. 387 (1985), there is no such right in state post-conviction proceedings, *Pennsylvania v. Finley,* 481 U.S. 551 (1987), or in federal habeas corpus proceedings. *Murray v. Giarratano,* 492 U.S. 1 (1989). Because there has been no organized effort on the part of state or federal governments to police the integrity of criminal convictions,

lawyers and law schools have banded together to form Innocence Projects to meet a need that historically has been carried only by a handful of pro bono attorneys.

Of the 1,080 exonerations to date, 120 of those cases involved the "confession" of a co-defendant. Perjury or false accusation were involved in 567 of those cases, and 475 of those cases also involved official misconduct. National Registry of Exonerations. Attorneys working on behalf of MIP, have substantial experience and expertise in the field of post-conviction innocence litigation that can help the Court identify and apply the appropriate legal standards to Mr. Ferguson's claim of actual innocence. The integrity of the jury selection process is of ultimate importance in protecting the actually innocent from wrongful convictions. When an actually innocent person is crippled by an unconstitutional trial, the likelihood of a just and fair result quickly diminishes.

Counsel for Mr. Ferguson and for the state consented to the filing of these suggestions of amicus curiae pursuant to Rule 84.05(f)(2).

ARGUMENT

I. The appropriate procedure for Petitioner to challenge his illegal confinement after a circuit court denial of his previously filed writ of habeas corpus is by filing an original habeas corpus petition with the Court of Appeals.

The parties disagree as to the appropriate procedure for requesting review of the underlying conviction, and the standard this Court utilizes in such a review. The State insists that the appropriate filing for Petitioner would be a writ of certiorari (Suggestions in Opposition to Petition for Writ of Habeas Corpus, p. 8-10). Petitioner disagrees. Amici will briefly discuss the history of the writ of habeas corpus and the appropriate methods to challenge the underlying conviction.

When a habeas court grants a writ discharging the petitioner, the **State** may petition for writ of certiorari in this court as a matter of right. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221, 230 (Mo. App. 2011); *State ex rel. Koster v. Koffman*, 290 S.W.3d 126, 128 (Mo. App. 2009). In a certiorari review, the court reviews a grant of habeas relief to determine whether the underlying court exceeded its authority or abused its discretion. *McElwain*, 340 S.W.3d at 231. This review is limited to questions of law. Because the decision of the habeas court will result in the discharge of the defendant, the State is permitted review by a higher court as a matter of right.

When a habeas court denies petitioner's writ of habeas corpus, he or she is not discharged and remains confined. Unlike the State's appeal as of right from a grant of habeas relief, the decision denying discharge of a habeas petitioner is not a final judgment from which an appeal lies. *Buchanan v. State*, 216 S.W.3d 238 (Mo. App. 2007). "The distinction thus made between judgments remanding, and those discharging

the prisoner, grows out of the nature of the writ whose *raison d'etre* is the protection of personal liberty." *Weir v. Marley*, 12 S.W. 798, 799 (Mo. 1889). Instead, he or she must file a new writ with a higher court as Mr. Ferguson has done in this case. Rule 91.02(a); Rule 91.22; Rule 91.01(b); Rule 91.02(a). *See Webster v. Purkett*, 110 S.W.3d 832, 837 (Mo. App. 2003); *Brown v. State*, 66 S.W.3d 721, 732 (Mo. banc 2002). This Court has jurisdiction to issue an original writ of habeas corpus pursuant to Article I, Section 12 and Article V, Section 4 of the Missouri Constitution, Rule 91.01(b), and R.S.Mo. § 532.020 *et seq.*

a. This Court reviews the evidence in support of Petitioner's original writ of habeas corpus *de novo*.

The writ now before this court is an original writ. This court may appoint a judge to serve as special master to consider the evidence and make findings of fact and conclusions of law to submit to this court. Rule 68.03; *State ex rel. Winfield v. Roper*, 292 S.W.3d 909, 910 (Mo. banc 2009); *State ex rel. Woodworth v. Denney*, SC91021, 2013 WL 85427 (Mo. banc Jan. 8, 2013). *See also Abel v. Wyrick*, 54 S.W.2d 411 (Mo. banc 1978)(holding that the Court may refer the matter to the circuit court for determination of fact issues).

