

50 Creighton L. Rev. 367

Creighton Law Review  
March, 2017

Note  
Laurel Freemyer

Copyright © 2017 by Creighton University; Laurel Freemyer

## DOES ACTUAL INNOCENCE ACTUALLY MATTER? WHY THE SCHLUP ACTUAL INNOCENCE GATEWAY REQUIRES NEWLY PRESENTED, RELIABLE EVIDENCE

### I. INTRODUCTION

A man was suspected, interviewed, arrested, indicted, tried in state court, convicted, sentenced, and imprisoned, all the while asserting his innocence.<sup>1</sup> After exhausting every option for post-conviction relief within the state, this man filed a first and a second petition for habeas corpus in federal court.<sup>2</sup> His petitions were denied, and he once again asserted his innocence.<sup>3</sup> This man had evidence that could potentially exonerate him, yet the United States Court of Appeals for the Eighth Circuit refused to consider the evidence in response to his pleas for assistance.<sup>4</sup> This man is Ricky Kidd.<sup>5</sup> Kidd is currently serving a life sentence without the possibility of parole, and he still asserts his innocence.<sup>6</sup>

A jury convicted Kidd in *State v. Kidd*<sup>7</sup> for the murder of two men.<sup>8</sup> After exhausting all state court remedies, Kidd filed two federal habeas corpus petitions, the second of which the Eighth Circuit denied because the evidence presented to prove his innocence was not considered new.<sup>9</sup> The Eighth Circuit applied a stricter standard than other circuits apply for new evidence.<sup>10</sup> Because Kidd fell short of the stricter standard, the Eighth Circuit affirmed Kidd's conviction.<sup>11</sup>

The Innocence Network is a group of organizations from around the world that provides free legal services to individuals who maintain their innocence even despite their convictions.<sup>12</sup> The Network notes \*368 that at least 347 innocent men and women have been exonerated based on DNA testing, twenty of whom were sentenced to death for their alleged crimes.<sup>13</sup> Seventy percent of the 347 exonerations involved eyewitness misidentification.<sup>14</sup> Forty-three percent involved misidentifications involving the race of the exoneree.<sup>15</sup> Forty-six percent involved misuses of forensic sciences.<sup>16</sup> The Midwest Innocence Project, an affiliate of the Innocence Network, is currently advocating for Ricky Kidd's immediate release from prison based on the compelling evidence that demonstrates Kidd's innocence.<sup>17</sup>

This Note will first explore *Kidd v. Norman*,<sup>18</sup> including the facts, holding, and complex procedural background.<sup>19</sup> Next, this Note will explore the series of cases that formed and refined the actual innocence gateway.<sup>20</sup> Then, this Note will discuss the current circuit split regarding the definition of new evidence as it relates to the actual innocence gateway.<sup>21</sup> Finally, this Note will explain how the Eighth Circuit has too narrowly defined new evidence for purposes of the actual innocence gateway for procedurally barred habeas petitions.<sup>22</sup>

### II. FACTS AND HOLDING

In *State v. Kidd*,<sup>23</sup> the Sixteenth Circuit Court for Jackson County, Missouri convicted Ricky Kidd on two counts of felony murder in the first degree and two counts of armed criminal conduct.<sup>24</sup> The judge sentenced Kidd to life in prison without the possibility of parole.<sup>25</sup> Kidd navigated his way through a complex post-conviction procedural maze, all the while asserting he was actually innocent of the crimes for which he had been convicted.<sup>26</sup>

On February 6, 1996, Oscar Bridges and George Bryant were shot dead in Bryant's home in Kansas City, Missouri.<sup>27</sup> Bryant's four-year-<sup>369</sup> old daughter, Kayla, witnessed the murders and later testified against Kidd and his co-defendant, Marcus Merrill.<sup>28</sup> Kayla witnessed a white car pulling into Bryant's driveway as she watched television in the living room.<sup>29</sup> Two men dressed in black exited the car, entered the house at Bryant's invitation, and briefly conversed with Bridges in the kitchen.<sup>30</sup> After the conversation, the men shot Bryant and chased Bridges into the basement where they shot him as well.<sup>31</sup> While the two assailants were preoccupied, Bryant escaped out of the open garage door and yelled for help.<sup>32</sup> Richard Harris, who later testified against Kidd at trial, heard Bryant's cry.<sup>33</sup> Harris observed two men exit the house, drag Bryant behind a car, and shoot Bryant twice.<sup>34</sup>

At Kidd's trial, Kayla testified to what she witnessed the day of the murder but was unable to identify the shooters.<sup>35</sup> However, prior to trial, Kayla identified Kidd to the police as one of the murderers.<sup>36</sup> Kidd was sentenced as a prior offender to life in prison without the possibility of parole.<sup>37</sup> The trial court noted that Kidd was not charged as a prior offender in the indictment, but the assistant prosecutor determined that it was not necessary to amend the indictment.<sup>38</sup> The Missouri Court of Appeals for the Western District of Missouri later noted Kidd was erroneously sentenced as a prior offender because the prosecutor improperly offered evidence regarding past drug trafficking offenses.<sup>39</sup> The jury found Kidd guilty on all counts and the court sentenced him according to his status as a prior offender.<sup>40</sup>

Kidd appealed to the Missouri Court of Appeals for the Western District of Missouri, claiming that the trial court erred in admitting <sup>370</sup> hearsay statements that did not qualify for an exception; in denying Kidd's request to sever from his co-defendant, Merrill; and in allowing testimony regarding Kidd's nickname as it was unfairly prejudicial.<sup>41</sup> The Missouri Court of Appeals for the Western District of Missouri noted that a portion of the hearsay statements qualified for an exception.<sup>42</sup> Additionally, the court determined the alibi evidence Kidd presented at the trial was not irreconcilable with Merrill's mistaken identity defense, meaning the joint trial did not prejudice Kidd.<sup>43</sup> Finally, the court determined that Harris's testimony regarding the nickname was relevant to describe the murderer's manner or demeanor and, thus, was not unfairly prejudicial.<sup>44</sup> Thus, the appellate court affirmed the trial court's judgment.<sup>45</sup>

Kidd filed a petition for post-conviction relief in the Missouri Court of Appeals due to ineffective assistance of counsel.<sup>46</sup> The Sixth Amendment of the United State Constitution prohibits ineffective assistance of counsel.<sup>47</sup> Kidd alleged that his appellate counsel did not challenge the trial court's determination that Kidd was a prior offender.<sup>48</sup> The appellate court affirmed the denial of Kidd's petition <sup>371</sup> because while Kidd's appellate counsel erred, Kidd did not suffer prejudice as a result.<sup>49</sup> The Missouri Court of Appeals explained Kidd's sentence, life imprisonment without the possibility of parole, was the minimum sentence for non-capital first-degree murder and, thus, the failure to challenge the improper sentencing did not prejudice Kidd.<sup>50</sup>

Kidd filed a petition for habeas corpus in the United State District Court for the Western District of Missouri.<sup>51</sup> The federal district court initially dismissed the petition, but Kidd obtained new counsel and filed a petition for relief for the final judgment based on several ineffective assistance of trial counsel claims.<sup>52</sup> Kidd acknowledged the claims were procedurally defaulted because Kidd did not raise the claims in the proceedings that followed his conviction.<sup>53</sup> However, Kidd claimed that he could circumvent the default by presenting new evidence that proved he was actually innocent of the crime.<sup>54</sup> The district court conducted an evidentiary hearing at which the court reviewed several pieces of new evidence.<sup>55</sup> The court reviewed the new evidence Kidd presented to support his assertion that Gary Godspeed Jr., Gary Godspeed Sr., and Marcus Merrill, Kidd's co-defendant, actually killed George Bryant and Oscar Bridges.<sup>56</sup> The new evidence included testimony from Merrill admitting Kidd was not involved in the murders.<sup>57</sup> Additionally, Kidd presented evidence that Godspeed <sup>372</sup> Sr. had contacted Kidd before the murders, attempting to obtain Kidd's help in robbing Bryant, and Godspeed Sr. confessed to murdering Bridges and Bryant.<sup>58</sup> Furthermore, the evidence included new testimony from eyewitness Richard Harris, which greatly discredited Harris as a witness.<sup>59</sup>

The federal district court denied the petition, reasoning the new evidence upon which Kidd based his claim was available to the defense at the original trial and, thus, did not satisfy the requirements for a showing of actual innocence.<sup>60</sup> The court

determined Merrill's most recent testimony was the only piece of new evidence, and the court deemed Merrill an unreliable witness.<sup>61</sup>

In the face of defeat in the federal district court, Kidd then obtained a certificate of appealability from the United States Court of Appeals for the Eighth Circuit.<sup>62</sup> On appeal to the Eighth Circuit, Kidd claimed the district court erred in applying an overly narrow standard of new evidence.<sup>63</sup> Kidd asserted the Eighth Circuit's standard for new evidence, as laid out in *Amrine v. Bowersox*,<sup>64</sup> was inconsistent with the standard for actual innocence established in *Schlup v. Delo*<sup>65</sup> and *House v. Bell*<sup>66</sup> by the United States Supreme Court.<sup>67</sup>

On appeal, Kidd presented additional new evidence to the Eighth Circuit.<sup>68</sup> The evidence demonstrated Merrill and the Godspeeds traveled from Georgia to Kansas City together a few days before the murders.<sup>69</sup> Additionally, the evidence indicated a close relationship between Merrill and the Godspeeds, including evidence demonstrating \*373 Godspeed Sr. employed Merrill, and Merrill lived with Godspeed Jr. at one point.<sup>70</sup> Godspeed Sr. rented a car the day before the murders that matched the description of the car witnessed leaving the crime scene.<sup>71</sup> Merrill and the Godspeeds were together the morning of the shooting, had access to the guns used in the murders, and communicated their plans to rob someone later that day.<sup>72</sup> Kayla knew Godspeed Jr. as her father's brother, and on two occasions during the murder investigation, Kayla identified the murderer as her father's brother.<sup>73</sup> Beyond establishing the connection between Merrill and the Godspeeds with the murder, Kidd provided evidence that strengthened his alibi and impeached the eyewitness, Harris.<sup>74</sup>

The Eighth Circuit affirmed the denial of Kidd's successive habeas petition.<sup>75</sup> The appellate court reasoned that precedent compelled the court to apply the standard from *Amrine*, which defined new evidence as evidence that was not presented at the original trial and could not have been discovered with reasonable diligence at the time of the original trial.<sup>76</sup> The court determined that all of the new evidence presented by Kidd was not new according to the *Amrine* standard.<sup>77</sup> Due to the factual similarity between *Amrine* and Kidd's case, the Eighth Circuit felt compelled to decide this case in a similar manner and denied Kidd's petition.<sup>78</sup> Kidd then appealed to the United States Supreme Court, which denied certiorari.<sup>79</sup>

### III. BACKGROUND

#### A. THE SUPREME COURT'S GENERAL TREATMENT OF ACTUAL INNOCENCE CLAIMS

##### 1. *The Carrier Standard*

In *Murray v. Carrier*,<sup>80</sup> the United States Supreme Court determined that a petitioner must show cause for a procedural default in \*374 order for the court to address the successive habeas petition.<sup>81</sup> The Court noted that an attorney's inadvertent failure to raise a claim of error in the prior post-conviction proceedings does not show cause for a procedural default; thus, the court cannot hear the defaulted claim.<sup>82</sup> However, a court may hear the petitioner's claim if the petitioner can establish the petitioner's actual innocence.<sup>83</sup> In *Smith v. Commonwealth of Virginia*,<sup>84</sup> the underlying case in *Carrier*, a jury convicted Michael Smith of capital murder following rape.<sup>85</sup> Without his knowledge, Smith's counsel appealed to the Virginia Supreme Court without mentioning certain errors that occurred at trial.<sup>86</sup> However, the Supreme Court denied certiorari, noting that courts only recognize errors assigned within the appeals and the errors were not mentioned in Smith's appeal to the Virginia Supreme Court.<sup>87</sup>

After an additional petition and denial, Smith filed a petition for a writ of habeas corpus.<sup>88</sup> The United States District Court for the Eastern District of Virginia denied the petition, holding that Smith's claimed error regarding the prosecutor withholding the victim's statements was procedurally defaulted because Smith did not raise it in his original appeal to the Virginia Supreme Court.<sup>89</sup>

Smith then appealed to the United States Court of Appeals for the Fourth Circuit, claiming that his attorney inadvertently left the claim of error out of his initial appeal, resulting in the default.<sup>90</sup> Smith argued that because the claim was mistakenly excluded on appeal, the Fourth Circuit should hear his petition.<sup>91</sup> Smith did not assert a Sixth Amendment ineffective assistance of counsel claim because he believed that his attorney had mistakenly, as opposed to intentionally, left the claim out of his appeal.<sup>92</sup> The Fourth Circuit remanded the \*375 case to the district court, reasoning that cause of the default only

needed to be the result of the attorney's inattention or inadvertent action, not necessarily a deliberate tactical strategy.<sup>93</sup> In the face of the remand, the petitioner appealed to an en banc panel in the Fourth Circuit, which determined only deliberate decisions to exclude a claim from a petition for habeas corpus satisfy the cause requirement.<sup>94</sup> The United States Supreme Court ultimately granted certiorari to decide the issue.<sup>95</sup>

