

No. 22-569

IN THE
Supreme Court of the United States

IN RE CHRISTOPHER DUNN.

ON PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF THE UNITED STATES

REPLY TO BRIEF IN OPPOSITION

JUSTIN C. BONUS
Counsel of Record
JUSTIN C. BONUS ATTORNEY AT LAW
118-35 Queens Blvd., Suite 400
Forest Hills, NY 11375
(347) 920-0160
justin.bonus@gmail.com

Counsel for Petitioner



TABLE OF CONTENTS

	<i>Page</i>
TABLE OF CONTENTS.....	i
TABLE OF CITED AUTHORITIES	ii
RESPONSE TO THE STATE’S OPPOSITION	1

TABLE OF CITED AUTHORITIES

	<i>Page</i>
CASES:	
<i>Ex parte Joe Rene Elizondo</i> , 947 S.W.2d 202 (Tex. Crim. App. 1996)	3
<i>Feather v. United States</i> , 18 F.4th 982 (8th Cir. 2021)	4
<i>House v. Bell</i> , 547 U.S. 518 (2006)	2, 3
<i>In re Davis</i> , 130 S. Ct. 1 (2009)	3, 8
<i>In re Davis</i> , 137 S. Ct. 2273 (2017)	3
<i>In re Davis</i> , No. CV409-130, 2010 U.S. Dist. LEXIS 87340 (S.D.Ga. Aug. 24, 2010)	3
<i>In re Lincoln v. Cassady</i> , 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016)	1
<i>Kevin Johnson v. Missouri</i> , 598 U. S. ____ (2022)	9
<i>People v. Hamilton</i> , 115 A.D.3d 12 (N.Y. App. Div. 2d Dep’t 2014)	3

Cited Authorities

	<i>Page</i>
<i>Sawyer v. Whitley</i> , 505 U.S. 333 (1992).....	3
<i>Schulp v. Delo</i> , 513 U.S. 298 (1995).....	2, 3
<i>State ex rel. Amrine v. Roper</i> , 102 S.W.3d 541 (Mo. 2003).....	2, 3, 4
<i>United States v. Harris</i> , 403 U.S. 573 (1971).....	7

STATUTES AND OTHER AUTHORITIES:

U.S. Const. Art. 1 Sec. 9, Cl. 2.....	8
U.S. Const. Art. VI, Clause 2.....	1
Friendly, <i>Is Innocence Irrelevant? Collateral Attack on Criminal Judgments</i> , 38 U. Chi. L. Rev. 142 (1970)	2
Mo. Rev. Stat. § 547.031	9
Rule 29.15	8

RESPONSE TO THE STATE'S OPPOSITION

Christopher Dunn was found innocent by Judge William Hickle and has met his burden. He is entitled to immediate habeas relief. This Court has the opportunity to, once and for all, answer the question as to whether it and other courts around the country must recognize freestanding claims of innocence and what the standard for a freestanding claim is.¹

Here, the State of Missouri is ignoring the truth while mostly misrepresenting Mr. Dunn's position and the evidence that was presented to the Missouri State Circuit Court of Texas County.² Here, Judge William

1. The State's invocation of "dual sovereignty" is misplaced. Supreme Court precedent is the law of the land. The Supremacy Clause of the Constitution of the United States (Article VI, Clause 2) establishes that the Constitution, federal laws made pursuant to it, and treaties made under its authority, constitute the "supreme Law of the Land," and thus take priority over any conflicting state laws, such as the state court precedent in *In re Lincoln v. Cassidy*, 517 S.W.3d 11 (Mo. Ct. App. W.D. 2016).

