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UNITED STATES OF AMERICA

Joseph Amrine – Facing execution on tainted testimony

"*The Amrine case has many of the hallmarks of wrongful convictions: No physical evidence, self-interested witnesses, alleged misconduct by investigators, a poor defense lawyer and an appeals process stacked against the defendant.*" Missouri newspaper[1]

Introduction

Joseph Amrine, now 45, was sentenced to death for the murder of fellow inmate Gary Barber in a Missouri prison in 1985. For the past 17 years he has maintained his innocence.

In the absence of any physical evidence identifying Amrine as the murderer, the state's case against him at his 1986 trial consisted of the testimony of three inmates. The prosecutor, now a judge, admitted in post-conviction proceedings in 1998 that without this testimony "we would not have had a case". A federal court in 1997 noted that without the testimony of the three inmates, "there would appear to be no evidence implicating Amrine in Barber's murder".[2]

Each of the three inmates has now said that his trial testimony was false, made as a result of threats or offers from the authorities. Meanwhile, the testimony of a prison guard which pointed to one of Amrine's accusers as the prime suspect, has been reinforced on appeal.

The testimony of prison informants is widely recognized as unreliable. Prosecutors in Nashville, Tennessee, for example, are not permitted to pursue the death penalty in a case which is based "principally" on such testimony. Among the recent conclusions reached by the Commission on Capital Punishment set up in 2000 to examine the death penalty in Missouri's neighbouring state of Illinois is that "no defendant should face the ultimate penalty a state can impose if the conviction is based solely on the testimony of an in-custody informant".

If the state were required to bring Joseph Amrine to trial on the current evidence, would a reasonable juror find Amrine guilty of the murder beyond a reasonable doubt? The jury foreman from the 1986 trial, a strong supporter of the death penalty, thinks not. He has said: "If I had to decide this case again based on all the facts that I now know I would find Joe Amrine not guilty. I believe that we convicted the wrong man".[3] Another of the jurors has also examined the current evidence and reached the same conclusion: "I am convinced that Joe

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[1] *Executing without evidence.* St Louis Post-Dispatch, 5 May 2000.

[2] *Amrine v Bowersox*, 128 F.3d 1222, US Court of Appeals for the Eighth Circuit, 3 November 1997.

[3] Statement of Russell Gross, Jury Foreman, 10 October 2001: "I am not making this statement because I have any reservations about the death penalty. I believe that America has been way too lenient with criminals for way too long. If a person is unquestionably guilty of murder, then he should be automatically and immediately executed without any further judicial process. Criminal defendants have way too many rights and the courts free too many guilty people on technicalities. I think we need to expand the use of the death penalty to include all violent crimes such as murder and rape... No one would accuse me of being soft on crime".

Amrine is innocent, and he should be pardoned for the murder of Gary Barber. I urge Governor Holden to stop Joseph Amrine's execution and correct this miscarriage of justice".[4]

Just as cruelty – to inmates and their families – is an inherent characteristic of the death penalty, there is also no escaping the risk of executing people for crimes they did not commit. This was recognized in the April 2002 report of the Illinois Commission on Capital Punishment. Following its two year study, the 14-member Commission was "unanimous in the belief that no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death."[5]

The Commission was set up by the Illinois governor after he imposed a moratorium on executions in his state in January 2000 because of its "shameful record of convicting innocent people and putting them on death row". The cases of 13 such people had come to light in Illinois since 1987. This is not an issue confined to Illinois, however. For example, Eric Clemmons was sentenced to death in 1987 in Missouri, also for a prison murder committed in 1985. After 13 years on death row he was acquitted at a retrial.[6] He was represented at his original trial by the same lawyer who represented Joseph Amrine at his. This lawyer's representation of capital defendants has been called into question on numerous occasions.[7]

[4] Statement of Larry Hildebrand, 15 October 2001. He states that he supported the death penalty at the time of the trial, but over the years has reached the conclusion that it "is wrong".

[5] *Report of the Governor's Commission on Capital Punishment.* Illinois, April 2002.

[6] At the time of the prison murder, as now, Eric Clemmons was serving a life sentence without the possibility of parole for 50 years after being convicted of a 1982 killing. A federal judge has called for executive clemency in the case, having concluded that the sentence "may amount to a great injustice", given that the "state could have charged Clemmons with second-degree murder or even manslaughter on the facts", rather than the capital murder charges brought by "an aggressive prosecutor". The judge said that the case was an "appropriate one" for an executive reduction of sentence, noting that Clemmons had already served 17 years, "seven more than the minimum for second-degree murder and seven more than the maximum for manslaughter". *Clemmons v Delo*, US Court of Appeals for the Eighth Circuit, 21 May 1999.

[7] Eric Clemmons was convicted in 1987. Following his conviction evidence emerged that the state had withheld exculpatory evidence, and that the defence lawyer's inadequate representation had, at best, compounded this problem. The Eighth Circuit overturned the conviction in 1997. Emmett Nave was executed in 1993 in Missouri. In 1990, a federal court ruled that he received inadequate assistance at the sentencing phase. The Eighth Circuit reinstated the death sentence, finding that seven of the 10 claims had been procedurally defaulted (barred from review in the federal courts because they had not been properly raised in the state courts). In 1995, William Boliek, still on death row in Missouri, was similarly found to have been denied effective assistance because his lawyer had failed to object to improper prosecutorial argument or to present mitigating evidence. The Eighth Circuit also reversed that ruling because the claims were procedurally barred. Both Nave and Boliek were represented at trial by the lawyer who defended Joseph Amrine at his.

Eric Clemmons is one of more than 100 people to have been released from death rows across the USA since 1973 after evidence of their innocence emerged. This stark statistic was acknowledged in a recent judicial opinion. Indicating his inclination to find the federal death penalty unconstitutional because of the risk of executing the wrongfully convicted, US District Judge Jed S. Rakoff wrote: "We now know, in a way almost unthinkable even a decade ago, that our system of criminal justice, for all its protections, is sufficiently fallible that innocent people are convicted of crimes with some frequency".[8] Two US Senators recently described the US death penalty system as "so riddled with errors that for every eight people executed in the modern death penalty era, one person on death row has been found innocent. No one would buy a particular car if the brakes failed in one car for every eight cars that came off the lot, and we should never accept that level of error when people's lives hang in the balance."[9]

Joseph Amrine's life hangs in the balance. The Missouri Attorney General's Office has asked the state Supreme Court for an execution warrant. In so doing, the state is contravening a basic international safeguard, adopted at the United Nations two years before Joseph Amrine's trial, which requires countries which have not yet abolished the death penalty not to impose it when there is any doubt about the guilt of the accused, when there is "room for an alternative explanation of the facts".[10]

In 1956, the US Supreme Court said that "the dignity of the United States Government will not permit the conviction of any person on tainted testimony".[11] Nearly a half century later, will the USA permit the execution of Joseph Amrine on the basis of just such testimony?

Missouri and the death penalty

Amnesty International opposes the death penalty in all cases, regardless of questions of guilt or innocence, the seriousness of the crime, the existence or absence of mitigating evidence, or the method used by the state to kill the prisoner. The organization believes that every death sentence is an affront to human dignity, and every execution a symptom of a culture of violence rather than a solution to it. The victims of violent crime and their families are deserving of respect, compassion and justice; retributive killing is surely not the way to achieve these goals.

A clear majority of countries – currently 111 – have abolished the death penalty in law or practice. The international community has ruled out the death penalty as a sentencing option

[8] *USA v Alan Quinones*. US District Court, Southern District of New York. 25 April 2002.

[9] *Halt executions across the nation.* Baltimore Sun, 16 May 2002, by US Senators Russ Feingold and Jon Corzine, co-sponsors of the proposed National Death Penalty Moratorium Act.

[10] United Nations Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty.

[11] *Mesharosh v. United States*, 352 U.S. 1 (1956)

in international courts for even the worst crimes – genocide, war crimes, and crimes against humanity. The USA's continuing resort to this punishment, including in ways which violate international minimum safeguards, starkly gives the lie to its claims to be a progressive force for human rights in the world. Since resuming executions in 1977, nearly 800 men and women have been put to death across the United States, more than 600 of them since 1990. As of the end of May 2002, Missouri had executed 57 prisoners, lying third in the country's executing states behind Texas and Virginia.

Amnesty International urges the State of Missouri to stop all executions immediately and work towards abolition of the death penalty. To do so would be to provide the type of leadership urgently needed in the USA on this fundamental human rights issue.