The Supreme Court determined the Fourth Circuit erred in applying the wrong standard for evaluating cause of a procedural default.<sup>96</sup> The Court held the petition was procedurally defaulted, yet Smith could bypass that default by showing Smith was actually innocent of the crime.<sup>97</sup> The Court reasoned a petitioner must demonstrate that it is more likely than not a constitutional violation resulted in the conviction of an innocent person.<sup>98</sup>

## **2. The Sawyer Standard**

In *Sawyer v. Whitley*,<sup>99</sup> the United States Supreme Court held that to circumvent the procedural bar to successive habeas corpus petitions based on a showing of actual innocence, the petitioner must show by clear and convincing evidence that but for the constitutional error underlying the petition, no reasonable jury would have sentenced the petitioner to death under state law.<sup>100</sup> In *State v. Sawyer*,<sup>101</sup> the underlying cause of action for *Sawyer v. Whitley*, the state of Louisiana convicted Robert Wayne Sawyer of first-degree murder for the death of Fran Arwood, sentencing Sawyer to death.<sup>102</sup> The \*376 sentence was based on evidence that Sawyer committed aggravated arson at the time of the murder by dousing the victim with lighter fluid and lighting her on fire.<sup>103</sup> The trial court determined that the aggravated arson was an aggravating circumstance, justifying a death sentence under Louisiana state law.<sup>104</sup> The Supreme Court of Louisiana affirmed Sawyer's conviction, reasoning the evidence used to convict Sawyer showed Sawyer possessed the intent to commit murder.<sup>105</sup>

Sawyer filed a petition for habeas corpus in the United States District Court for the Eastern District of Louisiana, but the federal district court denied relief because Sawyer failed to base his petition on a constitutional violation.<sup>106</sup> The United States Court of Appeals for the Fifth Circuit affirmed the denial because the petition did not warrant relief.<sup>107</sup>

After a series of appeals and petitions for post-conviction relief, including two writs of certiorari to the United States Supreme Court, Sawyer finally reached the Supreme Court in 1992.<sup>108</sup> The Supreme Court granted certiorari to review the petitioner's second petition for habeas relief based upon Sawyer's claim that he was actually innocent of the crime.<sup>109</sup> Sawyer contended the Fifth Circuit erred in 1) determining Sawyer did not sufficiently demonstrate the cause of his failure to raise certain claims in his first habeas petition and 2) finding Sawyer failed to demonstrate his actual innocence of the crime.<sup>110</sup> Sawyer asserted because the Fifth Circuit noted that Sawyer failed to demonstrate his actual innocence of the crime, the Fifth Circuit could not reach the merits of the claim.<sup>111</sup>

The Supreme Court reasoned that if a petitioner cannot show cause for the failure to raise the issues in his first petition and prejudice resulting therefrom, the petitioner can still circumvent the general bar to a second petition if the petitioner can show that the petitioner was actually innocent of the crime.<sup>112</sup> The Court emphasized \*377 that a petitioner must demonstrate by clear and convincing evidence that without constitutional error in failing to present the evidence underlying the claim of actual innocence, no reasonable juror could have determined that the defendant was eligible for a sentence of death.<sup>113</sup> The Court held that Sawyer failed to meet this standard and, thus, affirmed the second denial of Sawyer's habeas corpus petition.<sup>114</sup>

## **3. Schlup v. Delo: Supreme Court Adopts the Carrier Standard Instead of the Sawyer Standard for Purposes of the Actual Innocence Gateway**

In *Schlup v. Delo*,<sup>115</sup> the United States Supreme Court determined the standard established in *Murray v. Carrier*, rather than the standard established in *Sawyer v. Whitley*, applies to procedurally barred successive petitioners for habeas corpus when the petitioner claims to be actually innocent of the crime.<sup>116</sup> In *Schlup*, a Missouri jury convicted Lloyd Schlup, a prisoner in a Missouri penitentiary, for assisting in the murder of another inmate.<sup>117</sup> The trial court sentenced Schlup to death.<sup>118</sup> Through a petition for habeas corpus in the United States District Court for the Eastern District of Missouri, Schlup asserted that because of the ineffective assistance of his counsel, the trial court did not contemplate evidence that showed he was actually innocent of the crime.<sup>119</sup> The district court refused to review the evidence in question, reasoning that Schlup's petition did not satisfy the *Sawyer* standard by showing with clear and convincing evidence that but for the underlying constitutional error, no

reasonable juror would determine Schlup was guilty.<sup>120</sup>

Schlup appealed to the United States Court of Appeals for the Eighth Circuit, claiming the district court erred in 1) failing to reach the merits of his claim because evidence demonstrated cause and prejudice and 2) failing to find that he was actually innocent of the murder.<sup>121</sup> The Eighth Circuit affirmed the district court's denial of Schlup's cause and prejudice claim as well as his actual innocence claim.<sup>122</sup> The court reasoned that Schlup failed to meet the *Sawyer* \*378 standard requiring clear and convincing evidence that no reasonable juror would have found him guilty of murder.<sup>123</sup>

Schlup then appealed to the United States Supreme Court, which granted certiorari to decide whether the *Carrier* standard or the more stringent *Sawyer* standard was more appropriate in procedurally barred habeas claims where a petitioner asserts his actual innocence.<sup>124</sup> In reviewing both standards, the Court determined the *Carrier* standard was more appropriate in reviewing actual innocence claims.<sup>125</sup> The Court recognized that society's interest in finality, comity, and preservation of judicial resources generally prohibits courts from examining the merits of a second habeas petition.<sup>126</sup> However, the Court emphasized these interests must be balanced against society's interest in preventing a fundamental miscarriage of justice.<sup>127</sup>

The Court determined that the standard from *Carrier*, as opposed to the *Sawyer* standard, incorporated the balance of these interests when the petitioner asserts that but for a constitutional violation the petitioner would not have been convicted.<sup>128</sup> The Court noted that a petitioner must base his or her innocence claim on new evidence that was not presented at the original trial.<sup>129</sup> The Court reasoned that the qualifications for actual innocence, namely that the petitioner is actually innocent of the crime and can support the claim with new, reliable evidence that was not presented at the trial level, are met in so few cases, so the less stringent *Carrier* standard adequately protects the individual's interest in preventing the fundamental injustice of a death sentence for an innocent person while not posing a significant threat to comity, finality, and preservations of judicial resources.<sup>130</sup> When a petitioner asserts an actual innocence claim to circumvent a procedural default to successive petitions for habeas corpus, the *Sawyer* standard does not adequately protect an individual's interest in avoiding a fundamental miscarriage of justice.<sup>131</sup>

## **\*379 B. THE CIRCUIT SPLIT**

### ***1. Application of the Broader Understanding of New Evidence: The Seventh and Ninth Circuits***

#### **a. The Seventh Circuit: *Gomez v. Jaimet***

In *Gomez v. Jaimet*,<sup>132</sup> the United States Court of Appeals for the Seventh Circuit determined a petitioner need only supply evidence newly presented to the court, as opposed to evidence not discoverable at the original trial with an exercise of due diligence, to support a claim of actual innocence in a procedurally barred habeas petition.<sup>133</sup> In *Gomez*, an Illinois trial court convicted Ariel Gomez of first-degree murder and sentenced him to thirty-five years in prison following a fatal drive-by shooting at a Chicago bus stop.<sup>134</sup> During trial, Gomez's attorney did not allow Gomez to testify.<sup>135</sup> Gomez appealed his conviction to the Illinois Appellate Court, asserting that he did not voluntarily waive the constitutional right to testify on his own behalf, and, therefore, Gomez's trial counsel was ineffective.<sup>136</sup> However, the appellate court affirmed his conviction.<sup>137</sup> Gomez then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, which denied the petition.<sup>138</sup> The district court reasoned that the ineffective assistance of counsel claim upon which Gomez based his petition was procedurally defaulted because Gomez had not raised the claim in his motion for a new trial in Illinois state court.<sup>139</sup> Additionally, the court noted Gomez did not demonstrate he was actually innocent of the murder as required to circumvent the procedural default.<sup>140</sup>

Gomez then appealed to the United States Court of Appeals for the Seventh Circuit, asserting that his claim of actual innocence overcame the procedural default.<sup>141</sup> The Seventh Circuit emphasized Gomez must support the actual innocence claim with new reliable evidence that was not presented at trial.<sup>142</sup> The State argued Gomez must support his claim of actual innocence with newly discovered reliable \*380 evidence.<sup>143</sup> In response, the Seventh Circuit noted there was nothing in *Schlup v. Delo*<sup>144</sup> to indicate that new evidence needed to be unavailable at the original trial.<sup>145</sup> The court went on to explain that requiring new evidence to be newly discoverable when a petitioner asserts an ineffective assistance of counsel claim would add a roadblock to the actual innocence gateway laid out in *Schlup*.<sup>146</sup> The court determined the standard for an actual



innocence gateway claim is sufficiently stringent and noted it was inappropriate to develop an additional roadblock that had no Supreme Court approval.<sup>147</sup>

#### **b. The Ninth Circuit: *Griffin v. Johnson***

In *Griffin v. Johnson*,<sup>148</sup> the United States Court of Appeals for the Ninth Circuit held that to circumvent a procedural bar to a successive habeas corpus petition based on a claim of actual innocence, the petitioner must present new, reliable evidence that was not presented at the original trial.<sup>149</sup> In *Griffin*, James Griffin was indicted for intentional murder in Oregon state court.<sup>150</sup> Griffin, encouraged by his attorney, accepted a plea bargain for a twenty-five year prison sentence after a key expert witness changed his testimony immediately before trial.<sup>151</sup> However, Griffin later applied for post-conviction relief in Oregon state court where, as required by Oregon state law, he asserted that he did not voluntarily or intelligently admit guilt.<sup>152</sup> Griffin also asserted ineffective assistance of counsel claims because Griffin's attorney refused to investigate Griffin's mental illness.<sup>153</sup> Griffin did not present any evidence to support either claims in the post-conviction \*381 hearing so the court affirmed his conviction.<sup>154</sup> Griffin then appealed to the Oregon Court of Appeals based on a claim that his trial attorney had a conflict of interest.<sup>155</sup> The court of appeals also affirmed Griffin's conviction.<sup>156</sup>

Griffin then petitioned for federal habeas corpus relief to the United States District Court for the District of Oregon based, in part, on an ineffective assistance of counsel claim.<sup>157</sup> The district court denied the petition, reasoning Griffin's claims were procedurally defaulted because Griffin failed to show cause and prejudice or actual innocence to bypass the procedural default on his claim.<sup>158</sup> However, the district court issued a certificate of appealability for Griffin's ineffective assistance of counsel claim.<sup>159</sup>

Griffin appealed to the United States Court of Appeals for the Ninth Circuit, claiming the new evidence presented to support his claim of actual innocence only needed to be newly presented, not newly discovered.<sup>160</sup> The Ninth Circuit noted the United States Supreme Court's discussion of newly presented evidence versus newly discovered evidence in *Schlup*.<sup>161</sup> Consequently, the Ninth Circuit determined that evidence used to support a claim of actual innocence needs only to be newly presented, not newly discovered.<sup>162</sup> The Ninth Circuit determined that in light of the newly presented evidence furnished by Griffin, it was still not more likely than not that no reasonable juror would have convicted Griffin of the crime; therefore, the Ninth Circuit affirmed the decision of the district court.<sup>163</sup>

### **\*382 2. Application of the Moderate Understanding of New Evidence: The Third Circuit**

#### **a. The Third Circuit: *Hubbard v. Pinchack***

In *Hubbard v. Pinchack*,<sup>164</sup> the United States Court of Appeals for the Third Circuit determined that new evidence used to support a claim of actual innocence in a procedurally barred habeas petition is sufficient if it is not simply a repackaging of the evidence shown at trial.<sup>165</sup> In *Hubbard*, the State of New Jersey convicted Frank Hubbard of murder.<sup>166</sup> Hubbard appealed the conviction through the state court system without success.<sup>167</sup> Hubbard then filed a petition for habeas corpus in the United States District Court for the District of New Jersey.<sup>168</sup> The district court denied Hubbard's first habeas petition, reasoning the claims Hubbard presented, including a claim of ineffective assistance of counsel, were procedurally defaulted because he did not assert the claims in his state court proceedings.<sup>169</sup>

Hubbard then appealed to the Third Circuit, claiming that the district court erred in denying his petition for habeas relief based on actual innocence.<sup>170</sup> The Third Circuit affirmed the denial of postconviction relief, reasoning that the only new evidence that Hubbard set forth to support his claim of actual innocence was his own testimony.<sup>171</sup> The court reasoned that allowing a defendant's own testimony to satisfy the new evidence requirement for an actual innocence claim would set the bar far too low, allowing almost anyone to pass through the actual innocence gateway.<sup>172</sup>

#### **b. The Third Circuit: *Houck v. Stickman***

In *Houck v. Stickman*,<sup>173</sup> the United States Court of Appeals for the Third Circuit determined that evidence used to support a claim of actual innocence only needs to be newly presented evidence if that same evidence is used to support the underlying

ineffective assistance of counsel claim.<sup>174</sup> In *Houck*, Houck was prosecuted for and convicted \*383 of kidnapping, among several other charges.<sup>175</sup> Houck filed a petition for state habeas corpus relief, which did not contain an ineffective assistance of counsel claim based on Houck's counsel's failure to raise an alibi defense in his original trial, but he did raise other ineffective assistance of counsel claims.<sup>176</sup> Houck's petition was denied in state trial court as well as state appellate court.<sup>177</sup> Houck then filed a petition for habeas corpus in the United States District Court for the Western District of Pennsylvania, again asserting ineffective assistance of counsel claims, which included a claim regarding his alibi defense.<sup>178</sup> The district court denied the petition because the claims were procedurally barred.<sup>179</sup> The court noted that Houck did not establish cause and prejudice or actual innocence, which is required to circumvent the procedural bar.<sup>180</sup> Thereafter, however, the court granted Houck a certificate of appealability to address the actual innocence claim.<sup>181</sup>