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup v. Delo,* 513 U.S. 298, 325 (1995). When a habeas petitioner asserts a claim of actual innocence in Missouri, he or she may assert the following claims: (1) the claim relates to a jurisdictional issue; (2) a "gateway of innocence" claim: the petitioner establishes

manifest injustice because newly discovered evidence makes it is more likely than not that no reasonable juror would have convicted the petitioner; and/or (3) a "gateway cause and prejudice" claim: the petitioner establishes the presence of an objective factor external to the defense, which impeded the petitioner's ability to comply with the procedural rules for review of claims, and which has worked to the petitioner's actual and substantive disadvantage infecting his entire trial with error of constitutional dimensions. *McElwain*, 340 S.W.3d at 244-45 (quoting *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 546 (Mo. banc 2003)). The Missouri Courts have expanded habeas review further by recognizing freestanding claims of actual innocence. *Amrine*, 102 S.W.3d at 546-47.

Once the petitioner adequately pleads any one of these issues, habeas is appropriate and the court reviews the claims *de novo*. "A plea of estoppel by record in a habeas corpus case is good on the same facts where the prisoner has been **discharged**, but is bad where the prisoner has been remanded." *Ex parte Clark*, 106 S.W. 990, 996 (1907)(emphasis added). A higher court is not bound by the decisions of the lower court. *Id.* The fact that lower court denied discharge does not bar the discretion of higher court to discharge the petitioner.

b. Cause and Prejudice

This Court evaluates the Petitioner's actual innocence claims applying separate standards of review. The first analysis involves the traditional "cause and prejudice" analysis. Under the cause and prejudice analysis, a procedural default may be excused if

petitioner can show cause for and prejudice from the default. *McElwain*, 340 S.W.3d at 244.

In order to establish cause exists, the petitioner must show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule. "In Missouri, a habeas petitioner may show cause for a procedural default by demonstrating that his claim was not 'known to him' in time to include it in a direct appeal or a post-conviction motion." *State ex rel. Koster v. McCarver*, 376 S.W.3d 46, 53 (Mo. App. 2012). *See State ex rel. Engel v. Dormire,* 304 S.W.3d 120, 125-26 (Mo. banc 2010); *State ex rel. Simmons v. White,* 866 S.W.2d 443, 446 (Mo. banc 1993). When the otherwise procedurally defaulted constitutional error works to the petitioner's actual and substantive disadvantage, prejudice is established. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210 (Mo. banc 2001).

c. "Gateway Of Innocence" Claim: The Petitioner Establishes Manifest Injustice Because Newly Discovered Evidence Makes It Is More Likely Than Not That No Reasonable Juror Would Have Convicted The Petitioner

The actual innocence component of the miscarriage of justice standard is "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Schlup*, 513 U.S. at 315. Manifest injustice is established when the petitioner shows that a constitutional violation has probably resulted in the conviction of one who is actually innocent. The petitioner must

show that it is more likely than not[1] that no reasonable juror would have convicted him in light of the new evidence of innocence. *Id.* at 328-329; *Clay v. Dormire*, 37 S.W.3d 214, 217 (Mo. banc 2000). When the Court determines that Petitioner has established that he is probably actually innocent, this Court considers the Constitutional claim on the merits. *Schlup*, 513 U.S. at 327. *See Reasonover v. Washington,* 60 F. Supp. 2d 937, 947 (E.D.Mo. 1999).

In analyzing the evidence to determine whether the petitioner has established that he is more likely than not actually innocent, the Court considers new evidence. The analysis is not comparable to a summary judgment determination. *Schlup*, 513 U.S. at 331 (holding that in properly analyzing all of the evidence, the Court cannot find "petitioner's showing of innocence …insufficient solely because the trial record contained sufficient evidence to support the jury's verdict"). As Justice Kennedy made clear, satisfying the actual innocence standard does not require "a case of conclusive exoneration." *House v. Bell,* 547 U.S. 518, 553 (2006).