Joseph Amrine's trial – death by default?

"*I got the impression that when he was presenting the defense case, [Amrine's lawyer] was meeting his witnesses for the very first time....There was a sharp contrast between the contradictory and faltering testimony of the defense witnesses and the very well-rehearsed and cogently presented state's case*." Juror from Joseph Amrine's trial[12]

Gary "Fox" Barber was stabbed to death on 18 October 1985 in a recreation room at the Missouri State Penitentiary (now the Jefferson City Correctional Center) in Cole County, Missouri. There were 45 to 50 inmates in the room at the time. Joseph Amrine, who was serving a 15-year prison sentence for burglary and robbery to which he had pleaded guilty in 1977 at the age of 20, was charged with the murder. In the absence of any physical evidence identifying Amrine as the murderer[13], the prosecution's case against him consisted of the testimony of three fellow inmates – Randall Ferguson and Jerry Poe testified that they had seen Amrine stab Barber, while Terry Russell told the jury that there was ill-feeling between Amrine and Barber, that Amrine had threatened to stab Barber a week before the killing and had admitted the crime to Russell immediately after it.

The state's star witness was Randall Ferguson, a 19-year-old inmate serving a five year term on burglary and drug-related charges. He testified that Joseph Amrine and Gary Barber had paced up and down the recreation room side by side, Amrine's arm around Barber's

[12] Statement of Larry Hildebrand, 15 October 2001.

[13] There was two small drops of blood found on Joseph Amrine's clothing. At the trial the state's serologist testified that the sample was not big enough to be able to date or type it. At a post-conviction hearing in 1989, a serologist testified that if the blood had been fresh, it was likely that it could have been identified, evidence which would suggest that the blood stain predated the crime in question. The defence presented no such testimony, and the prosecutor used the indeterminate blood tests to encourage the jury to vote for guilt – "...there isn't any explanation for that blood on his clothes. The defendant didn't offer you one".

shoulder, for 15 minutes before Joseph Amrine pulled out a knife and stabbed Barber in the back. He said that Barber had said, "Joe, I'm going to get you", an exclamation heard by neither of the two prison guards at the scene.

Unbeknownst to the jury, Jerry Poe had given a different version of events in his court deposition before the trial. Poe, a 23-year-old in prison for burglary, had said that Amrine "just walked up behind Gary Barber and stabbed him, stabbed him in the back" as he was standing by the punching bag. Asked whether Barber and his attacker were "walking together", Poe replied: "No... this guy just came up right behind Barber and stuck him. Barber wasn't even paying attention."[14] The jury was left unaware of this glaring inconsistency between the versions of the state's only two purported eyewitnesses to the stabbing.[15] The prosecution did not elicit details of the crime from Poe when he was on the witness stand, and the defence lawyer also failed to bring this information to light. Joseph Amrine testified at his post-conviction hearing in 1989 that he had pointed out the inconsistencies to his trial lawyer in order for him to cross-examine Poe. Asked at the same hearing whether he recalled his client highlighting such discrepancies to him, the trial lawyer replied "That's possible".

A prison guard, John Noble, testified that he had seen Gary Barber chase someone before he collapsed. He told the court that he believed the person being chased was Terry Russell – Noble had pointed Russell out to a fellow guard immediately after the stabbing, which led to Russell being taken in for questioning. Questioned by the prosecutor at the trial, however, Officer Noble appeared to waver about his identification of Russell, and agreed that Russell and Amrine were similar in size and appearance. He would later clarify in post-conviction proceedings that his equivocation stemmed from his not knowing Terry Russell by name: "I pointed to an inmate who in my opinion was the one that Barber was chasing. I did not know him at the time by name... I was going by appearance". Nevertheless, Noble said, the man he had pointed out to his fellow officer "turned out to be Terry Russell."[16] The jury foreman recalls that John Noble's trial testimony "led me to believe that he saw Joe Amrine fleeing from Fox Barber after the stabbing". Having read Noble's 1998 clarification, the jury foreman states that "it [is] clear to me that he saw Terry Russell fleeing from Gary Barber".[17]

Terry Russell claimed not to have been in the recreation room at the time of the stabbing. If the defence lawyer had investigated Russell's alibi witness, he would have found

[14] Deposition of Jerry Reginald Poe, 10 April 1986. *State v Amrine.* Circuit Court of Cole County.

[15] There was another version of the murder as well. On 21 October 1985, three days after the stabbing, the prison warden wrote: "It appears that inmate Barber was sitting at a table when assaulted". Letter from Bill Armontrout to R. Dale Riley, Assistant Director, Zone II. 21 October 1985.

[16] Testimony of John Noble, 24 June 1998. US District Court for the Western District of Missouri.

[17] Statement of Russell Gross, Jury Foreman, 10 October 2001.

that no one of that name was in the prison at that time.[18] Terry Russell mentioned during his testimony that he had taken a lie detector test, without saying if he had passed it. The defence lawyer failed to challenge this, which may have left the jury with the impression that Russell had passed the test – jurors are likely to presume that the state does not put a key witness on the stand who has failed a polygraph test. In post-conviction proceedings, Terry Russell admitted that he had not passed the test.[19]

A number of prisoners testified that Joseph Amrine had been involved in a card game in a different part of the room at the time of the stabbing. Five of them said that before he had collapsed and died, Gary Barber had chased someone. Three said that the person being pursued was Terry Russell. It seems that the defence lawyer had not spoken to at least one of these defence witnesses before calling him to the witness stand.[20] Juror Hildebrand has recalled that while "the inmates didn't have much credibility in the first place because they were inmates who were presented to us in chains and prison garb", the defence lawyer's apparent lack of preparation further undermined their credibility. The juror recalls an example:

> "In presenting Joe's "alibi" defense, Mr Ossman [the defence lawyer] used a hand made sketch that was supposed to be a diagram of the scene of the crime, but it was extremely crude. I think one of the inmates sketched it during his testimony.... When Mr Amrine's witnesses testified, they were asked to point out where, on this awkward chart, Mr Amrine was sitting when Gary Barber was stabbed... The very rough drawing that Mr Ossman used was very confusing to the jury and clearly confusing to the defense witnesses.. [It] destroyed the credibility of the defense case."[21]

The trial lawyer's lack of investigation and preparation was also indicated by the fact that he did not interview or present Ronnie Ross, who testified at a post-conviction hearing in 1989 that he had also been playing cards with Amrine when Barber was stabbed. In 1996, another inmate who was in the recreation room at the time signed an affidavit that he had seen Terry Russell stab Gary Barber as Barber was "boxing at the punching bag". Kevin Dean's

[18] "No one using this name [Harry Heard or Harry Hurd] was incarcerated at the JCCC (formerly MSP) on 18 October 1985." Affidavit of Karen Fick, Jefferson City Correctional Center records office, 23 June 1998. In post-conviction proceedings, Russell said that he had meant Johnny Hurd. However, no inmate named Johnny Hurd was in that part of the prison at the time of the murder either.

[19] At the state post-conviction hearing in 1989, Russell indicated that he had not passed the test, which he had taken on 22 October 1985. At the federal hearing on 24 June 1998, he clarified that: "They said that I passed some of it and I didn't pass it as far as the murder and as far as being in the room". He also claimed that the prosecuting authorities had told him to mention the polygraph test during his trial testimony.

[20] The trial transcript reflects that the defence lawyer said of the witness, Brian Strothers,: "I haven't had an opportunity to interview the man, your Honor".

[21] Statement of Larry Hildebrand, 15 October 2001.

affidavit concludes: "Joe's attorney never talked to me but I got called to the courthouse at Joe's trial. They never called me as a witness though... I don't know why I wasn't called."[22]

The all-white jury – Joseph Amrine is black – voted to convict.[23] The jury foreman has stated: "I don't recall that we had much trouble deciding that Mr Amrine was guilty", and juror Hildebrand similarly recalls that there "were almost no deliberations at all" because "there really was nothing to discuss". The defence lawyer's apparent failure to raise uncertainty about Amrine's guilt in the jurors' minds – he did not even request that the court give them an instruction about the credibility of inmate testimony – likely compounded his subsequent failure to raise mitigating evidence at the sentencing phase. Studies have shown that residual doubt about guilt is the strongest mitigating factor in the minds of capital jurors – jurors are far less likely to impose a death sentence if they hold any lingering doubt over the defendant's guilt.

