

**IN THE CIRCUIT COURT OF  
JACKSON COUNTY, MISSOURI**

<b>STATE OF MISSOURI,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	<b>No. 16CR03006321-02</b>
<b>v.</b>	)	
	)	<b>Division 10</b>
<b>KEITH CARNES,</b>	)	
	)	
<b>Defendant.</b>	)	

**DEFENDANT’S REPLY IN SUPPORT OF HIS  
MOTION FOR NEW TRIAL**

The prosecutor’s twenty page opposition to Mr. Carnes’ motion is remarkable for a significant omission. The state does not attempt to distinguish or even mention the leading Missouri innocence case, *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. banc 2003), that bears remarkable similarities to the facts presented here. Like Joe Amrine, Mr. Carnes was convicted, despite the absence of any physical evidence, by eyewitness testimony of two<sup>1</sup> individuals who have since recanted their trial testimony. The *Amrine* decision also totally eviscerates the state’s arguments that a defendant in Missouri cannot obtain a new trial based upon recantations of key prosecution witnesses because such recantations are inherently unreliable. (Opp. at 15-17). If this view is correct, Joseph Amrine would now be dead instead of free. Instead, the crux of the *Amrine* decision is that

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<sup>1</sup> In *Amrine*, there were three witnesses who later recanted.

the “lack of any remaining direct evidence” – i.e., the sworn recantations canceling out trial testimony, coupled with the lack of physical evidence – requires a new trial. *Id.* at 544,548.

The prosecution’s opposition also contains two blatant falsehoods. First, in a pernicious attempt to impugn the credibility of the extraordinary investigative efforts of Latahra Smith and the K.C. Freedom Project, the state asserts that Ms. Smith “is apparently married to Mr. Carnes.” (Opp. at 19). This assertion is false. (See Exh. 16).

Second, the prosecution asserts that the Kansas City Police Department (KCPD) has extensively reinvestigated the case based upon the new evidence uncovered by Ms. Smith. (Opp. at 19). This assertion is also inaccurate. After Ms. Smith met with representatives of the KCPD and provided the newly discovered evidence and affidavits to them, they conducted no follow-up investigation whatsoever. (*Id.*). In fact, the KCPD did not contact a single witness that had been located and interviewed by Ms. Smith to evaluate the accuracy and credibility of their statements. (See Exh.’s 16, 17, 18, 19, 20, 21). Instead, as is commonplace when police departments are accused of botching an investigation that spawned a wrongful conviction, they swept these allegations under the rug, hoping they would go away.

Both the prosecution's and the police's cavalier approach to Mr. Carnes' compelling claim of innocence provide a textbook example of what legal scholars have described as the "myth of infallibility" of the criminal justice system. This view has been shattered by the DNA exoneration cases that first emerged in the 1990s and 2000s. The ever-expanding number of DNA exonerations has given rise to a phenomenon that one commentator has dubbed "innocence consciousness," which has rightly replaced the mistaken belief that the justice system almost never convicts an innocent person. See Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 Alb. L. Rev. 1465, 1468, 1479-1480 (2011). In fact, credible studies have indicated that between three to five percent of American prisoners who have been convicted and sent to prison are innocent. See Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. and Criminology 523 (2005). In fact, Professor Gross has contended that "any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands." *Id.* at 551.

The prosecution's antiquated and misguided position that wrongful convictions are a rarity in this country and in Jackson County is also underscored by its reliance on a number of case citations, from the pre-DNA exoneration era, that wrongly held, probably because the judges who authored those opinions also suffered from the same myth of infallibility mindset, that recantations should rarely

result in exonerations. (Opp. at 15-17). If the prosecution truly believes that Mr. Carnes' claim of innocence is not compelling, there is an easy solution: agree to allow this Court to hear the evidence and independently determine whether a new trial is warranted under the *Terry* standard. See *State v. Henderson*, 468 S.W.3d 422, 425 (Mo. App. S.D. 2015).

In contrast, the prosecution's cynical attempt to block this Court from conducting a full and fair review of the evidence is contrary to elementary principles of fairness and justice and also conflicts with Rule 3.8 of the ABA Model Rule of Professional Conduct. This rule calls upon prosecutors to "undertake further investigation...to determine whether the defendant was convicted of an offense that the defendant did not commit" should the prosecutor know of "new credible and material evidence [that] creat[es] a reasonable likelihood that a convicted defendant [is innocent]." *Model Rules of Professional Conduct, Rule 3.8(g)*, American Bar Association (2013).

As the underlying motion pointed out, there is nothing in the *Terry* decision that would preclude this Court from granting a hearing in this case. *Terry* held that, even when the deadline for filing a motion for new trial has passed, justice requires that a defendant may seek a new trial based upon new evidence and perjury "if satisfied that perjury had been committed and that an improper verdict or finding was thereby occasioned." *State v. Terry*, 304 S.W.3d 105, 111 (Mo.

banc 2010). In light of the *Lincoln* decision that precludes claims of innocence from being heard in non-capital habeas corpus actions, the prosecutor's position, that there is no available judicial forum to hear petitioner's freestanding claim of innocence, if adopted, creates a textbook violation of procedural due process.

The fundamental requirement of procedural due process includes an opportunity to be heard at a meaningful time and in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Where a convicted prisoner presents a compelling claim of innocence based on newly discovered evidence, fundamental fairness requires judicial review of those claims. See Paige Kaneb, *Innocence Presumed: A New Analysis of Innocence as a Constitutional Claim*, 50 Cal. W. L. Rev. 171, 211 (2014).

It is certainly not a radical notion that a prisoner who presents compelling evidence of his innocence should receive his day in court so a fair and impartial judge may determine whether his claim of innocence merits a new trial. This is all that Mr. Carnes asks.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 10, 2017, the foregoing was filed via case.net which sends notification to all counsel of record.

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