Houck appealed to the United States Court of Appeals for the Third Circuit.<sup>182</sup> The Third Circuit noted that it chose to review Houck's claim because Houck asserted that he was actually innocent of the crime and Houck insisted that but for the constitutional violation in his original trial, he would not have been convicted.<sup>183</sup> The Third Circuit emphasized that Houck would need to demonstrate that he was actually innocent based on new, reliable evidence and that it was more likely than not that no reasonable juror would have convicted Houck.<sup>184</sup> Thus, reasoning that Houck did not present a preponderance of evidence proving that no reasonable juror would find him guilty, the Third Circuit affirmed the district court's denial.<sup>185</sup>

Despite denying post-conviction relief, the Third Circuit importantly noted that it would be unfair to require new evidence to be newly presented and not available at the time of the original trial with an exercise of due diligence in ineffective assistance of counsel claims that were predicated on the counsel's failure to uncover or present exculpatory evidence at trial.<sup>186</sup> The court reasoned that to circumvent \*384 the procedural bar to the subsequent habeas petition, a petitioner must present new, reliable evidence to prove actual innocence.<sup>187</sup> If the petitioner could present new, reliable evidence, the court could reach the merits of the ineffective assistance of counsel claim.<sup>188</sup>

The problem is, the court noted, if the petition bases the ineffective assistance of counsel claim on the attorney's failure to discover exculpatory evidence at the time of the original trial, the very evidence that proves the ineffective assistance of counsel claim cannot be used to support the actual innocence claim because it would not be considered new by the more restrictive standard.<sup>189</sup> The situation would place the petitioner in a catch twenty-two in that the petitioner must assert the evidence is new and could not have been discovered with due diligence to pass through the actual innocence gateway.<sup>190</sup> After the petitioner gets through the gateway, the petitioner then must assert that the evidence could have been discovered with due diligence to prove that the counsel was ineffective.<sup>191</sup> The court determined that requiring evidence to be newly presented to support an actual innocence claim is a more equitable approach when the underlying constitutional violation is ineffective assistance of counsel based on the attorney not discovering exculpatory evidence.<sup>192</sup> Even in light of the new approach, Houck's evidence was insufficient to reach the threshold requirement, which mandates that it be more likely than not that no reasonable juror would have convicted Houck in light of the new evidence.<sup>193</sup>

### 3. Application of the Narrow Understanding of New Evidence: The Eighth Circuit

#### a. The Eighth Circuit: *Amrine v. Bowersox*

In *Amrine v. Bowersox*,<sup>194</sup> the United States Court of Appeals for the Eighth Circuit determined new evidence must be newly presented and not available at the original trial with an exercise of due diligence.<sup>195</sup> In *Amrine*, the State of Missouri prosecuted and convicted Joseph Amrine, then a prisoner in a federal penitentiary, for the murder \*385 of a fellow inmate.<sup>196</sup> The Missouri Supreme Court affirmed Amrine's conviction and denied his subsequent request for post-conviction relief.<sup>197</sup> Amrine then filed a petition for a writ of habeas corpus in the United States District Court for the Western District of Missouri.<sup>198</sup> The district court denied Amrine's first petition of habeas corpus.<sup>199</sup> Amrine filed an amended petition in district court, intending to bypass the procedural bar by asserting a claim of actual innocence.<sup>200</sup> However, the district court again denied his claim, determining the new evidence Amrine used to support the claim of actual innocence was not reliable, as mandated by the Supreme Court.<sup>201</sup>

Amrine then appealed to the Eighth Circuit, claiming the district court misapplied *Schlup v. Delo* by requiring the evidence be unavailable with an exercise of diligence at the time of the original trial.<sup>202</sup> The Eighth Circuit affirmed the denial, reasoning that most of the new evidence presented by Amrine would have been available at the first trial and the only piece

of legitimately new evidence was unreliable.<sup>203</sup>

#### **b. The Eighth Circuit: *Nash v. Russell***

In *Nash v. Russell*,<sup>204</sup> the United States Court of Appeals for the Eighth Circuit affirmed the denial of Donald Nash's second federal petition for habeas corpus, reasoning Nash failed to present new evidence that had not been presented at his trial and could not have been discovered with an exercise of diligence to support his actual innocence claim.<sup>205</sup> The murder of Judy Spencer had remained unsolved until 2007, at which point investigators reopened the investigation to analyze DNA evidence found on Spencer's body.<sup>206</sup> After investigators determined Nash's DNA matched the DNA found under Spencer's fingernails, \*386 Nash was charged with capital murder and convicted in Missouri state court in 2009.<sup>207</sup>

At Nash's trial, the state moved to exclude evidence indicating another potential suspect, which the court granted.<sup>208</sup> Nash filed a direct appeal based in part on the trial court excluding the third party suspect evidence in violation of Nash's Sixth Amendment rights.<sup>209</sup> The Missouri Supreme Court affirmed Nash's conviction, and Nash failed to file a motion for post-conviction relief in a timely manner.<sup>210</sup>

Nash then filed a petition for habeas corpus in the United States District Court for the Eastern District of Missouri, alleging Nash's actual innocence amongst other claims.<sup>211</sup> The court denied Nash's motion to amend his petition for habeas corpus to include new evidence supporting the claim.<sup>212</sup> Nash appealed to the Eighth Circuit, which affirmed the denial of the district court.<sup>213</sup> The Eighth Circuit reasoned the *Amrine* standard applied to new evidence in claims of actual innocence, which requires new evidence to not have been presented at the original trial and could not have been discovered earlier with an exercise of due diligence.<sup>214</sup> The court determined, without extensive elaboration, the evidence Nash presented was not new under the *Amrine* standard.<sup>215</sup> Thus, the Eighth Circuit determined Nash was not eligible for habeas relief in federal court, and affirmed the judgment of the district court.<sup>216</sup>

#### **\*387 C. THE SUPREME COURT'S APPLICATION OF NEW EVIDENCE IN *HOUSE V. BELL***

In *House v. Bell*,<sup>217</sup> the United States Supreme Court determined the standard for invoking actual innocence to circumvent a procedural bar to a successive habeas petition is not the same as the standard for invoking claims under the Anti-Terrorism and Effective Death Penalty Act of 1996<sup>218</sup> governing claims of insufficient evidence.<sup>219</sup> In *House*, the State of Tennessee prosecuted and convicted Paul Gregory House for murder, sentencing him to death.<sup>220</sup> The Tennessee Supreme Court affirmed House's conviction and subsequently denied two petitions for post-conviction relief.<sup>221</sup> House filed a petition for habeas corpus in the United States District Court for the Eastern District of Tennessee based on several ineffective assistance of counsel claims.<sup>222</sup> The district court determined that the petition was procedurally defaulted but held an evidentiary hearing to determine if House's new evidence satisfied either the standard from *Schlup v. Delo*<sup>223</sup> for actual innocence or the standard from *Sawyer v. Whitely*<sup>224</sup> for ineligibility for the death penalty.<sup>225</sup> The court determined that House's evidence did not satisfy either standard and, thus, denied House's petition for relief.<sup>226</sup>

House appealed to the United States Court of Appeals for the Sixth Circuit.<sup>227</sup> In a split en banc decision, the Sixth Circuit affirmed the denial of the writ of habeas corpus.<sup>228</sup> However, the six dissenting judges argued House had met the lesser *Schlup* standard for actual innocence, which required that in light of new evidence, it was more likely than not that no reasonable juror would have convicted \*388 House for the murder.<sup>229</sup> The majority of the en banc panel agreed with the district court, reasoning House's new evidence fell short of the requirements in *Schlup* and *Sawyer*.<sup>230</sup>

The Supreme Court granted certiorari and reversed the Sixth Circuit's ruling.<sup>231</sup> The Court noted in light of House's new evidence, it was more likely than not that no reasonable juror would have convicted House; therefore, the claim satisfied the *Schlup* standard for actual innocence.<sup>232</sup> House's new evidence consisted of DNA evidence, bloodstains on House's clothing, a new suspect, and testimony from witnesses.<sup>233</sup> The Supreme Court did not specifically determine the definition for new evidence in an actual innocence claim but determined that House's claim did meet the exacting standard under *Schlup*.<sup>234</sup> The Court reversed the denial of House's procedurally barred petition for habeas corpus and remanded the case back to the Sixth Circuit for proceedings consistent with the opinion.<sup>235</sup>



#### IV. ANALYSIS

In *Kidd v. Norman*,<sup>236</sup> the United States Court of Appeals for the Eighth Circuit incorrectly applied the narrowest definition of new evidence to evaluate Ricky Kidd's actual innocence claim for procedurally defaulted petitions for habeas corpus.<sup>237</sup> The Eighth Circuit erred in \*389 its definition of new evidence in an actual innocence claim due to the purposes underlying the actual innocence gateway in *Schlup v. Delo*,<sup>238</sup> the Supreme Court's use of new evidence in *House v. Bell*,<sup>239</sup> the inapplicability of the Eighth Circuit's definition to a petitioner's claim when the underlying constitutional violation is the ineffective assistance of counsel, and the exacerbation of the fundamental miscarriage of justice the actual innocence gateway is designed to prevent.<sup>240</sup>

After a jury convicted Kidd of first-degree murder, Kidd unsuccessfully appealed the conviction through the Missouri state judicial system.<sup>241</sup> Eventually, Kidd filed a writ of habeas corpus in the United States District Court for the Western District of Missouri, arguing he had a colorable ineffective assistance of counsel claim.<sup>242</sup> Although Kidd acknowledged he failed to raise the ineffective assistance of counsel claims in his state post-conviction proceedings, which generally default the claims, Kidd argued that the court should still address the procedurally defaulted claims because Kidd could show actual innocence.<sup>243</sup>

The district court denied the petition, reasoning that Kidd failed to present new, reliable evidence to support his claims, as required by the *Schlup* standard.<sup>244</sup> The *Schlup* standard, as created by the United States Supreme Court, allows a petitioner to escape a procedural default, such as a failure to raise an ineffective assistance of counsel claim in an earlier proceeding, if the habeas corpus petition is based on a constitutional violation.<sup>245</sup> A petitioner must demonstrate with new, reliable evidence that the petitioner is actually innocent of the crime.<sup>246</sup> Upon Kidd's appeal, the United States Court of Appeals for the Eighth Circuit determined the standard announced in *Amrine v. Bowersox*,<sup>247</sup> requiring that evidence supporting an actual innocence \*390 claim to have been unavailable and undiscoverable with an exercise of due diligence at the time of the original trial, was the appropriate standard to apply per stare decisis.<sup>248</sup>

First, this Analysis will show that new evidence for the purposes of an actual innocence gateway claim should be interpreted as evidence that is newly presented in order to be consistent with the purposes underlying *Schlup*.<sup>249</sup> Next, this Analysis will review the United States Supreme Court's decision in *House v. Bell*, specifically the Court's examination of newly presented, but previously available, evidence.<sup>250</sup> Then, this Analysis will demonstrate that the Eighth Circuit's definition of new evidence improperly precludes the actual innocence gateway for certain Sixth Amendment claims involving ineffective assistance of counsel.<sup>251</sup> Finally, this Analysis will expose the Eighth Circuit's error in continually applying the *Amrine* standard to actual innocence gateway claims because of its misquotation of *Schlup*, its inappropriate reliance on stare decisis, and its exacerbation of the very fundamental miscarriage of justice that the actual innocence gateway was designed to prevent.<sup>252</sup>

##### A. THE EIGHTH CIRCUIT'S APPLICATION OF THE AMRINE STANDARD IS INCONSISTENT WITH THE PURPOSES UNDERLYING SCHLUP V. DELO

In *Schlup v. Delo*,<sup>253</sup> the Supreme Court acknowledged that the purpose of the actual innocence gateway was to balance the societal interest in finality, comity, and preservation of judicial resources with the accused individual's interest in preventing a fundamental miscarriage of justice.<sup>254</sup> To fulfill this purpose, the Supreme Court established a general disposition regarding the actual innocence gateway--a disposition of lenience over stringency.<sup>255</sup> Specifically, regarding the standard to prove claims of actual innocence, the *Schlup* Court determined that applying a more lenient standard of proof was more appropriate than a restrictive standard of proof because justice merits extra protection.<sup>256</sup>

\*391 Specifically, the standard from *Murray v. Carrier*<sup>257</sup> and the standard from *Sawyer v. Whitley*<sup>258</sup> both refer to the standard of proof required to raise an actual innocence claim after successive habeas petitions; however, they differ in the level of proof required.<sup>259</sup> The *Carrier* standard requires a petitioner whose second habeas petition is procedurally barred to show that it is more likely than not that no reasonable juror would have found the petitioner guilty beyond a reasonable doubt.<sup>260</sup> The *Sawyer* standard requires that a petitioner show by clear and convincing evidence that without the constitutional error underlying the claim of actual innocence, no reasonable juror would have found the petitioner eligible for the death penalty.<sup>261</sup> Therefore, as the Court noted in *Schlup*, the standard in *Carrier* is much more lenient.<sup>262</sup> Thus, to remain consistent with the purposes of the actual innocence gateway, the Supreme Court indicated courts must apply the more lenient *Carrier*

standard.<sup>263</sup> In designating the *Carrier* standard as the appropriate standard of proof, the Supreme Court demonstrated its proclivity toward a more forgiving treatment of actual innocence claims, especially in light of the possible extreme injustice at stake.<sup>264</sup>