2. Dunn did not concede that there was **not** a *Brady* violation or a fraud upon the court. However, unlike the State, Dunn understands that he cannot relitigate a credibility determination or a determination on the merits. If the "shoe was on the other foot," the State would be crying out that the habeas court rendered a determination that this Court should not disturb. But that is not the case here, where the State must admit that Judge Hickle found that no jury would have convicted Christopher Dunn had it heard the evidence that the hearing court heard. Christopher Dunn never put forth inconsistent theories; his position has always been that he was on the phone at his home during the time of the murder. Neither Demorris Stepp nor Michael Davis received a benefit for coming forward now. In fact, Stepp testified that he propositioned

Hickle heard all evidence, old and new, considering both the hearing testimony taken in the case and the entire trial and appellate file. Habeas Hr. Tr. 98-100;³ *House v. Bell*, 547 U.S. 518, 537-38 (2006) (*Schulp v. Delo*, 513 U.S. 298, 327-28 (1995) (citing Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 160 (1970) (emphasis added)). In addition to failing to provide any evidence of guilt, the State has failed to address the fact that the hearing court, after taking into consideration all of the evidence that the State consented to making a part of the record, concluded that **no** jury would convict Christopher Dunn after it heard this evidence.

Significantly, the State of Missouri's Supreme Court, in *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003), defined the standard for a free-standing innocence claim based upon the analysis conducted in *Schlup*, U.S. at 315-316 (discussing *Herrera v. Collins*, 506, 419, 426 (1993). *Amrine*, 102 S.W.3d at 548. The *Amrine* court held that there should be a balance struck between the standard

the assistant attorney general to try to recant his recantation for a deal in 2017. Most certainly, Christopher Dunn could not offer Mr. Stepp a benefit. Lastly, it was noted that Eugene Wilson **was present at the scene** at the time of the shooting from police reports. Judge Hickle specifically noted Wilson's presence at the scene during the shooting in his decision. The State's unsupported position otherwise is fictional and just another attempt to reinvent history.

3. The Trial Transcript will be delineated by "Tr." followed by a page number. The PCR hearing that took place in 1993 will be delineated by "PCR Hr. Tr." followed by a page number. The habeas hearing which took place in 2018 will be delineated by "Habeas Hr. Tr." followed by a page number.

that “no rational juror could convict” and the “gateway” standard of innocence, wherein it is “more likely than not” that no reasonable juror would convict. That standard, the *Amrine* court concluded, requires the petitioner to make a clear and convincing showing of actual innocence that undermines confidence in the correctness of the judgment. *State ex rel. Amrine v. Roper*, 102 S.W.3d at 548 (citing *Ex parte Joe Rene Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996); *Miller v. Commissioner of Correction*, 242 Conn. 745, 700 A.2d 1108, 1132 (Conn. 1997)).⁴

As this Court knows, a jury is presumed to be rational and/or reasonable. In the instant case, Judge Hickle believed that no jury would convict Dunn. Moreover, the standard of “no reasonable juror would convict” and “clear and convincing evidence” appear to be synonymous. *In re Davis*, No. CV409-130, 2010 U.S. Dist. LEXIS 87340, at 137-145 (*collecting cases*); *People v. Hamilton*, 115 A.D.3d 12, 22-26 (N.Y.App.Div. 2d Dep’t 2014) (Discussing the standard for a freestanding claim of actual innocence at both the federal and state level) (*collecting cases*). As such, Dunn has met the standard set in *Herrera*, *Schlup*, *House*, and *In re Davis*.

In *Amrine*, merely on the recantations of all of the State’s witnesses alone during the habeas hearing, the

4. As was noted in Mr. Dunn’s initial brief, the clear and convincing evidence standard was used in determining whether Troy Davis proved his innocence. The Southern District of Georgia determined that Troy Davis’s presentation of evidence **did not** meet the standard of clear and convincing. *In re Davis*, No. CV409-130, 2010 U.S. Dist. LEXIS 87340, at *139-145, 217-218 (S.D.Ga. Aug. 24, 2010), *aff’d*, *In re Davis*, 137 S. Ct. 2273 (2017) (*citing Schlup v. Delo*, 513 U.S. 298, 327 (1995); *Sawyer v. Whitley*, 505 U.S. 333 (1992)).