At the sentencing phase of a US capital trial, the prosecution argues for execution and the defence is supposed to present evidence that supports a sentence of less than death. Joseph Amrine's lawyer presented no witnesses on his client's behalf, except the defendant himself, even though there were such witnesses available.[24] Joseph Amrine's testimony was more prejudicial than mitigating – while stating that he was innocent, he essentially bolstered the state's argument for execution by admitting that he was a disruptive prisoner and that he personally believed in the death penalty.

The federal courts have found that Joseph Amrine's trial lawyer "did not fulfill his obligation to investigate adequately whether there were witnesses willing to testify on his client's behalf at sentencing".[25] However, the courts have ruled that Amrine has not proved that he was prejudiced by this inadequate representation.[26] All other claims of inadequate trial counsel

[22] Affidavit of Kevin Dean-Bey, 16 October 1996.

[23] More than 50 African Americans condemned by all-white juries have been executed in the USA since 1977. See: *Arbitrary, discriminatory, and cruel: an aide-mémoire to 25 years of judicial killing* (AMR 51/003/2002, 17 January 2002).

[24] At the 1989 post-conviction hearing, Joseph Amrine's mother, three sisters and brother said that they would have testified at the trial if they had been asked. In addition, Bob Faith, who taught high school diploma classes in the prison said that he would have testified to his shock when he heard that Joseph Amrine had been charged with murder, and that he was a good student during his two years in the thrice-weekly class.

[25] *Amrine v Bowersox*, US Court of Appeals for the Eighth Circuit, 5 January 2001.

[26] For a successful appeal on this issue, as determined by the US Supreme Court in *Strickland v Washington* (1984), a prisoner must prove not only that their lawyer's performance was inadequate, but that it affected the outcome of the trial. Under *Strickland*, "judicial scrutiny of counsel's performance must be highly deferential... A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". The prosecutor from Joseph Amrine's trial recently acknowledged that the

have either been rejected by the federal courts, or dismissed as "procedurally defaulted" because they were not properly raised in the state courts. As explained further below, the courts have ruled that Joseph Amrine has not shown a sufficient showing of actual innocence to allow him to be granted full review of the defaulted claims.[27]

To support its bid for a death sentence, the state produced prison officials who testified that Joseph Amrine was an aggressive inmate. It also presented evidence of an incident in 1982 in which an inmate, Willie Dixon, had been stabbed. A prison officer testified that he had seen Amrine chasing Dixon with a knife earlier that same day in 1982. The inference was that Amrine had been responsible for the stabbing of Dixon, an incident for which Amrine was never prosecuted or apparently even subject to disciplinary action. At Amrine's post-conviction hearing in 1989, Willie Dixon testified that it had not been Amrine who had stabbed him. Willie Dixon was still in the Missouri State Penitentiary when Amrine's trial took place. Yet he was not called to testify by the defence lawyer (whose office was in the same town), nor was he called by the prosecution – presumably the state would have called Dixon if it knew he would testify that it had been Amrine who had stabbed him.[28] The prosecutor repeatedly referred to Dixon's stabbing during his closing argument for execution.

The state also presented testimony from the Warden of Missouri State Penitentiary, Bill Armontrout. He gave his opinion that the death penalty for inmate-on-inmate murder acted as a deterrent to prison murders, whereas life sentences did not. This is a theory with a serious credibility problem. For example, Robert O'Neal and Richard Zeitvogel were sentenced to death in May 1985 for the murder of fellow prisoners in Missouri State Penitentiary. Within six months, five other inmates in the prison were murdered, including Gary Barber.[29] Despite the

issue of inadequate legal representation in capital cases is "troublesome...no question about it." Prosecutor Thomas Brown, in *Unreasonable doubt: The Joe Amrine case*, a film directed by John McHale, 2002.

[27] International standards require adequate legal representation for capital defendants "at all stages of proceedings". UN Safeguards guaranteeing protection of the rights of those facing the death penalty, adopted at the UN in 1984. In 1989, the UN Economic and Social Council added that this should go "above and beyond the protection afforded in non-capital cases".

[28] The state's reply to Amrine's appeals on this issue do not discuss the merits of the claim, but merely argues that the claim should be dismissed on procedural grounds. *Amrine v Bowersox.* Brief of Appellee. April 2000. The federal courts have ruled that this issue is procedurally defaulted.

[29] Another was Henry Johnson, for whose murder Eric Clemmons served 14 years on death row before being acquitted. Martsay Bolder was sentenced to death in July 1980 for a 1979 murder of a fellow inmate. Within a year of his death sentence, there were reportedly four other inmate on inmate murders in Missouri State Penitentiary. Warden Armontrout gave an example that for 30 months after Frank Guinan was sentenced to death in May 1982 for the murder of a fellow prisoner, there had been no prison murders in Missouri. In fact, while there were no such murders in the rest of 1982 or 1983, there were three in 1984, which fell within the 30 month period. These included the murder of Arthur Dade on 3 February 1984, for which Lloyd Schlup was

demonstrable weakness of the Warden's deterrence theory, and the fact that it encouraged the jury to pass a death sentence on a generalized notion rather than the individualized circumstances of the case in question, the defence lawyer made only a general initial objection to it – which the judge overruled. For his part, the prosecutor harked back to the Warden's testimony in his closing argument, at the same time contriving to make the fact that the case was based "purely" on inmate testimony a reason for the jury to vote for execution:

> "What you do will say a great deal, in my opinion, about what happens in the months to come – not forever; memories fade – about what other inmates in that prison do... A life sentence is not going to serve any useful purpose. A death sentence, I submit to you, will save somebody's life... You heard the evidence and the testimony.... You'll save somebody's life, particularly in this case where it is based purely on inmates' testimony... and the juries here in Cole County, have the courage and the fortitude to sentence an inmate to death for the murder of another inmate under these circumstances, it's going to save somebody's life."

One of the jurors from the 1986 trial has recalled: "There was very little deliberation in the penalty phase of the trial. We felt we had no choice but to return a sentence of death. The testimony of Warden Bill Armontrout affected many of the jurors deeply. It convinced us that if we didn't vote to execute Joe, we would be risking the lives of other inmates and prison guards."[30]

Jailhouse informants - a notoriously unreliable form of testimony

"*I found Joe Amrine guilty at trial because he was a convict, and I don't trust convicts*". Jury foreman from Joseph Amrine's trialß[31]

The Commission on Capital Punishment, set up by Governor Ryan of Illinois after he imposed a moratorium on executions in 2000, examined the question of testimony provided by in-custody informants. The Commission's April 2002 report concluded that, even with stringent safeguards on the use of such evidence, "the potential for testimony of questionable reliability remains high, and imposing the death penalty in such cases appears ill-advised". The Commission points out that "a number of the Illinois cases in which inmates were ultimately released from death row involved proffers of testimony from in-custody informants, and much of which was of dubious veracity." It concluded that "no defendant should face the ultimate penalty a state can impose if the conviction is based solely on the testimony of an in-custody

sentenced to death (see further in text). Guinan, Bolder, Zeitvogel and O'Neal have all been executed.

[30] Statement of Larry Hildebrand, 15 October 2001.

[31] Statement of Russell Gross, 10 October 2001.

informant". It also recommended that prosecutors and defence lawyers involved in capital cases should receive periodic training on "the risks of false testimony by in-custody informants".

It is widely recognized that the testimony of fellow inmates has an inherent credibility problem, and that convictions based on such testimony should at the very least be subject to rigorous scrutiny. For example:

- In 1996, a federal judge offered advice to prosecutors: "The precautionary rule of thumb with a jailhouse confession presented by another inmate is that it is false until the contrary is proved beyond a reasonable doubt", and, "If you are going to have to rely on the uncorroborated or even weakly corroborated word of an accomplice or an informer, get back out in the field and go back to work".[32]
- In 1997, the Ninth Circuit Court of Appeals stated that "criminals who are rewarded by the government for their testimony are inherently untrustworthy", and that the defendant must be protected from "being the victim of a perfidious bargain between the state and its witness". (*Carriger v Stewart*).
- In 2000, the Oklahoma Court of Criminal Appeals wrote: "Courts should be exceedingly leery of jailhouse informants, especially if there is a hint that the informant received some sort of benefit for his or her testimony". (*Dodd v. State*)
- Under guidelines issued on 18 October 2001 by the Office of the District Attorney General in the 20th District of Tennessee (metropolitan Nashville and Davidson County): "Jailhouse informants may be used as corroborative witnesses but in no event shall a death penalty case be based principally upon their testimony".