Because the purpose of the actual innocence gateway is to balance the state's interests in finality, comity, and preservation of judicial resources with an individual's interest in justice if the individual is actually innocent of the crime, the Supreme Court determined that extra judicial protection is crucial in selecting the appropriate standard of proof.<sup>265</sup> Despite the Court's proclivity of leniency regarding actual innocence claims, the Eighth Circuit has repeatedly required defendants to meet an additional burden for actual innocence claims through its *Amrine* standard, which requires new evidence for purposes of the actual innocence gateway be newly presented and not available at the original trial with an exercise of due diligence.<sup>266</sup> The Eighth Circuit \*392 is not ignorant of the additional burden it applies.<sup>267</sup> By applying the *Amrine* standard, the Eighth Circuit imposes a burden above that imposed by other circuits and in contravention of the Supreme Court's general disposition of leniency toward actual innocence claims.<sup>268</sup> Therefore, the Eighth Circuit's application of the *Amrine* standard is inconsistent with protecting the individual's interest in avoiding injustice if the individual is actually innocent of the crime.<sup>269</sup> As a result, the Eighth Circuit erred in *Kidd v. Norman*<sup>270</sup> because the *Amrine* standard is inconsistent with the purposes underlying *Schlup*, which established the requirements of the actual innocence gateway.<sup>271</sup>

## **B. THE SUPREME COURT'S USE OF NEW EVIDENCE IN HOUSE V. BELL INVALIDATES THE EIGHTH CIRCUIT'S USE OF THE AMRINE STANDARD**

In *Kidd v. Norman*,<sup>272</sup> Kidd argued that the United States Supreme Court's decision in *House v. Bell*<sup>273</sup> invalidated the use of the \*393 Eighth Circuit's *Amrine* standard.<sup>274</sup> The United States Court of Appeals for the Eighth Circuit rejected this argument, reasoning the relevant issue in *House* was what standard of review applied to claims of actual innocence.<sup>275</sup> The Eighth Circuit thus stated that the issue in *House* did not address the definition of new evidence within the actual innocence standard.<sup>276</sup> However, in *House*, the Court acknowledged that the *Schlup* standard, developed in *Schulp v. Delo*,<sup>277</sup> requires the court reviewing the habeas petition to evaluate all evidence to determine whether a reasonable juror would have been more likely than not to find the petitioner guilty.<sup>278</sup> The Court in *Schlup* specifically noted that the more stringent standard in *Sawyer v. Whitley*,<sup>279</sup> which required that a petitioner make his case by clear and convincing evidence, was not the appropriate standard.<sup>280</sup>

In *House*, Paul Gregory House, convicted of capital murder, presented new evidence to circumvent the procedural bar to his petition for habeas corpus.<sup>281</sup> This evidence included the testimony of several people, evidence that semen consistent with House's DNA was on the nightgown and underwear of the victim, and evidence showing the victim's blood was on House's jeans.<sup>282</sup> However, before analyzing this evidence, the Court emphasized that House must present new, reliable evidence to support his actual innocence claim.<sup>283</sup> The Court noted that there was no dispute that House had presented some new, reliable evidence.<sup>284</sup> More specifically, House presented evidence that \*394 the bloodstains on House's clothing resulted from a mishandling of the evidence while in police custody and the testimony of several individuals implicated the victim's husband as the real murderer.<sup>285</sup> The bloodstain evidence was used to convict House in the state court trial and, thus, would have been available for testing at the time of the initial trial.<sup>286</sup> Further, the testimony implicating a different suspect could have been discovered at the original trial if House's attorney conducted a more diligent investigation.<sup>287</sup> This evidence that the Court determined was new and reliable to satisfy House's actual innocence claim was newly presented to the Court.<sup>288</sup> However, the evidence could have been discovered at the original trial with an exercise of diligence.<sup>289</sup> The Court considered the evidence and determined it \*395 was sufficient to satisfy House's actual innocence gateway claim, reversing the opinion of the appellate court.<sup>290</sup>

Thus, the Court implicitly determined that evidence is new and reliable when it is used to support a claim for actual innocence in a procedurally barred successive petition for habeas corpus if that evidence is newly presented to the Court, even though it could have been discovered with an exercise of diligence at the time of the original trial.<sup>291</sup> In applying the *Amrine* standard to claims of actual innocence, the Eighth Circuit requires that new evidence be newly presented to the court and requires that the evidence would have been undiscoverable at the original trial with an exercise of diligence.<sup>292</sup> Therefore, the Eighth Circuit's continued application of the *Amrine* standard is inappropriate because it imposes a burden upon a showing of actual innocence beyond that required by the United States Supreme Court.<sup>293</sup>

### C. THE SCHLUP ACTUAL INNOCENCE GATEWAY APPLIES TO SIXTH AMENDMENT INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

The actual innocence gateway from *Schlup v. Delo*<sup>294</sup> provides the means for a court to hear a procedurally barred petition for habeas corpus regarding a claim of actual innocence if the petition is based upon an underlying constitutional violation.<sup>295</sup> Ineffective assistance of counsel is considered a violation of the Sixth Amendment of the United States Constitution.<sup>296</sup> Therefore, the actual innocence gateway from *Schlup* provides a means for procedurally barred claims of \*396 actual innocence to be heard if the petitions are based on ineffective assistance of counsel claims.<sup>297</sup>

The United States Supreme Court allows a defendant to use new evidence to support a claim of actual innocence if the claim is based on an underlying ineffective assistance of counsel claim.<sup>298</sup> Ineffective assistance of counsel claims can and have included allegations that an attorney failed to discover or improperly utilized evidence that was available at the original trial.<sup>299</sup> In *Kidd v. Norman*,<sup>300</sup> Kidd requested the court to analyze evidence that his attorney could have discovered or better utilized with due diligence at the time of Kidd's trial.<sup>301</sup> This evidence could have demonstrated to a jury that Kidd's co-defendant, Merrill, had a strong relationship with the alternative suspects, which associated them in the days leading up to the murder; that Kidd had an alibi; that the victim's daughter implicated the alternative suspects in the murder; and that a vital witness was under the influence of drugs at the time of the murder.<sup>302</sup>

\*397 The quandary arises under the Eighth Circuit's application of the *Amrine* standard.<sup>303</sup> In order to pass through the actual innocence gateway so that a court will address the merits of the underlying ineffective assistance of counsel claim, the Eighth Circuit requires a defendant like Kidd to assert that all of the evidence used to support the claim could not have been discovered at the original trial with an exercise of due diligence.<sup>304</sup> However, after a defendant passes through the actual innocence gateway, in order to find the defendant had ineffective assistance of counsel, that same court would then require the defendant to assert that the same evidence that the petitioner used to support the claim could have been discovered with an exercise of diligence, his or her attorney did not exercise that diligence, and as a result, the attorney was constitutionally ineffective.<sup>305</sup> Thus, a defendant claiming actual innocence based on an ineffective assistance of counsel claim is caught in the ultimate catch twenty-two.<sup>306</sup> Therefore, courts should allow a defendant to use new evidence--meaning evidence that is newly presented to the court but that may have been available at the original trial with an exercise of due diligence-- when the underlying constitutional violation is a Sixth Amendment ineffective assistance of counsel claim, as it was in *Kidd*.<sup>307</sup>

### D. DISMANTLING THE AMRINE STANDARD

#### 1. The Eighth Circuit Misquoted the United States Supreme Court's Definition of New Evidence in *Schlup v. Delo*

In *Amrine v. Bowersox*,<sup>308</sup> the United States Court of Appeals for the Eighth Circuit misquoted the standard for new evidence from \*398 *Schlup v. Delo*<sup>309</sup> established by the United States Supreme Court.<sup>310</sup> In *Amrine*, the Eighth Circuit noted that the district court properly applied the standard for new evidence in an actual innocence gateway claim consistent with the Supreme Court's definition in *Schlup*.<sup>311</sup> The appellate court elaborated that evidence is only new for the purposes of an actual innocence claim if it was not available at the original trial and could not have been found at the original trial with an exercise of due diligence.<sup>312</sup> However, in *Schlup*, the Supreme Court did not say anything to indicate a requirement that evidence be unavailable at the original trial with an exercise of due diligence.<sup>313</sup> Instead, the Court determined an actual innocence claim must only be supported with new, reliable evidence that was not presented at the original trial.<sup>314</sup> Thus, in *Amrine*, the Eighth Circuit improperly stated the Supreme Court's *Schlup* standard for new evidence in an actual innocence claim.<sup>315</sup>

#### 2. *Stare Decisis* is Inappropriate When a Fundamental Miscarriage of Justice is at Stake

The United States Supreme Court determined that the concept of *stare decisis* is not an ironclad doctrine that must be followed in every case, particularly when there are constitutional issues involved.<sup>316</sup> Specifically, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>317</sup> the Court determined that a judgment must be influenced by prudential and practical concerns to test the effect of overruling or affirming a prior holding.<sup>318</sup> The Court further explained that when determining whether precedent is applicable, courts may examine if the precedent has proven to be unworkable in practice, the consequences and potential inequality of overruling, whether the rule is an anachronistic relic in relation to how the law has

developed, and \*399 whether facts or culture are viewed so differently that the rule is no longer applicable or justifiable.<sup>319</sup>

The *Amrine* standard is unworkable in practice because it makes the actual innocence gateway completely inaccessible to procedurally defaulted claims asserting ineffective assistance of counsel.<sup>320</sup> The *Amrine* standard requires the new evidence used to support an actual innocence gateway claim to be newly presented and undiscoverable at the original trial with an exercise of due diligence.<sup>321</sup> The additional burden of the *Amrine* standard in the Eighth Circuit creates a catch twenty-two for petitioners asserting an underlying ineffective assistance of counsel claim; thus, it is unworkable in practice.<sup>322</sup> In *Kidd v. Norman*,<sup>323</sup> the Eighth Circuit itself acknowledged that the United States Court of Appeals for the Third Circuit's more moderate approach to new evidence may be more appropriate in circumstances where the petitioner asserts an underlying ineffective assistance of counsel claim.<sup>324</sup> However, ignoring this reasoning, the Eighth Circuit still chose to apply the *Amrine* standard based on stare decisis.<sup>325</sup>

It is unlikely that modifying or eliminating the requirements of the *Amrine* standard will have unfair consequences on those who have reasonably relied on the rule because the United States Courts of Appeal for the Third, Seventh, and Ninth Circuits have all developed definitions of new evidence that do not create the issues inherent in the *Amrine* standard.<sup>326</sup> The alternative standards demonstrate the \*400 Eighth Circuit could depart from stare decisis without significant consequences on the actual innocence gateway or procedurally barred petitions for habeas corpus.<sup>327</sup>

While the *Amrine* standard is not necessarily outdated, the law surrounding the actual innocence gateway has developed to preserve its original purpose.<sup>328</sup> The purpose of the actual innocence gateway is to balance the state's interest in finality, comity, and preservation of judicial resources with an individual's interest in avoiding a fundamental miscarriage of justice.<sup>329</sup> As demonstrated, the *Amrine* standard circumvents that purpose by applying an additional burden for defendants claiming actual innocence.<sup>330</sup> The standard was ineffective when the Eighth Circuit originally decided *Amrine* and is ineffective as actual innocence gateway jurisprudence has developed.<sup>331</sup>

Finally, society and culture have developed in a way that favors justice and a well-functioning legal system.<sup>332</sup> Advancements in technology \*401 and DNA testing have resulted in exoneration of as many as 347 innocent men and women, and society is privy--more than ever--to the systemic injustices linked to many guilty verdicts.<sup>333</sup> In light of the increasing importance of equitable principles in society, the Eighth Circuit's continued application of a standard that the court itself recognized as one that undercuts equity is erroneous.<sup>334</sup>

The Supreme Court determined there are circumstances where it is appropriate and necessary to depart from precedent in order to preserve justice.<sup>335</sup> The Supreme Court has even demonstrated this to be true in the context of the actual innocence gateway in *Schlup* when the Court noted that its sworn allegiance to the doctrine of stare decisis did not preclude it from applying the more lenient standard of proof in *Murray v. Carrier*<sup>336</sup> to claims of actual innocence.<sup>337</sup> Particularly in *Kidd*, the Eighth Circuit recognized the issues of unfairness inherent in the *Amrine* standard, yet insisted it was bound to apply the standard to Ricky Kidd because of stare decisis.<sup>338</sup> By refusing to depart from precedent and follow the Supreme Court's example upholding stare decisis, the Eighth Circuit has erred, failing to make a prudential and practical determination in *Kidd*, especially in light of the potential fundamental miscarriage of justice imposed.<sup>339</sup>

### **\*402 3. The Eighth Circuit is Perpetrating the Fundamental Miscarriage of Justice Exemplified in *Kidd v. Norman***