Supreme Court of Missouri held that there was clear and convincing evidence of innocence that “undermine[d] [the] confidence in the correctness of the judgment.” *Amrine, supra.* at 543.⁵

Likewise in Dunn, Judge Hickle concluded, after taking the testimony of one of the recanting witnesses, Demorris Stepp, and considering the sworn recantation of Michael Davis, that Christopher Dunn was convicted solely upon the testimony of proven liars. *See* Appendix B at 10a (*citing Amrine*, 102 S.W.3d at 550). Significantly, Demorris Stepp, during his hearing testimony, testified that Michael Davis mentioned Christopher Dunn’s name only because Stepp told Davis to do so. This testimony corroborated Davis’s recantation, wherein he swore to the fact that he mentioned Dunn’s name only because Stepp told him to. There was no evidence presented that either of these men had any communication since Mr. Dunn’s conviction and Stepp’s incarceration. Their matching versions of who mentioned Dunn’s name first and the basis of Davis’s testimony implicating Dunn had to be the product of telepathy if there was any sort of collusion here.

Contrary to the State’s brief in opposition, Judge Hickle did not base the foundation of his belief that Christopher Dunn is innocent on the recantations of Demorris Stepp and Michael Davis; he found credible, independent evidence that Dunn did not kill Ricco Rogers on May 18, 1990. *Cf. Feather v. United States*, 18 F.4th 982, 986-988 (8th Cir. 2021) (Recantations that are not

5. At trial, the defendant presented 7 witnesses, including a corrections officer, who testified that he was not the killer. *Amrine, supra.* at 544.

supported by independent evidence and are, in fact, in conflict with other record evidence cannot be the basis of an actual innocence claim).⁶ Judge Hickle based his decision on the following evidence, both old and new:

1. Eugene Wilson: Judge Hickle found Wilson to be credible at Mr. Dunn's habeas hearing in 2018; an independent witness who had every reason to see that the right person was arrested and convicted for killing Ricco Rogers. *See* Appendix B at 13a-15a. The State was unable to controvert Wilson's testimony during the habeas hearing. The following evidence supported Judge Hickle's determination:
 - a. Wilson vividly described his actions that night, walking from the east to the west on Labadie Street in St. Louis with Marvin Tolliver, one of the residents of 5607 Labadie Street. Habeas Tr: 75-80.
 - b. Wilson testified that the street was pitch black because leaves from a tree covered the lighting, making it impossible to see very far. *Id.*

6. There was not a single piece of physical evidence, or any other evidence for that matter, that connected Christopher Dunn to the murder of Ricco Rogers. Only 15-year-old Stepp's and 12-year-old Davis's testimony convicted Dunn. The State's mentioning of clothing found at Mr. Dunn's house is a red herring. This clothing was never introduced at trial. It was also (1) never connected to the crime (i.e., no gunshot residue was found on the clothing), (2) never identified as being worn by the perpetrator, and (3) never proven to be Christopher Dunn's clothing.

- c. Wilson testified that when he and Tolliver were walking back to 5607 Labadie, Stepp, Davis, and Rogers were standing on the porch. As Wilson and Tolliver approached, Wilson saw flames from the west of the abandoned house next door. While he was facing in the direction of the shots, Wilson did not see who the shooter was because of the lighting. *Id.*
 - d. Wilson testified that Stepp and Davis could not have seen the shooter because both young men were facing him and Tolliver, as they were approaching 5607 Labadie and the shots rang out. *Id.*
 - e. As testified to by the medical examiner at trial, the trajectory of the bullet that was found in the skull of Ricco Rogers went from back to front and left to right. This trajectory supports Eugene Wilson's habeas testimony that Rogers, Stepp, and Davis were facing **away** from the shooter and could not have identified the perpetrator. Tr. 172.
 - f. By the time of the shooting, Eugene Wilson had lived with Ricco Rogers' family for a few years. After the shooting, Mr. Wilson comforted Rogers' mother. *Id.*
2. Nicole Bailey⁷: Ms. Bailey testified at Mr. Dunn's habeas hearing in 2018 that she was on the phone with Christopher Dunn at the time of the