Instead, the Court considers the probative force of the newly presented evidence and the evidence presented at trial. *Id*. "The *Schlup* inquiry, we repeat, requires a holistic judgment about 'all the evidence,' and its likely effect on reasonable jurors applying the reasonable-doubt standard." *House v. Bell*, 547 U.S. at 539 (quoting *Schlup*, 513 U.S. at 328). New evidence is defined as evidence that was "not presented at trial."

[1] Because the confidence in the trial is compromised when constitutional errors occur, the Courts analyze the evidence utilizing the less stringent "more likely than not" standard rather than the "clear and convincing" showing of actual innocence standard applied in a freestanding claim of actual innocence. *See Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003).

Schlup, 513 U.S. at 324. *See Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003)(finding that evidence does not need to be newly available, just newly presented); *Griffin v. Johnson*, 350 F.3d 956, 960 (9th Cir. 2003)(holding the same); *Reasonover*, 60 F. Supp. 2d at 948.

The Circuit Court's Analysis is Erroneous

The circuit court judgment begins with a statement setting forth the standard of review (Pet. Exh. 116, p 3-6). The court then begins an analysis of the evidence purportedly utilizing the freestanding actual innocence standard as set forth in *Amrine.* This factual analysis fails when the court goes through and analyzes the evidence witness-by-witness, rather than engaging in a holistic analysis of the evidence at trial, and all new evidence surfacing after the trial. *Schlup*, 513 U.S. at 328. This type of piece-by-piece analysis is specifically rejected, because it fails to account for the effect of all of the evidence on the jurors (Exhibit 116, p. 7-26). As Justice O'Connor observed in *Schlup,* where the lower courts applied a *Jackson*-like standard to deny habeas relief, "[i]t is a paradigmatic abuse of discretion for a court to base its judgment on an erroneous view of the law." *Schlup,* 513 U.S. at 333 (O'Connor, J., concurring) (discussing the standard in *Jackson v. Virginia*, 443 U.S. 307 (1979).

II. A conviction cannot stand based on the testimony of perjurers and liars

Actually innocent people are convicted based on testimony that is later found to be false or perjured. Brandon L. Garrett, Convicting the Innocent: Where Criminal Prosecutions Go Wrong, 139-40 (2011); Richard A. Leo et al., Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century, 2006 Wis. L.

Rev. 479, 486 (2006). One hundred fourteen (over 10 percent of the 1,080 to date) convictions in which DNA evidence established innocence involved false or perjured evidence. National Registry of Exonerations. Understandably, courts regard recantations with suspicion.[2] This suspicion must be tempered by the reality that innocent people are convicted at an alarming rate based on false testimony. This false testimony is induced by plea offers, by mental disabilities, by fear that refusal to testify will lead to a harsher result, by a desire to be a "good" witness, or for a variety of other reasons. *See* Rob Warden, The Snitch System, Center on Wrongful Convictions (2004)(available at http://www.innocenceproject.org/docs/SnitchSystemBooklet.pdf); Garrett, *supra*. In fact, 25 percent of DNA exonerations involved innocent defendants who made incriminating statements. The Innocence Project, http://www.innocenceproject.org. Unfortunately, direct appellate review and post-conviction review of these cases is insufficient in correcting the conviction of innocents both because the evidence is often not challenged by defense counsel and because lodged challenges are not successful.