Asked in a recent interview about the state's reliance on the testimony of the three inmates in Joseph Amrine's case, the trial prosecutor responded: "Why did we rely on them in that case? I don't remember the case, but I presume we had to rely on them. I assume based on what we believed the truth was, we needed their testimony to make the case".[33] His successor, who took office as Cole County prosecutor the year after Joseph Amrine's trial, has stated that he would be unlikely to pursue "any prosecution" if it were to rely "solely on inmate testimony", and states that he has not done so during his 16 years in office. He acknowledged that, while he does not call into question the probity of the investigators or his predecessor in the

[32] Trott, Stephen S. *Words of warning for prosecutors using criminals as witnesses*, 47 Hastings L.J. (1996).

[33] Prosecutor Thomas Brown, in *Unreasonable doubt: The Joe Amrine case*, a film directed by John McHale, 2002.

Amrine case, it is "problematical for the system to execute someone where all the witnesses have recanted".[34]

The problem is amply illustrated by cases of some of the people released from death rows across the USA since 1973 after evidence of their innocence emerged.[35] For example:

- Neil Ferber was released in 1986, almost four years after he was sentenced to death in Pennsylvania. The state declined to retry him after, among other things, it emerged that a jailhouse informant had given perjured testimony at the first trial. During Ferber's subsequent lawsuit against the authorities, a judge described the police handling of the case – including the manipulation of witnesses – as "a Kafkaesque nightmare . . . a malevolent charade . . . the so-called justice system of a totalitarian state."
- Federico Macias was sentenced to death in Texas in 1984 on the basis of the testimony of a co-defendant and jailhouse informants. His conviction was overturned, a grand jury refused to indict him again because of lack of evidence. He was released in 1993.
- Ronald Williamson was released in 1999. He was sentenced to death in Oklahoma in 1987. Among other things, his trial lawyer had failed to question the motive of a jailhouse informant who alleged that Williamson had confessed to the murder.
- Steve Manning had charges against him dropped in 2000. He had been sentenced to death in Illinois in 1993 on the basis of the word of a jailhouse informant who testified that Manning had confessed to him in jail.
- Charles Fain was released in August 2001 after charges against him were dropped. He had been sentenced to death in Idaho in 1983. The evidence against him included the word of two jailhouse informants, who said that Fain had confessed to the murder.

In addition, a recent landmark study revealed a national rate of prejudicial error in US capital cases of 68 per cent. The most common errors were "(1) egregiously incompetent defense lawyers who didn't even look for – and *demonstrably missed* – important evidence that the defendant was innocent or did not deserve to die; and (2) police or prosecutors who *did* discover that kind of evidence but *suppressed* it, again keeping it from the jury".[36]

Trial testimony recanted

[34] Telephone call from Amnesty International, International Secretariat, London, UK, to Cole County Prosecuting Attorney Richard Callahan, 24 May 2002.

[35] For full list of cases, see: http://www.deathpenaltyinfo.org/innoccases.html

[36] *A Broken System: Error Rates in Capital Cases, 1973-1995.* By James S. Liebman, Jeffrey Fagan and Valerie West, 12 June 2000.

"*When [the investigator] said he would stop me from being raped and stuff, I had to do it. But I can't let Joe die, because I lied on him.*"[37] Randall Ferguson, state's key witness against Joseph Amrine.

All three of Joseph Amrine's accusers – Randall Ferguson, Terry Russell and Jerry Poe – have now recanted their trial testimony. They claim that they lied as a result of threats or promises made by the authorities. It is alleged that all three – young prisoners in their late teens or early 20s at the time – were particularly vulnerable to providing testimony in return for protective custody given the sexual violence that was reportedly rife in the prison at the time. In addition, Randall Ferguson and Terry Russell were possible suspects in the murder, which by their own admission gave them further reason to deflect attention away from themselves. From the outset, Joseph Amrine denied any involvement in the crime.

Terry Russell was the initial focus of the investigation. Based upon Officer John Noble's identification of him as the man he had seen being chased by Gary Barber before he collapsed, 22-year-old Russell was taken into custody and questioned about the stabbing. Russell pointed the finger at Joseph Amrine, saying that Amrine had earlier said that he would stab Barber, and had admitted it to Russell immediately after the killing. He alleged that there was ill-feeling between Amrine and Barber because Barber had spread a rumour of a homosexual encounter between himself and Amrine.[38] A week earlier, Joseph Amrine had confronted Barber who had denied making such statements. Amrine had apparently accepted his denial, and after he walked away, a fight broke out between Terry Russell and Gary Barber, as a result of which they were put into disciplinary confinement. They were released from this segregation on the morning of 18 October 1995. Gary Barber was stabbed approximately four hours later. At the time he pointed Russell out to the other prison guard, Officer Noble was unaware of the fight a week earlier between Russell and Barber, or of the fact that the two had just been released from disciplinary detention.[39]

Questioned by Joseph Amrine's appeal lawyer at a hearing in federal district court in 1998, Russell explained why he had implicated Joseph Amrine in the Barber stabbing:

Q. So [the prison investigator] explained to you why he was questioning you about the murder; is that correct?
A. Yes.
Q. And he told you that the fight with Barber made you a suspect?

[37] Randall Ferguson, videotaped deposition, 14 July 1998.

[38] Statement of Terry Lee Russell, Missouri State Penitentiary, 18 October 1985.

[39] In his 1998 testimony in federal court, Terry Russell stated that the fight between him and Barber was about Barber's sexual advances on him, Russell.

A. Yes.
Q. The fact that you had both been released from lockdown that very day kind of made you a suspect?
A. Yes.
Q. And that John Noble saw you running from Barber and that also made you a suspect, didn't it?
A. Yes.
Q. Did they say anything about charging you with the crime?
A. Yes.
Q. And what did they tell you?
A. They read me my rights and then they said they was going to charge me.
Q. So your primary concern at that time was that you were going to be charged with murder?
A. Yes.
Q. In your statement, you blame the stabbing of Fox Barber on Joe Amrine, don't you?
A. Yes.
Q. Why did you blame it on Joe Amrine?
A. Take it off me because I ain't do it.
Q. Why would you blame Joe Amrine as opposed to any other inmate who was in that [recreation] room?
A. It was just – I was just using that as a witness because there was a rumour going out about him and Barber had some words and that's why I used his name.
Q. So you knew about that rumour, about the argument between Amrine and Barber?
A. Yes.
Q. And so you used that to deflect suspicion away from yourself...
A. Yes.
Q. ...is that fair?
A. Yes.

At the 1998 hearing, Terry Russell stated that he lied at the trial:

Q. Did Joe ever tell you he wanted to kill Gary Barber?
A. No.
Q. Did Joe ever tell you he was planning to kill Gary Barber?
A. No.
Q. Did Joe every tell you that he had stabbed Gary Barber?
A. No.

Q. Did he say anything to you at the time that indicated that he was involved in any way in the murder of Gary Barber?
A. No.
Q. Was any of the testimony that you gave at the trial implicating Joe Amrine in the murder of Gary Barber true?
A. No.

At the time of Joseph Amrine's trial, Terry Russell was scheduled to be paroled in about two months. Following the trial, he was paroled. Six months later, he was convicted of second-degree murder and sentenced to life imprisonment.

If Randall Ferguson was particularly vulnerable to coercion it was not only because he was a possible suspect in the crime[40], but because he was the target of sexual violence within the prison. His videotaped deposition of July 1998, shows him to be very distressed at what he reveals. In this extract, he is questioned by Joseph Amrine's appeal lawyer:

Q. Were you having any special problems in the Missouri State Penitentiary in 1985?
A. Yes sir. I'm sorry.
Q. Sure. Can you tell me what those problems were?
A. I was being forced into homosexual stuff by Clifford Valentine and others.
Q. When you say homosexual stuff, can you describe what they were doing to you?
A. I was being forced to have sex with men; oral sex and anal sex.
Q. What would happen if you refused to cooperate?
A. I would get hurt.
Q. And were you ever actually hurt?
A. Yes. At one time an officer let another inmate into my cell, and closed the door, and he beat me up, and then forced himself upon me. He had sex with me forcefully. He raped me.
Q. What was your relationship with Clifford Valentine in October of 1985?
A. He was the big guy that was forcing me into sex, but he was also the only one strong enough to protect me.[41]

At first, Ferguson did not implicate Joseph Amrine. He was questioned some 30 times by the authorities over the six months following the stabbing, consistently saying that he did not

[40] Randall Ferguson was seen with blood on his face after the stabbing. In his 1998 deposition, he suggested that this may have been blood from his knuckles, cut during boxing in the recreation room.