While it may be easy to assume the injustice faced by Ricky Kidd is a settled occurrence of the past, the United States Court of Appeals for the Eighth Circuit is still applying the *Amrine* standard based on a misinterpretation of the United States Supreme Court opinion in *Schlup* and the unjustified application of stare decisis.<sup>340</sup> In *Nash v. Russell*,<sup>341</sup> the Eighth Circuit reviewed Donald Nash's claim of actual innocence.<sup>342</sup> The court cited to the standard for new evidence used to support an actual innocence claim from *Schlup* and stated this standard requires new, reliable evidence that was not presented at the original trial.<sup>343</sup> The Eighth Circuit then referenced its own additional requirement that evidence is new only if it was not presented at trial and could not have been found at the time of the original trial with an exercise of due diligence.<sup>344</sup> The potential fundamental injustice borne by Ricky Kidd when the Eighth Circuit declined to review evidence that could demonstrate Kidd's actual innocence in 2011 was imposed on Donald Nash in 2015.<sup>345</sup> Reflecting on the 347 innocent men and women who were exonerated of their crimes based on new DNA evidence, twenty of whom had been sentenced to death, it is \*403 clear how important it is for a court to be able to view new evidence.<sup>346</sup> Until the Eighth Circuit corrects its interpretation of new evidence and stops applying the *Amrine* standard to actual innocence claims, more men and women

may face the fundamental miscarriage of justice the *Schlup* actual innocence gateway was created to avoid.<sup>347</sup>

## V. CONCLUSION

In *Kidd v. Norman*,<sup>348</sup> the United States Court of Appeals for the Eighth Circuit affirmed the district court's denial of Kidd's petition for habeas corpus after concluding that Kidd's petition was procedurally barred because Kidd failed to raise a constitutional claim in a prior proceeding.<sup>349</sup> Kidd asserted that he could circumvent the procedural bar by demonstrating his actual innocence pursuant to *Schlup v. Delo*<sup>350</sup> under the actual innocence gateway.<sup>351</sup> The actual innocence gateway requires a petitioner to demonstrate that in light of new evidence, it is more likely than not that no reasonable juror would convict the petitioner.<sup>352</sup> However, following Eighth Circuit stare decisis, the Eighth Circuit applied the standard created in *Amrine v. Bowersox*<sup>353</sup> to Kidd's new evidence, which required that new evidence be newly presented and unavailable with an exercise of due diligence at the original trial.<sup>354</sup> The court determined that Kidd's evidence could have been discovered at the original trial with an exercise of due diligence and affirmed the district court's denial of his petition.<sup>355</sup>

The Eighth Circuit erred in applying the *Amrine* standard to *Kidd* because the *Amrine* standard imposes an additional burden on petitioners that is inconsistent with both the purposes of the *Schlup* actual innocence gateway and the Supreme Court's reasoning in *House v. Bell*<sup>356</sup> regarding the use of new evidence.<sup>357</sup> Further, the *Schlup* actual innocence gateway applies to petitioners claiming a constitutional violation, and the Eighth Circuit's restrictive *Amrine* standard applied in *Kidd* highlights the catch twenty-two for petitioners when their underlying constitutional violation is ineffective assistance of \*404 counsel based on failure to discover and present evidence.<sup>358</sup> Individuals must insist their evidence could not have been discovered at the original trial to proceed through the actual innocence gateway, yet must then insist that the evidence could have been discovered to prove that the counsel was ineffective.<sup>359</sup> Finally, the Eighth Circuit continues to err in applying the *Amrine* standard to procedurally barred petitions for habeas corpus because it relied on a misquotation of the Supreme Court in the development of the standard, inappropriately applied stare decisis to factually similar cases, and is further perpetrating the fundamental injustice that the actual innocence gateway intends to address.<sup>360</sup>

Due to the split between the United States Courts of Appeals on this issue, the United States Supreme Court should resolve whether new evidence used to support an actual innocence gateway claim from *Schlup* must be newly presented to the court or must also have been unavailable with an exercise of due diligence at the time of the original trial.<sup>361</sup> The Supreme Court determined that an individual's interest in avoiding a fundamental miscarriage of justice, such as serving a life sentence as an innocent person, is so important that it deserves extra judicial protection.<sup>362</sup> That protection should not be applied inconsistently from one circuit to the next when the very life and liberty of the accused is on the line.<sup>363</sup>

## Footnotes

<sup>1</sup> *Kidd v. Norman*, 651 F.3d 947, 947, 948 (8th Cir. 2011) [hereinafter *Kidd III*].

<sup>2</sup> *Kidd III*, 651 F.3d at 949.

<sup>3</sup> *Id.* at 950, 954.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 947.

<sup>6</sup> *Id.* at 947. See also *Ricky Kidd - Still Incarcerated Even Though Someone Else Confessed*, JAWS OF JUSTICE RADIO (May 13, 2013, 9:00 AM), <http://www.kkfi.org/program-episodes/ricky-kidd-still-incarcerated-even-though-someone-else-else-confessed/> (interviewing Kidd regarding his ongoing efforts to prove his innocence).



<sup>7</sup> 990 S.W.2d 175 (Mo. Ct. App. 1999).

<sup>8</sup> State v. Kidd, 990 S.W.2d 175, 177-78 (Mo. Ct. App. 1999) [hereinafter *Kidd I*], *aff'd sub nom. Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011).

<sup>9</sup> *Kidd III*, 651 F.3d at 949-53.

<sup>10</sup> *Id.* at 953.

<sup>11</sup> *Id.* at 953-54.

<sup>12</sup> *About the Innocence Network*, THE INNOCENCE NETWORK, <http://innocencenetwork.org/about/> (last visited Dec. 21, 2016).

<sup>13</sup> *DNA Exonerations in the United States*, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Dec. 21, 2016).

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Ricky Kidd*, MIDWEST INNOCENCE PROJECT, <http://themip.org/ricky-kidd/> (last visited Dec. 21, 2016). The Midwest Innocence Project filed a Missouri Rule 91 petition, requesting habeas relief on Kidd's behalf in February of 2016 while awaiting the results of DNA testing. *Id.*

<sup>18</sup> 651 F.3d 947 (8th Cir. 2011).

<sup>19</sup> *See infra* notes 23-79 and accompanying text.

<sup>20</sup> *See infra* notes 80-131 and accompanying text.

<sup>21</sup> *See infra* notes 132-216 and accompanying text.

<sup>22</sup> *See infra* notes 236-347 and accompanying text.

<sup>23</sup> 990 S.W.2d 175 (Mo. Ct. App. 1999).

<sup>24</sup> State v. Kidd, 990 S.W.2d 175, 177 (Mo. Ct. App. 1999).

<sup>25</sup> Kidd v. Norman, 651 F.3d 947, 947 (8th Cir. 2011).

<sup>26</sup> *Kidd III*, 651 F.3d at 947.

<sup>27</sup> *Id.* at 948.

<sup>28</sup> *Id.*

<sup>29</sup> *Kidd I*, 990 S.W.2d at 177.

<sup>30</sup> *Id.* at 178.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Kidd III*, 651 F.3d at 948.

<sup>34</sup> *Kidd I*, 990 S.W.2d at 178. Richard Harris was George Bryant's neighbor. *Kidd III*, 651 F.3d at 948. Harris was walking home at the time of the murders. *Id.* One of the assailants observed Harris and attempted to catch him, but Harris escaped. *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *State v. Kidd*, 75 S.W.3d 804, 807 (Mo. Ct. App. 2002) [hereinafter *Kidd II*], *aff'd sub nom. Kidd v. Norman*, 651 F.3d 947 (8th Cir. 2011). During the investigation, detectives interviewed Kayla, and she identified Merrill and Kidd as the murderers. *Kidd II*, 75 S.W.3d at 807. The court allowed the statements of detectives Jay Thompson, Robert Guffrey, and Jay Pruetting under a hearsay exception. *Id.* The exception permitted "testimony of a secondary witness introduced for corroboration of an identifying witness's unimpeached testimony concerning extrajudicial identification of the accused ...." *State v. Harris*, 711 S.W.2d 881, 885 (Mo. 1986) (en banc).

<sup>37</sup> *Kidd II*, 75 S.W.3d at 806.

<sup>38</sup> *Id.* at 807.

<sup>39</sup> *Id.* at 806-07.

<sup>40</sup> *Id.*

<sup>41</sup> *Kidd I*, 990 S.W.2d at 177. During Harris's testimony, Harris referred to Kidd as "[t]he Terminator," which Kidd argued was unfairly prejudicial. *Id.*

<sup>42</sup> *Id.* at 180. Further, the court noted the remaining testimony was hearsay, yet admissible absent a showing that "the error was so prejudicial that it deprived the defendant of a fair trial." *Id.* at 181 (quoting *State v. Richardson*, 923 S.W.2d 301, 311 (Mo. 1996) (en banc)).

<sup>43</sup> *Kidd I*, 990 S.W.2d at 182. The trial court must sever the trial of co-defendants if those co-defendants present irreconcilable defenses. *Id.* (quoting *State v. Oliver*, 791 S.W.2d 782, 786 (Mo. Ct. App. 1990)). The appellate court determined Kidd's alibi defense and Merrill's mistaken identity defense were not "inherently irreconcilable." *Id.*

44 *Id.* at 185.

45 *Id.* at 186.

46 *Kidd II*, 75 S.W.3d at 806. Missouri Rule 29.15 states, “A person convicted of a felony after trial claiming that the ... sentence imposed violates ... the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel ... may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15.” MO. CT. R. CRIM. P. 29.15.

47 U.S. CONST. amend. VI. The relevant part of the Sixth Amendment of the United States Constitution reads, “In criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed ... *and to have the Assistance of Counsel for his defense.*” *Id.* (emphasis added). See *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (noting that the constitutional right to counsel is understood as the effective assistance of counsel, meaning the ineffective assistance of counsel may establish a constitutional violation).

48 *Kidd II*, 75 S.W.3d at 806. Kidd elaborated that during his appeal, his counsel did not object to Kidd being sentenced as a prior offender, even though nothing in the information shown to the court demonstrated that he was a prior offender. *Id.* Further, the lack of notice of the State’s intention to charge him as a prior offender violated his constitutional right to due process. *Id.* The trial court sentenced Kidd to life imprisonment without the possibility of parole for the murder charges and a life sentence for each of the armed criminal action charges, all to be served consecutively. *Id.* at 807. The trial court took into account Kidd’s status as a prior offender in his sentencing. *Id.* at 806.

49 *Id.*

50 *Id.* The Missouri Court of Appeals vacated the trial court’s sentence, dismissed the armed criminal action charges, and resentenced Kidd based on two counts of first degree, non-capital murder. *Id.* at 808. The appellate court did not sentence Kidd as a prior offender. *Id.*

51 *Kidd III*, 651 F.3d at 947. Kidd based the petition on § 2254 of the United States Code. *Id.* (citing 28 U.S.C. § 2254 (2012)). This federal statute provides that [t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution ... of the United States. 28 U.S.C. § 2254. Kidd relied on the aforementioned ineffective assistance of counsel claim as the constitutional violation that merited a writ of habeas corpus. *Kidd III*, 651 F.3d at 947.

52 *Id.* at 947, 949.

53 *Id.* at 949. Kidd failed to raise the ineffective assistance of counsel claims in the state proceedings, and as a result, the claims were procedurally defaulted in the district court. *Id.*

54 *Id.* Kidd asserted a *Schlup* actual innocence claim, the purpose of which is to circumvent procedurally defaulted claims. *Id.* at 951. The United States Supreme Court has noted that procedural default “prohibits subsequent habeas consideration of claims not raised, and thus defaulted.” *McCleskey v. Zant*, 499 U.S. 467, 490 (1991).

55 *Kidd III*, 651 F.3d at 949-50.

56 *Id.* at 949.

- <sup>57</sup> *Id.* Merrill admitted during cross examination that he and Kidd spoke while Merrill was in prison. *Id.* During that time, Kidd implied that his attorney could assist Merrill in reducing his sentence if he testified. *Id.* The court later determined that this admission reduced Merrill's credibility as a witness because it showed that Merrill had an incentive to lie for Kidd to obtain release. *Id.* at 950.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.* Harris's testimony was discredited because of his connections to drugs, the fact that he was potentially high at the time he observed the murders, and other inconsistencies in his testimony. *Id.*
- <sup>60</sup> *Id.*
- <sup>61</sup> *Id.*
- <sup>62</sup> *Id.* See also FED. R. APP. P. 22 ("In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice ... issues a certificate of appealability under 28 U.S.C. § 2253(c)."). Kidd's proceeding arose under 28 U.S.C. § 2254 and, therefore, required a certificate of appealability. *Kidd III*, 651 F.3d at 947, 950.
- <sup>63</sup> *Kidd III*, 651 F.3d at 947. The Eighth Circuit quoted the precedential case *Amrine v. Bowersox*, which specifically states, "Evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Id.* (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001)).
- <sup>64</sup> 238 F.3d 1023 (8th Cir. 2001).
- <sup>65</sup> 513 U.S. 298 (1995).
- <sup>66</sup> 547 U.S. 518 (2006).
- <sup>67</sup> *Kidd III*, 651 F.3d at 951, 953.
- <sup>68</sup> *Id.* at 951.
- <sup>69</sup> *Id.*
- <sup>70</sup> *Id.* Additionally, Merrill paid for a room at a hotel where Godspeed Sr. stayed the night before the murders. *Id.*
- <sup>71</sup> *Id.* The car in question was a white Oldsmobile, which several witnesses claimed to have seen leaving the crime scene. *Id.*
- <sup>72</sup> *Id.*
- <sup>73</sup> *Id.* On two occasions Kayla told the police "daddy's brother killed daddy." *Id.*

<sup>74</sup> *Id.* The evidence included Harris’s history with drugs, his marijuana use at the time of the murders, the inconsistencies between the description of the shooter and Kidd, and other eyewitness testimony that did not place Harris outside of the Bryant home at the time of the murders. *Id.*

<sup>75</sup> *Id.* at 954.