In *Amrine*, the Court faced a conviction based on the testimony of known liars. Judge Wolff in his concurring opinion quite succinctly states the issue now before this Court: "Who should determine which time the witnesses were lying?" *Amrine*, 102 S.W.3d at 550. Mr. Amrine's conviction rested on the testimony of three inmates. Judge Wolff notes that no physical evidence linked Mr. Amrine to the murder, and his conviction was based solely on this now recanted testimony. Judge Wolff argued in

[2] Judge Green discusses the suspicion attached to recantations. Many of these cases were decided prior to the empirical evidence gathered over the last several years — 1998, 1968, 1984, in 1956) (Exhibit 116, p. 6).

favor of granting a new trial rather than appointing a special master. Those inmates later came forward and recanted their trial testimony. "In the peculiar circumstances of this case, the state should get no benefit from the original judgment because it is based solely on the testimony of liars. The state, not Amrine, should have the burden of persuasion." *Id.*

Mr. Ferguson's conviction rests solely on the shoulders of Charles Erickson and Jerry Trump. *Ferguson v. State*, 325 S.W.3d 400, 419 (Mo. App. 2010). The State had no forensic evidence or physical evidence tying Ryan Ferguson to this crime. *Id*. While litigating his post-conviction appeal, Mr. Ferguson discovered the first evidence of perjury in his case with Charles Erickson's recantation. *Id.* at 406-11.

To be held criminally responsible for perjury, the state must prove that the witness, "with the purpose to deceive, … knowingly testifies falsely to any material fact upon oath or affirmation legally administered, in any official proceeding before any court, public body, notary public or other officer authorized to administer oaths." R.S.Mo. § 575.040.1. Perjury, even if it alone does not amount to an exoneration, casts serious doubt in the validity of the conviction. *State v. Terry,* 304 S.W.3d 15, 108 (Mo. banc 2010). *See State v. Mooney*, 670 S.W.2d 510 (Mo. App. 1984)(holding that a taped statement of an alleged victim admitting to falsely testifying at trial provided impeachment evidence sufficient to remand for consideration of new evidence). Of the twenty-two Missouri exonerations to date, twelve (or fify-five percent) involved perjury or false accusation. National Registry of Exonerations. It is this Court's duty to "avoid a

'perversion of justice.'" *Terry*, 304 S.W.3d at 110. *See State v. Williams*, 673 S.W.2d 847 (Mo. App. 1984).

Certainly confidence in a conviction is shattered when a petitioner proves that the co-defendant testifying pursuant to a plea deal recants,[3] and the only eyewitness recants[4] admitting to perjury at the original trial. Jerry Trump's recantation[5] and testimony before the circuit court was so compelling that the circuit court extraordinarily found that Trump committed perjury in the original trial. "[T]he effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others, as we have said before." *Kyles v. Whitley*, 514 U.S. 419, 445 (1995); In the original trial, Trump's testimony leant a seed of credibility to Charles Erickson's wildly inconsistent testimony. Jurors exposed to Erickson's recantations of his prior testimony, and no eyewitness testimony would certainly harbor reasonable doubts.

Circling the wagons back to Erickson, the circuit court seems to now find his trial testimony credible based on review of footage from coverage by *48 Hours*. This finding belies this Court's previous analysis of Erickson's testimony. The circuit court seems to reason that because he is so inconsistent it somehow renders his initial testimony credible. This finding is itself incredible. Intriguingly, the court finds Erickson's in-court habeas testimony incredible yet does not make a finding that he committed perjury.

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[3] Of the 1,080 exonerations to date, 120 involved a co-defendant "confession." National Registry of Exonerations.
[4] Of the 1,080 exonerations to date, 443 involved mistaken eyewitness identification. *Id.*
[5] Of the 22 Missouri exonerations to date, 9 involved mistaken eyewitness identification. *Id*.

Analyzing the evidence, the *Amrine* court determined that the recantations met the clear and convincing burden of proof for a freestanding claim of actual innocence. *Amrine*, 102 S.W.3d at 548. "Evidence is clear and convincing when it 'instantly tilts the scales in the affirmative when weighed against the evidence in opposition, and the fact finder's mind is left with an abiding conviction that the evidence is true.'" *Id* (quoting *In re T.S.*, 925 S.W.2d 486, 488 (Mo. App. 1996)).