[41] When Randall Ferguson was first questioned after the murder, the authorities took the unusual step of acquiescing to Clifford Valentine's demand to be present during the questioning.

know anything about the murder. At Amrine's state post-conviction hearing on 16 February 1989, the judge asked the prison investigator:

Q. "Why did you keep coming back at him after he told you a number of times he didn't have any information?"
A "Well, you'd have to consider Inmate Ferguson's position at that time. And that position, from my professional opinion, was that Inmate Ferguson was very easily coerced."
.....
Q. Back to the word coercion... Isn't this a form of coercion to make a deal with a witness who's told you 30 times before that he doesn't know anything? Don't you consider that coercion?
A. Do I consider it coercion?
Q. Yes.
A. No, not necessarily, Judge.

It was not until April 1986, shortly before Joseph Amrine's trial, that Randall Ferguson decided to testify against Joseph Amrine. During post-conviction proceedings, the prison investigator confirmed that Ferguson's change of mind occurred after he had been told that his information was very valuable to the state.

Q. In fact, you told him on that day that he had information that was very valuable to you, didn't you?
A. [investigator] I told him I believed that, yes sir.
Q. At the time that he made that statement to you, he had not yet told you that he had seen anyone kill Gary Barber, had he?
A. I don't believe so, sir.
Q. All right. And it wasn't until after you told him that the information that he possessed was very valuable to you that he decided to cooperate with you, isn't that correct?
A. That sounds correct, yes sir.

For his part, Randall Ferguson states that he eventually decided to testify against Joseph Amrine after the authorities held out the prospect of protective custody. In his videotaped deposition of July 1998, he recalls a statement he gave to the authorities on 8 April 1986, in which he once again denied any knowledge of the stabbing:

Q. After I gave this statement, they turned the tape recorder off, and [the prison investigator] asked me if they took me out of the prison, protect me, if I would change my story.
A. Why would he ask you if you needed protection, do you know?

Q. Because they knew what was going on with me being forced into homosexuality and all that. They knew what was going on... They never did anything to stop it, but they knew.
Q. And how important was that to you to get away from that?
A. Oh God. It was real important. I -- I was having a hard time living with myself. It was -- oh, it was real important, because it hurt, you know, so much. Not just physically to be raped, but inside, you know. So it was real important. I -- I just couldn't take it no more.

On 17 April 1986, less than two weeks before Joseph Amrine's trial, Randall Ferguson gave a detailed statement to the authorities accusing Amrine of the murder of Gary Barber. A day earlier, he had signed an agreement under which pending charges against him for possession of a weapon in prison would be dismissed in return for his cooperation. The charge could have led to up to 10 years more in prison for Ferguson. He was placed in protective custody, and he states that he was promised that he would not face charges in the Barber killing, and that he would get a parole recommendation. He states that the authorities threatened that if he did not testify he would be placed back in the general prison population having been labelled a snitch, making him a target for violent reprisal. Asked in his July 1998 deposition whether he was aware at the time of "what happens to snitches in prison", Ferguson responded, "They die or get stabbed or burned up. A lot of things happen, you know".

In his 1998 deposition, Randall Ferguson said that his testimony was entirely false, and that the details of his 17 April 1986 statement followed hours of talking with the authorities during which "I would say some things, and the they would fill in the blanks... and I had to make up more stuff to make everything fit".[42]

[42] Serious allegations have been made about the quality of investigations in Missouri State Penitentiary around the time of the murder of Gary Barber. In 1998, a former investigator in the prison between November 1986 and April 1987, signed an affidavit in which she said: "In my experience with [chief investigator] A.D., I observed an alarming lack of regard for facts, integrity, and professionalism in his investigative techniques. Most 'investigations' began with a desired outcome as the first step, then the process of collecting supporting 'evidence' began.... As part of the investigative process, it was common practice for Mr D. to have officers who were involved in specific cases submit handwritten Inter Office Communications (IOC's). He would then direct me to review all of the reports for discrepancies and then type the reports to reflect only one picture of what happened. If officers were scheduled off the day after an incident, Mr D. would direct them to sign a blank IOC, and I would compose 'their' reports." Affidavit of Deborah Stafford, 5 August 1998. The affidavit makes numerous allegations of misconduct in specific cases, including the shoddy collection and storage of evidence, the misuse of evidence in a criminal case, and falsely accusing an inmate of assault to persuade him not to sue the Corrections Department. Deborah Stafford states that her eventual request for a transfer from the investigator's office resulted in discriminatory treatment. She resigned. She reportedly won a civil lawsuit against the Department.

Randall Ferguson took a polygraph test in 2001. The expert tester, a former police officer, concluded that "Ferguson was truthful when responding 'No' to the following relevant questions: 1. When you testified that on October 15, 1985 you saw Joe Amrine stab Gary Barber, were you being truthful? 2. On October 15, 1985, did you see Joe Amrine stab Gary Barber? 3. On October 15, 1985, when Gary Barber was stabbed, were you present in that rec room?".[43]

Jerry Poe has asserted that most of his testimony against Joseph Amrine was false. In his videotaped deposition of July 1998, asked why he had lied, he replied: "I was just young and they scared me into telling them what they wanted to hear". He stated that the authorities threatened that if he did not testify they would "put a snitch jacket on me" and "throw me out to the dogs" – that is, that he would be put back into the general prison population having been labelled a snitch. He stated that under such circumstances, unless the prisoner stays locked in his cell 24 hours a day, "you're going end up dead". He alleged that he was made promises, for example protective custody and help with parole, in return for his testimony. He alleged that the authorities even raised the possibility that he could be transferred out of Missouri, and that they gave him a list of "about 28 states" that had agreements with Missouri for such custodial transfers. Poe alleged that he was told "to pick out my first choice and then pick another two substitute states". He stated that he now realised that the authorities "never had any intention" of transferring him to another state, adding that if he had known "how their little system worked... knowing what I know now, I'd have never made any kind of statement to begin with".[44]

In an affidavit signed by Jerry Poe in 1996, he also alleges that he was coached by the authorities in an attempt to ensure that his testimony was consistent with the other state witnesses: "Before trial, [the investigators] came to see me at least five to six times. Each time they would go over their facts with me so I'd be ready for trial.... After the first couple of times I said whatever they wanted me to say because I was scared. They kept coming back to change little things and it was easy to see that they were trying to get my story to match the other witnesses. What I couldn't get was why they didn't use someone who really saw what happened."[45]

Jerry Poe and Randall Ferguson have expressed regret at their role in the case. In his affidavit, Jerry Poe states:

[43] David E. Knefelkamp, Certified Forensic and Clinical Polygraph Examiner. Letter to Joseph Amrine's appellate lawyer, 3 October 2001.

[44] Jerry Poe, videotaped deposition, 16 July 1998.

[45] Sworn affidavit of Jerry Reginald Poe, 6 September 1996.

> "I am really sorry for what I have done to Joe Amrine. I lied on this man because I was afraid and I hope it is not too late to right a wrong. I am not saying Joe Amrine didn't stab this man because he might have. What I am saying is that I didn't see him or anyone else stab him."

Randall Ferguson wrote letters to former Presidents George Bush and Bill Clinton to ask for their help "to set the record straight" and "to get to the truth of the matter". He even sought to confess to the murder himself in an apparent attempt to get the system to listen to him. Asked in his 1998 deposition why he had done this, he explained:

> "Because originally I testified against Joseph Amrine for the murder of Gary Barber, and my testimony was lies. And I just don't think I can live with myself if Joseph Amrine was to be killed because I lied on him, and I would rather die than to see him die because of me. You know, I just -- I tried to kill myself several times because of this. I've lived with it 13 years now, and you know, and I just -- I couldn't take it no more. And for 12, 13 years, I've tried to tell the truth, and nobody listened, nobody has took me serious, until all of a sudden I came out and said I did it. You know, and for 13 years I've told the truth, and nobody will listen. And then I knew that Joseph's time had to be running out, because he has been on death row for so long, I just didn't want to see somebody else die because I lied on him."