<sup>76</sup> *Id.* at 953.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Kidd v. Norman*, 133 S. Ct. 137 (2012).

<sup>80</sup> 477 U.S. 478 (1986).

<sup>81</sup> *Murray v. Carrier*, 477 U.S. 478, 485 (1986). Procedural default is defined as requiring “federal courts to deny consideration of the merits of a federal constitutional claim raised by a prisoner convicted in state court whenever the relevant state procedural law would find the claim ‘defaulted.’” Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 738 (1991).

<sup>82</sup> *Carrier*, 477 U.S. at 482.

<sup>83</sup> *Id.* at 497.

<sup>84</sup> 248 S.E.2d 135 (Va. 1978).

<sup>85</sup> *Carrier*, 477 U.S. at 482.

<sup>86</sup> *Id.* Smith asserted that the state court judge erred in part in not keeping statements of the victim out of evidence. *Id.* The court referred to the omission of the statement as the “discovery claim.” *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 483.

<sup>89</sup> *Id.* The court explained the petitioner should show cause for the procedural default in state court. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*



<sup>93</sup> *Id.* at 483-84.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 481-82. The Court noted a counsel's conduct that does not reach the standard for ineffective assistance according to the Sixth Amendment does not create cause for procedural default. *Id.* at 484.

<sup>96</sup> *Id.* at 488.

<sup>97</sup> *Id.* at 497. If the petitioner could demonstrate his innocence, the Court would hear his petition even though he did not raise the constitutional error in earlier appeals. *Id.*

<sup>98</sup> *Id.* at 496. The Supreme Court later elaborated that the *Carrier* standard requires the petitioner to demonstrate that it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. *Schlup v. Delo*, 513 U.S. 289, 327 (1995) [hereinafter *Schlup I*]. This is a lesser standard than the *Sawyer* standard, which required that the petitioner show by clear and convincing evidence that no reasonable juror would have convicted in light of the new evidence. *Schlup I*, 513 U.S. at 327.

<sup>99</sup> 505 U.S. 333 (1992).

<sup>100</sup> *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) [hereinafter *Sawyer II*].

<sup>101</sup> 422 So. 2d 95 (La. 1982).

<sup>102</sup> *State v. Sawyer*, 422 So. 2d 95, 97 (La. 1982) [hereinafter *Sawyer I*], *aff'd sub nom. Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

<sup>103</sup> *Sawyer I*, 422 So. 2d at 99.

<sup>104</sup> *Id.* at 102.

<sup>105</sup> *Id.* at 99. The district court specifically noted that its review was not to take the place of the jury in sentencing but, instead, to see if improper motivations or arbitrary factors had a role in the sentencing. *Id.* at 106.

<sup>106</sup> *Sawyer v. Whitley*, 772 F. Supp. 297, 308 (1991) [hereinafter *Sawyer III*].

<sup>107</sup> *Sawyer v. Butler*, 848 F.2d 582, 585-86 (5th Cir. 1988) [hereinafter *Sawyer IV*], *aff'd sub nom. Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

<sup>108</sup> *Sawyer II*, 505 U.S. at 337-38.

<sup>109</sup> *Id.* at 335-36.

<sup>110</sup> *Id.* at 336.

<sup>111</sup> *Id.* at 335-36.

<sup>112</sup> *Id.* at 338-39. *See also* [Wainwright v. Sykes](#), 433 U.S. 72, 77 (1977) (noting that without a showing of cause for the failure to raise a pretrial objection to an indictment and the resulting prejudice, a petition for habeas corpus would be procedurally barred).

<sup>113</sup> *Sawyer II*, 505 U.S. at 336.

<sup>114</sup> *Id.* at 350.

<sup>115</sup> 513 U.S. 298 (1995).

<sup>116</sup> *Schlup I*, 513 U.S. at 326-27.

<sup>117</sup> *Id.* at 302-05.

<sup>118</sup> *Id.* at 305.

<sup>119</sup> *Id.* at 306.

<sup>120</sup> *Id.* at 301, 306.

<sup>121</sup> *Schlup v. Delo*, 11 F.3d 738, 739 (8th Cir. 1993) [hereinafter *Schlup II*].

<sup>122</sup> *Schlup I*, 513 U.S. at 301.

<sup>123</sup> *Schlup II*, 11 F.3d at 743.

<sup>124</sup> *Schlup I*, 513 U.S. at 301, 326-27.

<sup>125</sup> *Id.* at 326-27.

<sup>126</sup> *Id.* at 318.

<sup>127</sup> *Id.* at 309.

<sup>128</sup> *Id.* at 326-27.

<sup>129</sup> *Id.* at 324.

<sup>130</sup> *Id.* at 325-27.

<sup>131</sup> *Id.* at 325-26. The court opined that “[t]he paramount importance of avoiding the injustice of executing one who is actually

innocent thus requires application of the *Carrier* standard.” *Id.*

<sup>132</sup> 350 F.3d 673 (7th Cir. 2003).

<sup>133</sup> *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003).

<sup>134</sup> *Gomez*, 350 F.3d at 675-76.

<sup>135</sup> *Id.* at 675.

<sup>136</sup> *Id.* at 677.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* Gomez premised his ineffective assistance of counsel claim on the fact that his attorney did not advise Gomez to testify at trial. *Id.* The court based the procedural default in the state court proceeding on the fact that Gomez did not raise the ineffective assistance of counsel claim in his motion for a new trial. *Id.*

<sup>141</sup> *Id.* at 678.

<sup>142</sup> *Id.* at 679.

<sup>143</sup> *Id.*

<sup>144</sup> 513 U.S. 298 (1995).

<sup>145</sup> *Gomez*, 350 F.3d at 679.

<sup>146</sup> *Id.* at 680.

<sup>147</sup> *Id.* The court determined the threshold for an actual innocence claim is sufficiently high because the court requires a petitioner to present new, exculpatory evidence that would make any reasonable juror more likely than not to acquit the petitioner. *Id.* at 179-80.

<sup>148</sup> 350 F.3d 956 (9th Cir. 2003).

<sup>149</sup> *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003).

<sup>150</sup> *Griffin*, 350 F.3d at 959.

<sup>151</sup> *Id.* Griffin's attorney relied upon an expert witness testifying that a fingerprint on the murder weapon did not match Griffin's, which was the primary basis of Griffin's defense. *Id.* The expert changed his mind, deciding he could not conclusively testify that the fingerprint belonged to Griffin. *Id.* Additionally, Griffin's lawyer did not pursue an insanity defense, even though Griffin informed him of a childhood mental illness diagnosis and a court's conclusion in an unrelated attempted rape conviction that Griffin needed psychiatric care. *Id.* Instead, Griffin's lawyer informed Griffin for the first time that he could be sentenced to life in prison if he did not accept the plea bargain. *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* Griffin dropped the ineffective assistance of counsel claim and involuntary admission claim. *Id.* Griffin asserted the conflict of interest claim because his attorney had previously prosecuted Griffin on multiple occasions. *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 960.

<sup>158</sup> *Id.* Under precedent established in *Sawyer v. Whitely*, a court is not entitled to reach the merits of a successive habeas petition based on claims that have been procedurally defaulted by the petitioner not properly pleading all of his claims in state court unless he demonstrates the cause of the default and the prejudice resulting therefrom. *Sawyer v. Whitely*, 505 U.S. 333, 338-39 (1992). A court can reach the merits of the petition if the petitioner can present evidence to show that he is actually innocent of the crime. *Sawyer II*, 505 U.S. at 339.

<sup>159</sup> *Griffin*, 350 F.3d at 960.

<sup>160</sup> *Id.* at 961. Griffin defined newly presented evidence as evidence that had not been presented to the trial court. *Id.*

<sup>161</sup> *Id.* at 961-62. The Ninth Circuit specifically noted the use of "evidence that was not presented at trial" in Justice Stevens's opinion in *Schlup v. Delo*. *Id.* Additionally, the Ninth Circuit referenced the use of "newly discovered evidence" in Justice O'Connor's concurrence in the *Schlup* opinion. *Id.*

<sup>162</sup> *Id.* at 962. The Ninth Circuit cited to its previous opinions in *Sistrunk v. Armenakis* and *Majoy v. Roe*, which both required new evidence be newly presented, not newly discovered. *Id.*

<sup>163</sup> *Id.* at 965-66.

<sup>164</sup> 378 F.3d 333 (3d Cir. 2004).

<sup>165</sup> *Hubbard v. Pinchack*, 378 F.3d 333, 341 (3d Cir. 2004).

<sup>166</sup> *Hubbard*, 378 F.3d at 336.

<sup>167</sup> *Id.* at 336-37.

<sup>168</sup> *Id.* at 336.

<sup>169</sup> *Id.* at 336-37. The court noted that Hubbard did not argue that he was actually innocent. *Id.* at 336.

<sup>170</sup> *Id.* at 337.

<sup>171</sup> *Id.* at 341-42.

<sup>172</sup> *Id.* at 341.

<sup>173</sup> 625 F.3d 88 (3d Cir. 2010).

<sup>174</sup> Houck v. Stickman, 625 F.3d 88, 94-95 (3d Cir. 2010).

<sup>175</sup> *Houck*, 625 F.3d at 90. The other charges included “aggravated assault, carrying a firearm without a license, reckless endangerment, and criminal conspiracy.” *Id.*

<sup>176</sup> *Id.* at 91.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 92.

<sup>180</sup> *Id.* Houck did not explicitly assert an actual innocence claim in his petition, so the judge did not address actual innocence. *Id.*

<sup>181</sup> *Id.* at 92-93.

<sup>182</sup> *Id.* at 93.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 95, 97.

<sup>186</sup> *Id.* at 94.

<sup>187</sup> *Id.* at 93.



188 *Id.*

189 *Id.* at 94.

190 *Id.*

191 *Id.* The court was specifically referencing the approach passed down in *Gomez v. Jaimet*. *Id.*

192 *Id.*

193 *Id.* at 95. Namely, the court noted that it was not more likely than not that no reasonable juror would have found Houck guilty of the crimes. *Id.*

194 238 F.3d 1023 (8th Cir. 2001).

195 *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001).

196 *Amrine*, 238 F.3d at 1026.

197 *Id.*

198 *Id.*

199 *Id.* The court noted the basis of the denial was that the claims were without merit or procedurally barred. *Id.*

200 *Id.*

201 *Id.* at 1026, 1028. The Supreme Court determined a petitioner must support a claim for actual innocence with new, reliable evidence. *Schlup I*, 513 U.S. at 324.

202 *Amrine*, 238 F.3d at 1029.

203 *Id.* An incriminating witness from Amrine's initial trial had recanted his testimony, but the district court found the witness to be unreliable. *Id.* at 1028. The Eighth Circuit noted that the district court's credibility determinations are reviewed with great deference and found no reason to overturn the determinations. *Id.* at 1029.

204 807 F.3d 892 (8th Cir. 2015).

205 *Nash v. Russell*, 807 F.3d 892, 899 (8th Cir. 2015).

206 *Nash*, 807 F.3d at 895.

207 *Id.*

- <sup>208</sup> *Id.* Specifically, the state requested DNA evidence from Lambert Anthony Feldman III that was found on Spencer's shoes be excluded under Missouri's direct connection rule. *Id.* The rule requires evidence implicating a third party suspect to show a direct connection to the crime. *Id.*
- <sup>209</sup> *Id.* at 896.
- <sup>210</sup> *Id.*
- <sup>211</sup> *Id.*
- <sup>212</sup> *Id.* Nash sought to include evidence of another unidentified male's DNA on the victim's shoes, a study regarding the likelihood of DNA remaining under someone's fingernails, and a report from an expert stating Nash's DNA was under the victim's fingernails because they cohabited. *Id.*
- <sup>213</sup> *Id.* at 898-99.
- <sup>214</sup> *Id.* at 899. The court also referenced the application of the *Amrine* standard in *Kidd v. Norman*, noting the prior discussion of the circuit split on the definition of new evidence and the approval of the *Amrine* standard. *Id.* See also *Kidd v. Norman*, 651 F.3d 947, 952-53 (8th Cir. 2011).
- <sup>215</sup> *Nash*, 807 F.3d at 899. The court noted the DNA evidence could have been discovered at the original trial with an exercise of due diligence, and the expert testimony and scientific study replicated what Nash presented at the original trial. *Id.*
- <sup>216</sup> *Id.*
- <sup>217</sup> 547 U.S. 518 (2006).
- <sup>218</sup> 28 U.S.C. § 2254.
- <sup>219</sup> *House v. Bell*, 547 U.S. 518, 538-39 (2006).
- <sup>220</sup> *House*, 547 U.S. at 521. The jury in House's trial also found all three aggravating circumstances required to sentence House to death. *Id.* at 533. These circumstances are a previous conviction involving violence, a murder that is especially heinous, and a murder committed during the course of a rape or kidnapping. *Id.* at 532.
- <sup>221</sup> *Id.* at 533-34.
- <sup>222</sup> *Id.* at 534.
- <sup>223</sup> 513 U.S. 298 (1995).
- <sup>224</sup> 505 U.S. 333 (1992).