The parallels of the *Amrine* case and the case at bar are undeniable. Applying the appropriate standard, this court considers all of the evidence including the recantation of Trump, the multiple recantations of Erickson and all additional new evidence to determine the probability that the jurors would have a reasonable doubt in the case. "On cross-examination, Erickson was subjected to a lengthy and extensive cross-examination wherein Ferguson's trial counsel was successful in illustrating that Erickson had made various prior statements that seriously undermined Erickson's credibility. *Ferguson*, 325 S.W.3d at 417.

"[T]he central purpose of any system of criminal justice" is not just "to convict the guilty" but to "free the innocent." *Herrera v. Collins,* 506 U.S. 390, 398 (1993). If the probability is more likely than not and Mr. Ferguson's original trial was unconstitutional, Mr. Ferguson must be discharged. If Mr. Ferguson's original trial was constitutional and yet he made a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment, Mr. Ferguson must be discharged.

III. The Lincoln County Opt-Out Jury Selection Process is Unconstitutional Meeting the Cause and Prejudice Standard for a Habeas Corpus Petitioner

When a claim would ordinarily be litigated as part of a post-conviction proceeding, but "the person asserts he could not bring [the claim] within the time limits set out in that rule, then habeas corpus rather than [a motion to correct manifest injustice] provides the mechanism by which the person may attempt to obtain relief." *Brown*, 66 S.W.3d at 730. The failure to comply with time limits set forth in the Missouri Supreme Court Rules does not preclude habeas review. *Id.* at 726. *See Simmons*, 866 S.W.2d at 446 (holding that even claims time-barred by Rule 29.15 are cognizable in habeas if the petitioner can show that the claim was not known to petitioner within the time allowed by rule.) *Simmons*, 866 S.W.2d at 446-47.

a. Lincoln County Opt-Out Provision Constitutes a Substantial Failure to Comply with Missouri Law so Fundamental and Systematic that Prejudice is Presumed

The "opt-out" procedure available for potential jurors in Lincoln County, Missouri constitutes a "substantial failure to comply" with the declared policy of R.S.Mo. §§ 494.400-494.505 *et seq*. Furthermore, a movant in a post-conviction proceeding need not make a showing of both a constitutional violation and actual prejudice when advancing this claim. A "substantial failure to comply,"[6] "is one that rises to the level of a constitutional violation **and/or** that actually prejudices the defendant." *State v. Anderson*, 79 S.W.3d 420, 431 (Mo. banc 2002)(emphasis added). The practice challenged in

[6] As used in R.S.Mo. § 494.465.1 – Challenge of jury on grounds that it was not selected in conformity with §§ 494.400-494.505.

Lincoln County is a violation of the jury selection statutes that is so "fundamental" or "systemic" that prejudice is presumed; therefore, the Court does not require a showing of prejudice. *Preston v. State*, 325 S.W.3d 420 (Mo. App. 2010). *See State v. Gresham*, 637 S.W.2d 20, 26 (Mo. banc 1982);[7] *State v. Sardeson*, 174. S.W.3d 598 (Mo. App. 2005); *Hudson v. State*, 248 S.W.3d 56 (Mo. App. 2008)(finding glitches in the computer system caused venire panels to be seated chronologically according to age, as opposed to randomly as mandated by Chapter 494, R.S.Mo. (2000). The "case involved 'violations of the statutory jury selection requirements that are so systemic in nature as to amount to a "substantial" failure to comply with the statutes,' thereby 'entitling defendant to relief, even in the absence of a clear showing of actual prejudice or a constitutional violation.'").

In summation, the court noted two important fundamental principles that were especially violated:

> Lincoln County's practice implicates two other principles fundamental to the declared policy of the jury selection statutes. First, all qualified citizens have "an *obligation* to serve as jurors when summoned for that purpose, unless excused." Section 494.400 (emphasis added). Second, excusal from jury service is generally predicated on a *discretionary judicial determination.* Section 494.430.1(2),(3). Permitting an otherwise qualified Missouri citizen to thwart these two principles by intentionally and unilaterally choosing to remove their name from a county's qualified jury list and forgo any potential jury obligations constitutes a statutory violation, one that is fundamental and systemic in nature.