In a letter to Joseph Amrine's lawyer, Randall Ferguson wrote: "I desperately need to see the greatest injustice ever committed by me rectified."[46]

The conviction and death sentence survive the appeals process

"*The fact that they've recanted doesn't per se mean anything to me... There's a process by which an inquiry is made in that regard, and I trust the system...I trust that the system will afford an opportunity for that investigation to be made and appropriate conclusions to be drawn therefrom*". Prosecutor from Joseph Amrine's trial[47]

Once a person is convicted, he or she is presumed guilty and the jury's verdict is presumed correct. The prisoner bears the burden of showing that the conviction or sentence was tainted by error. It is an uphill task, and one that faces many legal and technical hurdles.

[46] Letter to Joseph Amrine's appeal lawyer, 26 March 1998.

[47] Prosecutor Thomas Brown, in *Unreasonable doubt: The Joe Amrine case*, a film directed by John McHale, 2002.

The Missouri Supreme Court affirmed Joseph Amrine's 1986 conviction and death sentence in 1987. At a post-conviction hearing on 16 February 1989, Terry Russell and Randall Ferguson recanted their trial testimony. The appeal lawyer had not located Jerry Poe at this time. At the hearing, the state investigators denied having pressured Russell and Ferguson into testifying against Joseph Amrine, but acknowledged that the pending weapon charge against Ferguson had been dismissed and that he had been placed in protective custody in exchange for his testimony.

The judge overseeing the post-conviction hearing ruled that the inmates were not credible witnesses – that Russell's recantation was "designed solely to place him in good stead with Amrine" and that Ferguson's recantation was motivated by the desire to help a fellow prisoner. Amrine was denied relief, and the Missouri Supreme Court affirmed this decision in 1990.

Joseph Amrine then filed a *habeas corpus* petition to the federal US District Court for the Western District of Missouri. District Judge Fernando Gaitan considered and rejected the various claims which had been raised in state court, and refused to consider numerous other claims on the grounds that they had not been properly raised in state court and were therefore "procedurally defaulted".[48] Without holding a hearing, Judge Gaitan ruled that Amrine had failed to show sufficient evidence of actual innocence to overcome this procedural bar and to allow review of the defaulted claims. In his February 1996 opinion, the judge recognized that Russell's and Ferguson's new testimony contradicted what they had said at trial, but rejected Amrine's claim of innocence "in light of the continued existence of witness Poe's testimony":

> *Despite the new evidence of witnesses Russell and Ferguson recanting their testimony, the testimony of Jerry Poe remains unchallenged. At trial, Poe testified that he also witnessed petitioner stab Gary Barber... [T]his Court finds no reason to view Poe's testimony as not credible.... The Court concludes that despite the new evidence presented...by witnesses Russell and Ferguson, it cannot be said that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt in light of the continued existence of witness Poe's testimony.*[49]

[48] The defaulted issues included claims that Amrine's trial lawyer was ineffective for: failing to object to Amrine's appearance in court at jury selection in shackles in violation of right to presumption of innocence; for failing to challenge a jury selection process that led to an all-white jury; for failing to investigate Amrine's social, family and medical history; for failing to object to improper closing arguments by the prosecutor; and for failing to request that the jury be instructed on the credibility of inmate informants.

[49] *Amrine v Bowersox*. No. 90-0940. United States District Court for the Western District of Missouri. 26 February 1996.

It might seem from this opinion that if Jerry Poe's trial testimony were to be called into question as well, Judge Gaitan would consider Joseph Amrine's conviction unsafe and all his claims worthy of full review. After all, as the US Supreme Court wrote in 1987, "Our duty to search for constitutional error with painstaking care is never more exacting than it is in a capital case".[50]

Not long after Judge Gaitan's decision, Joseph Amrine's new appeal lawyer located Jerry Poe, who by now was back in prison. Jerry Poe gave an affidavit in which he stated that his trial testimony had been false. In addition, two additional affidavits were obtained. One was from Kevin Dean, a former inmate, who said that he saw the stabbing of Gary Barber, that it was Terry Russell who was responsible, and that Joseph Amrine was playing cards in a separate part of the recreation room at the time of the killing. The other affidavit was that of a current inmate Edward Epps, who asserted that he also saw the stabbing, that Gary Barber had chased his assailant after being knifed, that Joseph Amrine was not the killer, and that he, Epps, was unwilling to name the murderer out of fear for his own safety because he was still in prison. The lawyer appealed to the US Court of Appeals for the Eighth Circuit to send the case back to the district court in the light of the new evidence. In 1997, eight of judges on the US Court of Appeals for the Eighth Circuit agreed with the petition, while two dissented. The eight wrote:

> *Amrine has now come forward with evidence not previously available which directly contradicts the key evidence against him at trial. He now has a sworn recantation by the only previously unchallenged eyewitness, Jerry Poe... Dean and Epps also claim to have seen the killing and to know that Amrine did not do it, and Dean swears that the killer was Terry Russell....*".[51]

The Eighth Circuit sent Joseph Amrine's case back to the federal district court under the 1995 US Supreme Court decision, *Schlup v Delo*. This allows a condemned prisoner to obtain judicial review of otherwise barred claims if he or she produces reliable new evidence of actual innocence not available at trial, which demonstrates that it is more likely than not that with this new evidence no reasonable juror would have voted to convict.[52]

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[50] *Burger v Kemp*, 483 US 776 (1987).

[51] *Amrine v Bowersox*, US Court of Appeals for the Eighth Circuit, 3 November 1997.

[52] *Schlup v Delo*, 513 US 298, 23 January 1995. The Supreme Court said that the proper standard in such a case was for the defendant to be required to show that "a constitutional violation has *probably* [that is, more likely than not] resulted in the conviction of one who is actually innocent", a high but less stringent standard than that under which Schlup's case had been judged to that point, namely to demonstrate "*by clear and convincing evidence* that but for a constitutional error, no reasonable juror would have found him guilty" (*Sawyer v Whitley*, 1992).

Lloyd Schlup was, like Joseph Amrine, sentenced to death for the murder of a fellow inmate in Missouri State Penitentiary. Having exhausted all normal avenues of appeal, Schlup had appealed to the Supreme Court claiming that constitutional error at his trial – ineffective assistance of counsel and withholding of evidence by the prosecution – had deprived the jurors of critical evidence that would have allowed them to find him innocent, and that the evidence of his innocence should allow him to overcome the procedural bars that were preventing his claim of constitutional error from being heard. In Schlup's case, the new evidence of innocence included affidavits from numerous fellow inmates stating that they had witnessed the stabbing by someone other than Schlup. The Supreme Court remanded the case back to the lower courts for consideration, eventually resulting in Schlup being granted a new trial.[53]

The Supreme Court emphasised that the *Schlup* rule would apply only to the "extremely rare" cases in which there is "a substantial claim that constitutional error has caused the conviction of an innocent person", adding that "the quintessential miscarriage of justice is the execution of an innocent person." In its 1997 order sending Joseph Amrine's case back to the district court, the Eighth Circuit Court of Appeals stated:

> *The strength of Amrine's showing at this point raises the real possibility that his case may be an example of the "extremely rare" scenario for which the actual innocence exception is intended. Amrine's showing of actual innocence is stronger than that in Schlup because neither of the state's two eyewitnesses to that killing ever recanted any part of their testimony implicating Schlup, and here all three of the state's key witnesses against Amrine have recanted... Amrine's evidence, if found reliable, would almost certainly establish his actual innocence.*

The Eighth Circuit instructed the district court to "conduct an evidentiary hearing to determine first whether the evidence Amrine presents is new and reliable. The evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence". If the district court found the evidence new and reliable, the Eighth Circuit continued, it "should then consider if Amrine's evidence meets the *Schlup* standard entitling him to consideration of his barred constitutional claims".

[53] After a hearing, Schlup was found to have made a sufficient showing of actual innocence to entitle him to a hearing on his procedurally barred claims. After that hearing, the judge found that he had been denied adequate trial counsel, and he was granted a new trial. In 1999, Lloyd Schlup agreed to plead guilty to second-degree murder in order to avoid the possibility of being sentenced to death again -- he had come close to execution in 1992 and 1993. Under the plea, he was sentenced to life in prison for the murder of Arthur Dade, with credit for time already served. His appellate lawyer, who at the time of writing was due to represent him at a parole hearing on 7 June 2002, remains convinced of his innocence of the 1984 murder.