- <sup>225</sup> *House*, 547 U.S. at 534. *Schlup* requires that it be more likely than not that no reasonable juror would have convicted House of the crime in light of the new evidence. *Id.* at 536-37 (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)). The stricter *Sawyer* standard requires that House show by clear and convincing evidence that “but for a constitutional error, no reasonable juror would have found [House] eligible for the death penalty under the applicable state law.” *Id.* at 539 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)).
- <sup>226</sup> *Id.* at 535.
- <sup>227</sup> *Id.*
- <sup>228</sup> *Id.* at 535-36.
- <sup>229</sup> *Id.* at 536-37. The dissenters also argued the evidence supporting House’s actual innocence claim was so compelling that House was entitled to immediate release from prison under Sixth Circuit precedent. *Id.*
- <sup>230</sup> *Id.* at 535-36. For a more in-depth look at the reasoning laid out by the Sixth Circuit’s majority and dissenting opinions, see *House v. Bell*, 386 F.3d 668 (6th Cir. 2004).
- <sup>231</sup> *House*, 547 U.S. at 536.
- <sup>232</sup> *Id.* at 554, 547-48.
- <sup>233</sup> *Id.* at 553-54.
- <sup>234</sup> *Id.* at 554.
- <sup>235</sup> *Id.* at 555, 537. The Court noted the State’s concession that some of the evidence presented by House was new, so the issue of whether that evidence was actually new under the definition of new evidence was not before the Court. *Id.* at 537. However, the remainder of the evidence was not stipulated to by the State, and, thus, the Court’s examination of such evidence to support House’s actual innocence claim is telling. *Id.* When reviewing the evidence for purposes of House’s actual innocence claim, the Court determined that much of the evidence House presented—including the bloodstain evidence and the new witness testimony—was new evidence. *Id.* The Court noted that its only job in a *Schlup* inquiry is to review all evidence, regardless of its admissibility at the initial trial, in order to “assess the likely impact of the evidence on reasonable jurors.” *Id.* at 537-38 (quotations omitted).
- <sup>236</sup> 651 F.3d 947 (8th Cir. 2011).
- <sup>237</sup> See *infra* notes 23-79 and accompanying text. See also Laura Gaston Dooley, *Equal Protection and the Procedural Bar Doctrine in Federal Habeas Corpus*, 59 FORDHAM L. REV. 737, 738 (1991) (defining procedural default as requiring “federal courts to deny consideration of the merits of a federal constitutional claim raised by a prisoner convicted in state court whenever the relevant state procedural law would find the claim ‘defaulted.’”).
- <sup>238</sup> 513 U.S. 298 (1995).
- <sup>239</sup> 547 U.S. 518 (2006).
- <sup>240</sup> See *infra* notes 249-354 and accompanying text.

- <sup>241</sup> See *State v. Kidd*, 990 S.W.2d 175, 186 (Mo. Ct. App. 1999) (finding the trial court did not abuse its discretion in allowing testimony at trial referring to Kidd as the “Terminator” because the evidence was more probative than prejudicial); *State v. Kidd*, 75 S.W.3d 804, 815 (Mo. Ct. App. 2002) (concluding the lower court’s denial of Kidd’s post-conviction motion, in which he claimed ineffective assistance of counsel, was not clearly erroneous).
- <sup>242</sup> *Kidd v. Norman*, 651 F.3d 947, 949 (8th Cir. 2011).
- <sup>243</sup> *Kidd III*, 651 F.3d at 947. To circumvent the procedural bar to successive federal petitions for habeas corpus, a petitioner must demonstrate either cause for the failure to raise a claim and the resulting prejudice or actual innocence of the underlying crime. *Schlup v. Delo*, 513 U.S. 298, 314-15 (1995).
- <sup>244</sup> *Kidd III*, 651 F.3d at 951-54.
- <sup>245</sup> *Schlup I*, 513 U.S. at 314-15.
- <sup>246</sup> *Id.* at 324.
- <sup>247</sup> 238 F.3d 1023 (8th Cir. 2001).
- <sup>248</sup> *Kidd III*, 651 F.3d at 953. The court noted it previously applied the *Amrine* standard to cases similar to Kidd’s; thus, it was required to apply the *Amrine* standard to Kidd’s actual innocence claim. *Id.*
- <sup>249</sup> See *infra* notes 253-271 and accompanying text
- <sup>250</sup> See *infra* notes 272-293 and accompanying text.
- <sup>251</sup> See *infra* notes 294-307 and accompanying text.
- <sup>252</sup> See *infra* notes 308-347 and accompanying text.
- <sup>253</sup> 513 U.S. 298 (1995).
- <sup>254</sup> *Schlup v. Delo*, 513 U.S. 298, 318-21 (1995).
- <sup>255</sup> *Schlup I*, 513 U.S. at 326-27.
- <sup>256</sup> *Id.*
- <sup>257</sup> 477 U.S. 478 (1986).
- <sup>258</sup> 505 U.S. 333 (1992).

259 *Schlup I*, 513 U.S. at 326-27.

260 *Id.* at 327.

261 *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992).

262 *Schlup I*, 513 U.S. at 327.

263 *Id.* at 326-27.

264 Compare *Sawyer II*, 505 U.S. at 336 (adopting a stricter clear and convincing standard of proof when the petitioner claims “he is ‘actually innocent’ of the death penalty to which he has been sentenced ....”), with *Schlup I*, 513 U.S. at 325 (explaining the importance of imposing a more lenient standard of proof on a habeas petitioner “alleging a fundamental miscarriage of justice” than the standard imposed on a petitioner claiming his sentence is too severe, and thus adopting the more lenient *Carrier* standard for actual innocence claims).

265 *Schlup I*, 513 U.S. at 325.

266 See *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011) (applying the *Amrine* standard to Ricky Kidd’s actual innocence claim); *Nooner v. Hobbs*, 689 F.3d 921, 935 (8th Cir. 2012) (applying the *Amrine* standard to Terrick Nooner’s actual innocence claim); see also *Nash v. Russell*, 807 F.3d 892, 899 (8th Cir. 2015) (applying the *Amrine* standard to Donald Nash’s actual innocence claim).

267 *Kidd III*, 651 F.3d at 953 (quoting the United States Court of Appeals for the Seventh Circuit in *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003), which determined that the additional requirement to new evidence raises the threshold to satisfy a claim of actual innocence, thus, imposing an additional requirement).

268 Compare *Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard to Ricky Kidd’s actual innocence claim, requiring new evidence to be newly presented and unavailable at the original trial with an exercise of due diligence), with *Houck v. Stickman*, 625 F.3d 88, 93-94 (7th Cir. 2010) (requiring only that new evidence be newly presented to the court, not requiring evidence be unavailable at the original trial with an exercise of due diligence), *Gomez v. Jaimet*, 350 F.3d 673, 679 (3d Cir. 2003) (applying the *Amrine* standard with an exception for claims based on ineffective assistance of counsel), and *Schlup I*, 513 U.S. at 324 (determining a more lenient standard of proof is appropriate in actual innocence claims, demonstrating the Court’s less exacting general disposition).

269 Compare *Schlup I*, 513 U.S. at 324 (determining that the lesser standard in *Carrier* is more appropriate for actual innocence claims to balance the state’s interest in finality, comity, and preservation of judicial resources with the individual’s interest in justice), with *Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard, which incorporates an additional burden to an actual innocence claim by requiring the petitioner provide new evidence that was not available at the original trial and could not have been discovered with an exercise of diligence).

270 651 F.3d 947 (8th Cir. 2011).

271 Compare *Kidd III*, 651 F.3d at 953 (applying the standard from *Amrine* requiring new evidence be newly presented and not available at the original trial with the exercise of due diligence, and thus imposing an additional threshold requirement to an actual innocence claim), with *Schlup I*, 513 U.S. at 324 (determining the standard from *Carrier* properly struck the balance in an actual innocence claim between finality, comity, and preservation of judicial resources and an individual’s interest in avoiding a fundamental miscarriage of justice).



272 651 F.3d 947 (8th Cir. 2011).

273 547 U.S. 518 (2006).

274 *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011).

275 *Kidd III*, 651 F.3d at 953.

276 *Id.* at 953-54. The Eighth Circuit determined that the standard from *Schlup*, which required that a petitioner show that it was more likely than not that no reasonable juror would have found him guilty of the crime for which he was convicted, as opposed to the Antiterrorism and Effective Death Penalty Act of 1996 standard, which required that a petitioner show by clear and convincing evidence that no reasonable juror would have found the petitioner eligible for the death penalty for the crime for which he was convicted, was more appropriate. *Id.*

277 513 U.S. 298 (1995).

278 See *House v. Bell*, 547 U.S. 518, 537-38 (2006) (noting that a reviewing court must examine “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under ‘rules of admissibility that would govern at trial.’” (quoting *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995))).

279 505 U.S. 333 (1992).

280 *Schlup v. Delo*, 513 U.S. 298, 323-24 (1995). The Court determined that the *Carrier* standard was sufficiently strict to ensure that a petition had to be extraordinary to meet the standard, yet still provided a way to avoid a fundamental miscarriage of justice. *Schlup I*, 513 U.S. at 323-24.

281 *House*, 547 U.S. at 521.

282 *Id.* at 528-29.

283 *Id.* at 536-37.

284 *Id.* at 537. The Court noted the State conceded that some of the evidence presented by House was new, so the issue of whether that evidence was actually new under the Court’s definition of new evidence was not before the Court. *Id.* Specifically, the opinion cites pages 2078-79 (or 538-40) to reference the actual evidence the state stipulated was new. *Id.* The cited pages described the stipulated evidence to include the semen DNA evidence found on the victim’s clothing. *Id.* at 540. Consequently, the Supreme Court did not determine that said DNA evidence was new because it was stipulated as new. *Id.* at 538. However, it is clear from the inclusion of the phrase “some of the evidence” and the citation to pages describing the stipulation that the State’s stipulation only applies to the DNA evidence. *Id.* at 537-40. The remainder of the evidence was not stipulated to by the State, and, thus, the Court’s examination of the evidence to support House’s actual innocence claim is telling. *Id.* Furthermore, the Court rejected the State’s argument that the evidentiary determinations of the district court “tie[d] [the Court’s] hands.” *Id.* at 539. The Court reasoned the *Schlup* inquiry requires “a holistic judgment about ‘all the evidence.’” *Id.* (citing *Schlup I*, 513 U.S. at 329). The Court proceeded to note its uncertainty regarding some of the district court’s conclusions and its hesitancy to rely heavily on the district court’s determinations. *Id.* at 539-40. Therefore, the Court determined that much of the evidence House presented, including the bloodstain evidence and the new witness testimony, was new evidence because it reviewed the evidence for purposes of House’s actual innocence claim. *Id.* The State stipulated that only some of House’s evidence was new, the Court had the authority to examine “all the evidence,” and the Court voiced doubt regarding the district court’s evidentiary determinations. *Id.*

285 *Id.* at 547-50.

286 *Id.* at 528-29.

287 *Id.* at 554.

288 *Id.* at 549.

289 *Id.* at 528-29. This new evidence that showed the victim's blood found on House's jeans most likely spilled on the jeans after the jeans were in police custody. *Id.* at 553. The blood samples and the jeans were stored in the same box in the hot trunk of a car for several hours while being transported by two FBI agents. *Id.* Evidence confirmed that the blood samples in the vials did actually spill in transport and that the jeans were stored in the same bag as the samples. *Id.* at 543-44. The Court found that the evidence would likely have cast serious doubt on the reliability of the samples. *Id.* at 547. Finally, the new evidence contained testimony from several witnesses which implicated the victim's husband, not House, as the real murderer. *Id.* at 548-53. This included testimony that the husband had confessed to the murder to two separate people, as well as testimony from two people regarding a history of abuse perpetrated by the victim's husband, and testimony from two people regarding suspicious behavior of the victim's husband. *Id.* at 551. Lastly, House presented evidence that demonstrated that the bruises on House's body at the time of the murder were actually too old to have resulted from the crime. *Id.* at 553.

290 *Id.* at 555.

291 Compare *id.* at 540-53 (utilizing evidence that was available at the original trial to determine the validity of a claim of actual innocence in a procedurally barred petition for habeas corpus), with *Kidd III*, 651 F.3d at 953 (requiring evidence used to support an actual innocence claim be newly presented and unable to be discovered at the original trial with an exercise of due diligence).

292 *Kidd III*, 651 F.3d at 953.

293 Compare *id.* at 953 (requiring the application of the stricter *Amrine* standard, that evidence be newly presented and could not have been discovered at the original trial with an exercise of diligence, to claims of actual innocence), with *House*, 547 U.S. at 539 (referencing the *Schlup* requirement to examine "all the evidence" supporting an actual innocence claim in a federal habeas proceeding), and *Schlup I*, 513 U.S. at 328 (requiring an examination of all evidence in an actual innocence claim).

294 513 U.S. 298 (1995).

295 *Schlup v. Delo*, 513 U.S. 298, 316 (1995).

296 U.S. CONST. amend. VI. See also *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (noting the Sixth Amendment right to counsel is understood as the effective assistance of counsel, meaning the ineffective assistance of counsel establishes a constitutional violation).

297 Compare *Schlup I*, 513 U.S. at 316 (allowing a petitioner to circumvent a procedural bar to successive habeas petitions only when a constitutional error occurred in the initial trial), with *House v. Bell*, 547 U.S. 518, 534 (2006) (acknowledging that ineffective assistance of counsel in an initial trial is considered a constitutional error), and *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010) (applying the *Schlup* actual innocence gateway to a petitioner's procedurally barred habeas corpus petition when the underlying constitutional violation was a Sixth Amendment ineffective assistance of counsel claim).