Preston v. State, 325 S.W.3d 420, 426 (Mo. App. 2010).

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[7] This Order predates the decision in *Preston v. State*. *Sitton v. Norman*, SC93020, is currently pending before the Missouri Supreme Court. The parties will brief issues involving the divergent decisions by lower courts regarding the opt-out procedure in Lincoln County Circuit Court. The variety of circuits involved is solely the result of the location of the habeas petitioners' incarceration, thereby presenting issues of equal protection in addition to the improper jury selection.

Judge Callahan places an affirmative duty on trial counsel to seek out the evidence of the improper jury selection (Pet. Exh. 118 at p. 3).[8] The *Preston* Court considered and rejected this very same claim. The appropriate determination rests on whether trial or appellate counsel had knowledge of the unconstitutional behavior. *See Preston*, 325 S.W.3d at 423; *McElwain*, 340 S.W.3d at 254 (nothing in this record suggests that Dale Helmig was earlier alerted or should have been earlier alerted to the prospect of discovering that the jury had been provided a map that was never introduced into evidence during its deliberations). If this Court determines that Judge Callahan's analysis is correct, then the failure of counsel to discover the Lincoln County opt-out procedure would amount to ineffective assistance of counsel, a constitutional violation of Mr. Ferguson's rights that must be separately considered.

The Court found nothing in the record that indicated any knowledge on the part of trial or appellate counsel. The Court also found no evidence that counsel, "through reasonable diligence would have discovered the practice employed by the Lincoln County Circuit Court." *Preston*, 325 S.W.3d at 423. Therefore, the failure to consider the claim would result in fundamental unfairness. *Id. (*quoting *Hudson v. State*, 248 S.W.3d 56, 58-59 (Mo. App. 2008)). Notably, this discussion by Judge Callahan is in the context of his Order incorrectly finding that habeas is not the appropriate avenue for relief. His findings are later directly contradicted in *Preston*.

[8] The Court states, "There was no impediment to Ferguson discovering" the unconstitutional jury selection process. The Court does not find that trial counsel or appellate counsel knew of this process.

Mr. Ferguson originally litigated a habeas petition in front of Judge Callahan (Pet. Ext. 118). The Court found that R.S.Mo. § 494.465 did not authorize a habeas claim challenging the jury selection proceeding (Pet. Exh. 118 at 4). Attempting to make an alternate ruling, Judge Callahan states that Mr. Ferguson failed to timely file his challenge within the 14-day time frame allowed by R.S.Mo. § 494.465.1.

The evidence is clear that Mr. Ferguson's trial counsel did not know about the Lincoln County opt-out program. The discovery of this did not occur until after Mr. Ferguson filed his direct appeal and his Rule 29.15 motion; therefore, the grounds were not known to him at the time of these filings. The habeas court misapplied the law, and dismissed his claim finding that habeas was not the appropriate avenue for relief. *See McElwain*, 340 S.W.3d at 239. Mr. Ferguson diligently asserted this claim at every stage possible including a habeas filing with this Court which was dismissed without prejudice.[9] *Id.* (finding petitioner able to proceed with petition for writ of habeas corpus in the Circuit Court of DeKalb County after Missouri Supreme Court denies habeas without prejudice.)