In 1999, a federal judge on the US District Court for the Eastern District of Missouri criticized the "due diligence" clause that the Eighth Circuit had attached to its remand order in the Amrine case. Her criticism came as part of a ruling in which she held that the 1983 capital murder trial of another Missouri prisoner, Ellen Reasonover, had been "fundamentally unfair". That conviction, too, had rested primarily on the testimony of jailhouse informants, and Reasonover has since been exonerated.[54] Chief Judge Jean Hamilton gave a hypothetical example to illustrate her concern with the Amrine ruling:

> *A habeas petitioner presents a claim of ineffective assistance of counsel which is procedurally barred... The petitioner presents compelling evidence of actual innocence, but all the evidence was available at the time of trial, and could have been discovered in the exercise of due diligence. Further, petitioner presents evidence that the available evidence was not utilized because of trial counsel's lack of diligence.*
>
> *Under the Eighth Circuit's definition of new evidence, the petitioner's Schlup claim must fail, notwithstanding the compelling evidence of actual innocence. Under Amrine, the evidence presented by the petitioner is not "new", and therefore may not be considered by the habeas court. The petitioner's claim would be procedurally barred, and the habeas court would be precluded from ruling on the petitioner's ineffective assistance of counsel claim.*
>
> *In contrast, under Schlup, the evidence presented by the petitioner is "new" because it was "not presented at trial". Assuming that the new evidence is reliable and sufficient to sustain the petitioner's burden under Schlup, the habeas court must consider the merits of the petitioner's ineffective assistance of counsel claim because failure to do so would result in a "fundamental miscarriage of justice".*[55]

[54] Ellen Reasonover was convicted of the 1983 murder of a service station attendant. There was no physical evidence linking her to the crime, no eyewitness, no confession. The evidence consisted primarily of the testimony of two jailhouse informants who said that Reasonover had confessed to them. The prosecutor, now a judge, had attempted to obtain a death sentence, but a single holdout juror prevented this and Reasonover was sentenced to life imprisonment without the possibility of parole for 50 years. She was released in August 1999 after it emerged that the prosecutor had withheld exculpatory evidence and entered into secret deals with the informants. In 2001, Ellen Reasonover filed a lawsuit against the state, the prosecutor and the investigators, for unlawful incarceration.

[55] *Reasonover v. Washington*, 60 F. Supp. 2d 937. US District Court for the Eastern District of Missouri, 1999.

Perhaps if Joseph Amrine's case had been before Judge Hamilton he would by now have been granted a new trial. Lloyd Schlup was granted a new trial. Joseph Amrine, whose "showing of actual innocence is stronger than that in Schlup" according to eight federal judges, faces execution. Such is the arbitrariness of the death penalty.[56]

After the Eighth Circuit sent the case back to him, Judge Fernando Gaitan held an evidentiary hearing on 24 June 1998, at which the defence presented live testimony from Terry Russell, Kevin Dean, and former prison guard John Noble. The state presented the testimony of the trial prosecutor and the officials who had investigated the murder. They testified that neither Poe nor Ferguson had been threatened into testifying. The state also presented the testimony of another inmate, Kevin Booker. This testimony has once again called into question the methods employed by the state in this case.[57] Live testimony from Randall Ferguson and Jerry Poe was not presented for logistical reasons – they were in prison in Minnesota and Kansas respectively. Their videotaped depositions (they were questioned by the state and the defence) were obtained in July 1998 and sent to the court.

In an Order on 29 October 1998, the federal court denied relief to Joseph Amrine. Judge Gaitan had determined that only Jerry Poe's recantation constituted new evidence. He

[56] Article 6(1) of the International Covenant on Civil and Political Rights (ICCPR), ratified by the USA in 1992, prohibits the arbitrary deprivation of life. The Human Rights Committee was established by the ICCPR to monitor its implementation. The Committee, regarding the right to liberty, has stated that 'arbitrariness' is not be equated simply with 'against the law', but must be interpreted more broadly, to include notions of inappropriateness, injustice and lack of predictability. UN Doc. CCPR/C/39/D/305/1988. August 1990.

[57] Kevin Booker, a prisoner serving a life sentence who had been in the Missouri State Penitentiary on 18 October 1985, did not implicate Joseph Amrine in his testimony. However, after he left the court, the state produced an audiotape in which Booker said that Joseph Amrine had stabbed Gary Barber: "I did see Joe Amrine sitting at a table along with Mr Fox Barber and I did witness Joe Amrine stab Barber in the back with an ice pick, yes sir." This claim would appear unreliable because no other witness placed Gary Barber at the table when he was stabbed, and Booker was reportedly not even in the recreation room at the time of the stabbing. On 5 August 1998, Kevin Booker signed an affidavit, in which he stated that in the first week of June 1998, he had been visited by a state investigator who wanted to talk to him about the Barber murder: "I told him that I had no comments about the incident because I was only fifty days away from being paroled. I got up and left the visitation room. As I was going back to work, Chief Investigator A.D. [same A.D. as in Stafford affidavit, see footnote 42] ordered me to go to the investigator's office... D. told me that if I did not make a taped statement saying that I saw Joe Amrine stab Fox Barber in the back, then he would make sure that I lost my parole date." Booker's affidavit states that he then gave his statement implicating Joseph Amrine, because having been in prison since 1981 he did not want to lose parole. Booker continues: "On June 11, 1998, D. warned me that I should not testify on Joe Amrine's behalf at his federal hearing. He told me that I couldn't testify for Amrine because I was on tape saying that Amrine stabbed Barber. I told D. that I intended to tell the court that I lied on the tape... When I appeared in court, I refused to lie for the attorney general. The truth is that Joe Amrine did not stab Gary Barber."

reasoned that both Russell and Ferguson had recanted their testimony before he made his 1996 ruling, and that Kevin Dean had been available to testify at the trial but had not been called (see above). Officer Noble's clarified testimony was also not considered to be new. There was no further discussion of these individuals' testimony in Judge Gaitan's order.

Judge Gaitan then found that Jerry Poe was not a credible witness, including because his recantation had come not long after the Eighth Circuit had affirmed his conviction for sending two threatening letters from his prison cell, which provided a possible motivation for recanting his Amrine testimony out of anger against the state. Because Poe's evidence was not reliable, Judge Gaitan ruled, Joseph Amrine could not make a claim of actual innocence that would allow his defaulted claims to be reviewed.[58]

Joseph Amrine appealed the ruling to the Eighth Circuit, arguing that Judge Gaitan's ruling was in error and that he should have taken account of all the evidence supporting Joseph Amrine's claim of actual innocence. In its response, the state argued that the district court's decision, including its finding on Poe's credibility, was entitled to deference. It likewise argued that the finding in the state courts on the unreliability of Ferguson's and Russell's recantations should be respected: "Simply because Poe did not recanted [sic] his trial testimony during the pendency of petitioner's post-conviction proceedings does not mean that the state court's factual finding relating to Ferguson and Poe [sic, Russell] is not entitled to deference".[59]

On 5 January 2001, a three-judge panel of the Eighth Circuit – which included the only two judges to have dissented against the Eighth Circuit's 1997 decision to send the case back to the federal district court – affirmed Judge Gaitan's decision. It said that the district court "did not err by deciding to focus on the testimony of Poe". Judge Gaitan's finding that Poe's recantation could not be relied upon was a determination "which is entitled to great deference, and we see no reason to overturn it".[60]

The power of executive clemency exists precisely to compensate for the rigidity of the courts. It is a necessary failsafe because, as US Supreme Court Justice William Rehnquist wrote in a 1993 opinion: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."[61]

[58] *Amrine v Bowersox*, US District Court for the Western District of Missouri, 29 October 1998.

[59] Brief of Appellee.

[60] *Amrine v Bowersox*, US Court of Appeals for the Eighth Circuit, 5 January 2001. The Court noted that it had been unable to obtain a copy of Judge Gaitan's October 1998 order until March 2000.

[61] *Herrera v Collins*, 506 U.S. 390 (1993). While a number of inmates have gone to their deaths in the USA despite serious doubts about their guilt, others have been granted executive clemency over the years. They include Jesse Rutledge (Florida, 1983), Doris Ann Foster (Maryland, 1987), Ronald Monroe (Louisiana, 1989),

The question of credibility

"*Amrine's evidence, if found reliable, would almost certainly establish his actual innocence*." US Court of Appeals for the Eighth Circuit, *Amrine v Bowersox*, 1997.