298 Compare *House*, 547 U.S. at 534-36 (applying the *Schlup* actual innocence gateway to a petition for habeas corpus where House asserted multiple ineffective assistance of counsel claims), with *Schlup I*, 513 U.S. at 336 (determining that *Schlup*'s procedurally

barred habeas corpus petition was eligible to pass through the actual innocence gateway in order for the Court to decide the merits of Schlup's underlying ineffective assistance of counsel claim), and *Herrera v. Collins*, 506 U.S. 390, 404 (1993) (determining that the claim of actual innocence itself was not a constitutional claim and, instead, was a gateway for the Court to hear the constitutional claim).

299 *Houck*, 625 F.3d at 94. See *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (determining that an attorney's failure to investigate and present mitigating evidence constituted ineffective assistance of counsel); see also *Wiggins v. Smith*, 539 U.S. 510, 534 (2003) (noting that a failure to investigate mitigating evidence is considered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution).

300 651 F.3d 947 (8th Cir. 2011).

301 *Kidd v. Norman*, 651 F.3d 947, 951 (8th Cir. 2011).

302 *Kidd III*, 651 F.3d at 951. Additional evidence included that one of the Merrills paid for a hotel room in which one of the suspects stayed the night before the murder, one of the suspects rented a white car similar to that identified leaving the crime scene, and testimony placing Merrill and the suspects together on the morning of the murders. *Id.* Further evidence demonstrated Merrill traveled with the alternative suspects just days before the murder, shared an apartment with one of the suspects, and was employed by the other suspect. *Id.* Finally, Kidd's trial counsel failed to appropriately investigate and confirm Kidd's alibi, failed to raise eyewitness testimony from the victim's daughter implicating the alternative suspects, and failed to impeach a vital witness at trial with information relating to drug use at the time of the murders. *Id.*

303 Compare *Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard to procedurally defaulted habeas petitions when the petitioner asserts he is actually innocent of the crime), with *Gomez v. Jaimet*, 350 F.3d 673, 680 (7th Cir. 2003) (noting when a constitutional violation underlying an actual innocence claim is ineffective assistance of counsel based on the trial attorney not discovering evidence at the time of the trial, it would "defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation.").

304 *Kidd III*, 651 F.3d at 952-53.

305 *Houck*, 625 F.3d at 94.

306 *Gomez*, 350 F.3d at 680.

307 Compare *Schlup I*, 513 U.S. at 314, 316 (allowing a petitioner to present new evidence to pass through the actual innocence gateway when the petitioner's initial trial was tainted by ineffective assistance of counsel), with *Williams*, 529 U.S. at 390 (determining that an attorney's failure to investigate and properly utilize evidence that was available at the original trial constitutes ineffective assistance of counsel), *Houck*, 625 F.3d at 94 (determining that the *Amrine* standard was generally appropriate, with a narrow exception for ineffective assistance of counsel claims, as long as the new, reliable evidence was the very evidence the petitioner uses to support his claim of actual innocence), and *Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard even though Kidd based his actual innocence claim on the ineffective assistance of his counsel).

308 238 F.3d 1023 (8th Cir. 2001).

309 513 U.S. 298 (1995).

310 *Amrine v. Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001).

311 *Amrine*, 238 F.3d at 1029.

312 *Id.*

313 See *Schlup v. Delo*, 513 U.S. 298, 337-38 (1995) (refusing to create the requirement that evidence be unavailable at the original trial with an exercise of due diligence and instead elaborating that an actual innocence analysis “allows the reviewing tribunal also to consider the probative force of *all* relevant evidence that was either excluded or unavailable at trial.” (emphasis added)).

314 *Id.*

315 Compare *Amrine*, 238 F.3d at 1029 (noting the district court’s decision was consistent with *Schlup* in requiring new evidence that was not presented at trial and could not have been found at trial with an exercise of due diligence), with *Schlup I*, 513 U.S. at 337-38 (requiring only that new evidence either be excluded from the original trial or unavailable at the original trial, but not both).

316 *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854 (1992).

317 505 U.S. 833 (1992).

318 *Casey*, 505 U.S. at 854.

319 *Id.* at 854-55.

320 Compare *Schlup I*, 513 U.S. at 314, 316 (allowing a petitioner to present new evidence to pass through the actual innocence gateway when the petitioner’s initial trial was tainted by ineffective assistance of counsel), with *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (determining that an attorney’s failure to investigate and properly utilize evidence that was available at the original trial constitutes ineffective assistance of counsel), and *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010) (determining that the *Amrine* standard was generally appropriate, with a narrow exception for ineffective assistance of counsel claims, as long as the new, reliable evidence was the very evidence the petitioner used to support his claim of actual innocence).

321 See *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011) (discussing and applying the *Amrine* standard).

322 See *Houck*, 625 F.3d at 94 (determining it is unfair to apply the *Amrine* standard to petitioner when the petitioner claims his trial counsel was ineffective by not discovering exculpatory evidence at the time of the trial if the petitioner is relying on the very evidence the attorney did not discover to support his actual innocence gateway claim to reach the underlying constitutional claim).

323 651 F.3d 947 (8th Cir. 2011).

324 *Kidd III*, 651 F.3d at 953.

325 *Id.*

326 Compare *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003) (determining a petitioner asserting a claim of actual innocence must support the claim with new, reliable evidence that was not available at the original trial, but need not present evidence that was also unavailable at the original trial with an exercise of diligence), with *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003) (determining a petitioner asserting a claim of actual innocence must support the claim with new, reliable evidence that was not available at the original trial, but need not present evidence that was also unavailable at the original trial with an exercise of diligence), and *Houck*, 625 F.3d at 94-95 (noting the standard for new evidence required evidence that was not presented to the

court at trial and was also unavailable at trial with an exercise of due diligence but allowing a narrow exception for petitioners who assert an underlying ineffective assistance of counsel claim based on the attorney's failure to discover evidence at the time of the original trial).

<sup>327</sup> See *Kidd III*, 651 F.3d at 952-54 (explaining how the Seventh and Ninth Circuits' approach to new evidence are criticized for being too broad, the Eighth Circuit's approach is criticized for its inapplicability to ineffective assistance of counsel claims, and the Third Circuit's approach is modified by allowing an exception to the *Amrine* standard for ineffective assistance of counsel claims).

<sup>328</sup> See *Schlup I*, 513 U.S. at 318-21 (recognizing the purpose of the actual innocence gateway is to balance society's interests in finality, comity, and preservation of judicial resources with an individual's interest in avoiding a fundamental miscarriage of justice if the individual is actually innocent of the crime).

<sup>329</sup> *Id.*

<sup>330</sup> Compare *Schlup I*, 513 U.S. at 324 (determining that the lesser *Carrier* standard of proof is more appropriate for actual innocence claims to balance the state's interest in finality, comity, and preservation of judicial resources with the individual's interest in justice), with *Kidd III*, 651 F.3d at 953 (applying the *Amrine* standard, which incorporates an additional burden to an actual innocence claim, requiring that the petitioner provide new evidence that was not available at the original trial and could not have been discovered with an exercise of diligence).

<sup>331</sup> Compare *Schlup I*, 513 U.S. at 324 (determining that the lesser standard in *Carrier* is more appropriate for actual innocence claims to protect an individual's interest in avoiding the fundamental miscarriage of justice of a sentence of life imprisonment or death for an innocent person), with *Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard is flawed in that it is inapplicable to petitioners asserting an ineffective assistance of counsel claim, yet applying *Amrine* because it has applied *Amrine* in similar circumstances in the past), and *Nash v. Russell*, 807 F.3d 892, 899 (8th Cir. 2015) (demonstrating the Eighth Circuit is consistently applying the *Amrine* standard to actual innocence claims).

<sup>332</sup> Judge J. Thomas Greene, *Some Current Causes for Popular Dissatisfaction with the Administration of Justice*, 14 UTAH B.J., no. 4, May 2001, at 4, 35 (noting public dissatisfaction with a legal system that functions unfairly by favoring the wealthy, treating races differently, being influenced by politics, and disproportionately targeting minorities and non-English speakers).

<sup>333</sup> DNA Exonerations in the United States, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Dec. 21, 2016). See also Greene, *supra* note 332, at 35 (noting public dissatisfaction with a judicial system influenced improperly by the wealth or race of the client and the perceived greed of lawyers and judges).

<sup>334</sup> Compare Green, *supra* note 332, at 35 (noting public dissatisfaction with a legal system that functions unfairly by favoring the wealthy, treating races differently, allowing itself to be influenced by politics, and disproportionately targeting minorities and non-English speakers), with *Kidd III*, 651 F.3d at 953 (acknowledging the merits of the Third Circuit's modified approach to new evidence for petitioners like Ricky Kidd, yet refusing to apply the more equitable method because of stare decisis), and *Nash*, 807 F.3d at 899 (continuing to apply the *Amrine* standard to petitioners in spite of the alternative approach).

<sup>335</sup> See *Casey*, 505 U.S. at 854 (recognizing the doctrine of stare decisis required affirmation of prior holdings determining women have the constitutional right to an abortion before fetal viability).

<sup>336</sup> 477 U.S. 478 (1986).

<sup>337</sup> *Schlup I*, 513 U.S. at 326. The Court indicated its disposition toward actual innocence claims is more lenient because "the significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence is reflected in our decisions that permit reduced procedural protections at sentencing." *Id.*

- <sup>338</sup> See *Kidd III*, 651 F.3d at 953 (noting the merits of the Third Circuit’s approach to new evidence because it allows application of the actual innocence gateway to petitioners such as Ricky Kidd but refusing to apply the modified standard because of stare decisis).
- <sup>339</sup> Compare *Casey*, 505 U.S. at 854 (recognizing stare decisis was not an immutable rule and, based on the judiciary’s “prudential and pragmatic considerations,” could be overturned in order to honor countervailing constitutional principles), with *Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard precluded Ricky Kidd and others asserting ineffective assistance of counsel claims from utilizing the actual innocence gateway, yet refusing to overturn stare decisis in light of the constitutional issue).
- <sup>340</sup> Compare *Amrine*, 238 F.3d at 1029 (noting the district court was consistent with *Schlup* in requiring new evidence that was not presented at trial and could not have been found at trial with an exercise of due diligence), with *Schlup I*, 513 U.S. at 327-28 (requiring only that new evidence either be excluded from the original trial or unavailable at the original trial, but not both), *Casey*, 505 U.S. at 854 (recognizing stare decisis was not a rigid rule and could be overturned in order to honor countervailing constitutional principles), *Kidd III*, 651 F.3d at 953 (recognizing the *Amrine* standard precluded Ricky Kidd and others asserting ineffective assistance of counsel claims from utilizing the actual innocence gateway, yet refusing to overturn stare decisis in light of the constitutional issue), and *Nash*, 807 F.3d at 899 (requiring new evidence used to support an actual innocence claim be not presented at the original trial and unavailable with an exercise of due diligence per *Amrine*).
- <sup>341</sup> 807 F.3d 892 (8th Cir. 2015).
- <sup>342</sup> *Nash*, 807 F.3d at 899.
- <sup>343</sup> *Id.* The court noted *Schlup* gave several examples of new, reliable evidence “including exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence.” *Id.*
- <sup>344</sup> *Id.* (citing *Amrine*, 238 F.3d at 1028; *Kidd III*, 651 F.3d at 951-53).
- <sup>345</sup> See *Kidd III*, 651 F.3d at 954 (affirming the district court’s denial of Kidd’s petition for habeas corpus, thus denying Kidd the opportunity to present evidence which may have proven Kidd’s innocence); *Nash*, 807 F.3d at 899 (affirming the district court’s judgment and recognizing Nash’s new evidence deserves “serious consideration,” yet denying Nash an opportunity for federal habeas relief).
- <sup>346</sup> DNA Exonerations in the United States, INNOCENCE PROJECT, <http://www.innocenceproject.org/dna-exonerations-in-the-united-states/> (last visited Dec. 21, 2016).
- <sup>347</sup> *Schlup I*, 513 U.S. at 320.
- <sup>348</sup> 651 F.3d 947 (8th Cir. 2011).
- <sup>349</sup> *Kidd v. Norman*, 651 F.3d 947, 948 (8th Cir. 2011).
- <sup>350</sup> 513 U.S. 298 (1995).
- <sup>351</sup> *Kidd III*, 651 F.3d at 948.
- <sup>352</sup> *Schlup v. Delo*, 513 U.S. 298, 324, 326-27 (1995).

<sup>353</sup> 238 F.3d 1023 (8th Cir. 2001).

<sup>354</sup> *Kidd III*, 651 F.3d at 953.

<sup>355</sup> *Id.* at 953-54.

<sup>356</sup> 547 U.S. 518 (2006).

<sup>357</sup> *See supra* notes 253-293 and accompanying text.

<sup>358</sup> *See supra* notes 294-307 and accompanying text.

<sup>359</sup> *See supra* notes 304-305 and accompanying text.

<sup>360</sup> *See supra* notes 308-347 and accompanying text.

<sup>361</sup> *See supra* notes 132-216 and accompanying text.

<sup>362</sup> *See supra* note 264 and accompanying text.

<sup>363</sup> *See supra* notes 132-216 and accompanying text.

50 CRLR 367

---

End of Document

© 2017 Thomson Reuters. No claim to original U.S. Government Works.