"[T]here is no reasoned basis under Missouri law to deprive a petitioner in a habeas corpus proceeding of the benefit of a presumption of prejudice in the face of an established constitutional violation if the benefit of that presumption would have been afforded to the defendant on direct appeal. This conclusion is particularly appropriate

[9] Dale Helmig's failure to raise *Brady* violation on direct appeal or in his Rule 29.15 proceeding not fatal to ability to establish "cause" in connection with the gateway of cause and prejudice in this habeas proceeding, because the ***legal*** basis to ***effectively*** raise the *Brady* violation was not available to Dale Helmig at the time of his Rule 29.15 motion.

where the gateway of cause and prejudice is relied upon to permit review of an otherwise procedurally defaulted claim." *Id.* at 256. Had Mr. Ferguson discovered this opt-out program prior to filing for direct appeal or post-conviction relief, relief would have been granted. *See Sardeson*, 174 S.W.3d at 602. The degree of the Lincoln County "opt-out" program violation is "fundamental" or "systemic in nature"; therefore, Mr. Ferguson is not required to show actual prejudice. *Preston*, 325 S.W.3d at 425.

b. Actual Innocence and Constitutional Violation

The habeas court failed to apply the appropriate standard of review when considering the Lincoln County jury selection process. In fact, the court failed to undertake any analysis of this claim in the Order dated October 31, 2012, (Pet. Exh. 116 at 1-3), noting that the claim was dismissed and citing to the previously issued order dated July 22, 2011. This order pre-dates the evidentiary hearing precluding the consideration and analysis of any of the evidence, and precludes the application of the law in light of the unconstitutional jury selection. The failure to view the evidence under the more likely than not standard for petitioner's claim is apparent in the summary dismissal of Claims II, III and IV by the circuit court, and is boldly revealed in the court's summary citing only to *Amrine* (Pet. Exh. 116, p. 2, and 33-40).

The Courts must strike a balance between the need for finality of judgments and allowing the actually innocence an opportunity to come before the Court. When the Court is faced with an obviously unconstitutional jury selection process the conviction itself becomes highly suspect. The jury selection in Mr. Ferguson's case occurred in 2005 some two years prior to the jury selection in *Preston*. "[D]ue to this exceptional

circumstance, refusal to consider Preston's Rule 29.15 claim in this case would result in fundamental unfairness. *See Hudson*, 248 S.W.3d at 58-59; *Preston*, 325 S.W.3d at 423. The *Ferguson* record also does not include any evidence that trial counsel or appellate counsel knew of this practice until they attempted to litigate it through a habeas action. The decision in this previous habeas was limited to a finding that it could not be heard because habeas was the incorrect avenue for relief.[10] This previous litigation does not prevent this Court from reviewing the juror claim for cause and prejudice and for manifest injustice in light of the plethora of evidence of actual innocence.

IV. Conclusion

For the foregoing reasons, in addition to those urged by petitioner, amici respectfully urge this Court to grant the petition for writ of habeas corpus.

Respectfully Submitted,

/s/Laura O'Sullivan

LAURA E. O'SULLIVAN, #41318
UMKC SCHOOL OF LAW
MIDWEST INNOCENCE PROJECT
500 E. 52ND STREET
KANSAS CITY, MO 64110-2467
(816) 235-1006
(816) 235-5276 (FACSIMILE)

AMICUS COUNSEL IN SUPPORT OF PETITIONER

/s/ Sean D. O'Brien

PROFESSOR SEAN D. O'BRIEN
UMKC SCHOOL OF LAW
500 E. 52ND STREET
KANSAS CITY, MO 64110-2467
(816) 235-6152
(816) 235-5276 (FACSIMILE)

AMICUS COUNSEL IN SUPPORT OF PETITIONER

[10] This finding is directly contradicted in *Preston*.

CERTIFICATE OF SERVICE

The undersigned certifies that two copies of the foregoing brief on behalf of *amici curiae* Midwest Innocence Project was sent through the eFiling system, to the following counsel of record this 22nd day of March, 2013.

Samuel Henderson
Attorney at Law
10 South Broadway, Suite 2000
St. Louis, MO 63102

Kathleen Zellner & Douglas Johnson
1901 Butterfield Road, Suite 650
Downers Grove, IL 60515

Stephen Hawke
Attorney General
State of Missouri
P.O. Box 899
Jefferson City, MO 65102

/s/ Laura O'Sullivan
Laura O'Sullivan