The state used the testimony of three inmates to convict Joseph Amrine. It was willing to endorse their credibility then, when it served its purpose. Now that the testimony has been recanted it has successfully appealed to the courts that such recantations are not credible. Responding to Joseph Amrine's appeals, the state has argued: "While in one breath petitioner claims that inmates are not reliable witnesses, in the next breath petitioner claims that inmates are reliable if they are recanting their testimony. This makes little sense".[62]

At the heart of the question of the credibility of jailhouse testimony is the power relationship between the state and the prisoner. Prisoners can, or believe they can, benefit from providing the state with testimony – in terms of privileges, leniency, immunity from prosecution, or protection from ill-treatment. It is the state that has the power in such a situation, not the defence. In this case, it seems that Joseph Amrine's three accusers stood either to save themselves from possible charges stemming from the murder of Gary Barber, or to earn themselves protection from the violence in the prison.

What do they have to gain from recanting? Joseph Amrine's appeal lawyer was not in a position to offer them anything, except, perhaps, the means to salve their consciences if indeed their original testimony was false. Moreover, such recantations can carry costs. In his testimony in federal district court in June 1998, Terry Russell was asked when anyone from the prosecution had last raised the possibility that he could be charged with the murder of Gary Barber. Russell replied that this had happened about two weeks earlier, when an Assistant District Attorney had tried "to persuade me not to come and testify" at the 1998 hearing. On cross-examination, the prosecutor from the Attorney General's Office did not seek to rebut this. Recantation can also carry potential perjury charges. At the 1989 state post-conviction hearing, Randall Ferguson was asked by an Assistant Attorney General:

Q. Do you know what the penalties for perjury in a murder trial are?
A. No, I don't.

Herbert Bassette (Virginia, 1992), Ansen Avery Maynard (North Carolina, 1992), Joseph Payne (Virginia, 1996), Henry Lee Lucas (Texas, 1998), David Chandler (Federal, 2001), Phillip Dewitt Smith (Oklahoma, 2001), and Charlie Alston (North Carolina, 2002).

[62] *Amrine v Bowersox*, US Court of Appeals for the Eighth Circuit, Brief of Appellee. April 2000.

Q. It's a class A felony where you can get life imprisonment. It's your testimony today you lied when Joseph Amrine went on trial and that none of your testimony was correct?
A. Yes.

Randall Ferguson was the prosecution's star witness, who provided the details of the crime on which the state continues to rely in challenging efforts to overturn Joseph Amrine's conviction. For well over a decade, Randall Ferguson has maintained that he lied at the trial. This is far longer than he levelled his allegations against Amrine. In the six months between the murder of Gary Barber and the trial, Randall Ferguson refused to implicate Amrine despite being questioned around 30 times. He agreed to testify only after the value of his testimony to the state was made explicit. Almost immediately after the trial, there were already signs of the unreliability of his testimony. At a hearing on 8 July 1986, on a motion for a new trial, a letter was introduced in which Ferguson had written that he testified to "save my own ass", and he explained that "if I didn't testify, you know, charges could possibly have been put on me". His letters to former President George Bush and President Clinton, as well as his apparent suicide attempts, appear to be further evidence of his credibility. His videotaped deposition of July 1998 is very compelling, and would appear to show a man traumatized by the prison rape he says he wanted to escape and by the role he has played in sending a man to death row.

The state counters that he is not credible, citing the fact that Ferguson once "attempted to claim that he was responsible for the murder of Barber [and] later acknowledged that he had no involvement...", and that he had "admitted that he had psychological problems and is currently on medication for those problems".[63]

The inconsistencies of Poe's pre-trial version of the crime and Ferguson's trial testimony are further reasons to doubt the veracity of their 1986 statements. The fact that their recantations are now consistent with John Noble's testimony lends further weight to their credibility. Juror Hildebrand has stated: "In my opinion, John Noble is the most credible witness, and what he saw matches the recantations."[64] The jury foreman, Russell Gross, states:

> "Looking back, I realize that Ferguson and Russell had a lot to lose at trial because they were suspects. That gave them a lot of incentive to lie and implicate Joe Amrine. On the other hand, Russell, Ferguson and Poe now have no reason to lie. I can't think of anything they have to gain by admitting that they committed perjury at Joe Amrine's trial. I understand that there is no statute of limitations on murder, so Terry Russell in particular has a strong reason for sticking by his trial testimony if it were true.

[63] *Amrine v Bowersox*, US Court of Appeals for the Eighth Circuit, Brief of Appellee.

[64] Statement of Larry Hildebrand, 15 October 2001.

> However, I am most impressed with the video deposition of Randall Ferguson. Now that Randy is a free man, he has everything to lose, and nothing to gain by trying to help Joe Amrine. To me, that is persuasive proof that Randall Ferguson is now telling the truth."[65]

Is this view unreasonable? Would a reasonable juror find Joseph Amrine guilty of the murder of Gary Barber beyond a reasonable doubt on the current state of the evidence?

Conclusion

I think the system failed, failed terribly in this case". Juror from Joseph Amrine's trial[66]

There is growing national disquiet in the USA about the fairness and reliability of the capital justice system. The moratorium on executions in Illinois imposed in January 2000 because of the number of wrongful capital convictions there, remains in force two and half years later. A second moratorium, sparked by concern over racial and geographic bias in capital sentencing, was announced in May 2002, this time by the Governor of Maryland, Parris Glendening.

Two years ago, Governor Glendening commuted the death sentence of Eugene Colvin-El shortly before he was due to be executed. The governor stated that he could not be absolutely certain of the inmate's guilt: "It is not appropriate to proceed with an execution when there is any level of uncertainty, as the death penalty is final and irreversible".

- **!** Governor Bob Holden must under no circumstances allow the execution of Joseph Amrine to go forward.

On 25 April 2002, US District Judge Jed S. Rakoff, concerned about the number of wrongful capital convictions in the USA, wrote: "Just as there is no statute of limitations for first-degree murder – for the obvious reason that it would be intolerable to let a cold-blooded murderer escape justice through the mere passage of time – so too one may ask whether it is tolerable to put a time limit on when someone wrongly convicted of murder must prove his innocence or face extinction".[67]

In 1994, Earl Washington faced extinction after a decade on death row for a crime he did not commit. Shortly before he was due to be executed, his death sentence was commuted by the Virginia governor. In October 2000, after DNA tests showed his innocence, Earl

[65] Statement of Russell Gross, Jury Foreman, 10 October 2001.

[66] Larry Hildebrand, interviewed on *Unreasonable doubt: The Joe Amrine case, op.cit.*

[67] *USA v Alan Quinones*. US District Court, Southern District of New York.

Washington was granted an absolute pardon and released. Donald Paradis was sentenced to death in Idaho in 1981. In 1996, the Idaho governor commuted his sentence to life imprisonment because of doubts about his guilt. In 2001, 20 years after his trial, Donald Paradis was released when his murder conviction was overturned.

- **!** At a minimum, Governor Holden must commute this death sentence, so that Joseph Amrine can continue to challenge his conviction free from the threat of execution.

Amnesty International does not know who stabbed Gary Barber. It submits that the state does not know either, despite the fact that it has been successful in having the appeal courts uphold Joseph Amrine's conviction. It surely cannot be held that Joseph Amrine's conviction is safe, when all three of his accusers have recanted their testimony. The prosecutor from the 1986 trial recently gave assurances that "we don't prosecute a case, much less seek the death penalty, unless we are absolutely sure we've got the right person". However, he added, "that's not to say we couldn't be wrong, you know, we're human beings like anybody else".[68]

Amnesty International believes that Joseph Amrine should have been granted a new trial by the appeal courts once the evidence against him had, in effect, fallen apart. The organization notes the words of the US Supreme Court in *Schlup v Delo*, that "proof beyond a reasonable doubt marks the legal boundary between guilt and innocence". It further notes that all the jurors in the Amrine case who have been willing to examine the evidence as it stands now have stated that they believe they convicted the wrong man. The organization believes that there is a real possibility that no reasonable juror would find Joseph Amrine guilty beyond a reasonable doubt if the case was brought to court today.

- **!** The courts failed to grant Joseph Amrine a new trial. Governor Holden should do the executive equivalent of what the appeal courts should have done. He should grant Joseph Amrine a pardon, with the stipulation that the state may retry him for the murder of Gary Barber within a reasonable time, or release him. Any new trial should not allow recourse to the death penalty.[69]

[68] Prosecutor Thomas Brown, in *Unreasonable doubt: The Joe Amrine case*, op.cit.

[69] Amnesty International recognizes there would be a double jeopardy issue. In order for Joseph Amrine to be retried under such circumstances, he would likely have to waive his right to protection from double jeopardy.