7. Formerly Nicole Williams.

shooting. Habeas Tr: 56-63; Appendix B at 15a. Bailey stated that she remembered her time on the phone with Dunn because of the birth of her child, the TV show *Hunter*, and because Mr. Dunn was arrested when she called his house later that morning. To back up Ms. Bailey's claims, Mr. Dunn submitted a TV guide documenting that the TV show *Hunter* came on at 11:00 PM on May 18, 1990. Ms. Bailey stated that she began her telephone call with Mr. Dunn during the show. The call ended when a nurse came into her hospital room to take her vitals at 1:00 AM. This was corroborated by the medical records submitted as evidence during the hearing. *Id.* The State provided no evidence to refute Ms. Bailey's hearing testimony.

3. Curtis Stewart: Mr. Stewart provided both a sworn statement and hearing testimony at Mr. Dunn's habeas hearing in 2018. *See* Appendix B at 16a. In 1991, Stewart heard Demorris Stepp admit that he did not know who shot Ricco Rogers and he intended to lie at Christopher Dunn's trial. *Id.* Stewart's hearing testimony was both rebuttal evidence and a statement against penal interest regarding Stepp's admission that he intended to testify falsely against Dunn. *United States v. Harris*, 403 U.S. 573, 583-84 (1971) ("Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility").
4. Catherine Jackson: Ms. Jackson provided an affidavit that corroborated Christopher Dunn's alibi. *See* Appendix B at 15a. Ms. Jackson swore

to the fact that Mr. Dunn was on the phone with her for 30-60 minutes beginning between 10:00 and 11:00 PM. Jackson's affidavit lines up with both Dunn's evidence presented during his post-conviction hearing in 1993 and Ms. Bailey's habeas testimony.

5. Evidence Presented at Christopher Dunn's Rule 29.15 Hearing: Christopher Dunn, Martha Dunn (mother), and Arnetta Dunn (sister) testified in 1993 at a motion for a new trial that Christopher Dunn was inside his home on the telephone at the time that Ricco Rogers was murdered.

The State's suggestion that this Court should not recognize claims of actual innocence and that the State of Missouri has alternative methods for Mr. Dunn's release is a denial of Mr. Dunn's right to due process and habeas relief under both Missouri law and the United States Constitution. Art. 1 Sec. 9, Cl. 2 of the U.S. Const.

The State posits that Mr. Dunn can seek clemency or a pardon from the governor of Missouri. The State also wants this Court to believe that Mr. Dunn can seek relief from the local prosecutor pursuant to Mo. Rev. Stat. § 547.031. Justice Stevens addressed both of these erroneous positions in response to Justice Scalia's dissent. *In re Davis*, 130 S. Ct. 1, 1-2 (2009). As Justice Stevens stated in *Davis*, to deny a habeas petition with robust evidence of innocence is to deny a defendant his right of access to the courts.

The State is suggesting to this Court that Mr. Dunn must rely on either the governor's or local prosecutor's discretion. Historically, both of these entities rubber stamp

convictions and heavily prioritize finality. With respect to Mo. Rev. Stat. § 547.031, the State's position is hypocritical and frankly, judicially duplicitous. First, the State, by way of the Attorney General's Office, consistently opposes any local prosecutor's motions to vacate, even in the face of egregious constitutional violations. *Kevin Johnson v. Missouri*, 598 U. S. ____ (2022).⁸ Secondly, the State's suggestion of relief pursuant to Mo. Rev. Stat. § 547.031 would require another hearing where Christopher Dunn and the circuit attorney would have to present the same evidence before a judge of coordinate jurisdiction. This is just a waste of judicial economy and presents a procedural conundrum wherein courts of the same jurisdiction and power could render entirely different decisions on the same set of facts. Mo. Rev. Stat. § 547.031 presents more problems than solutions in a case like Mr. Dunn's.

Not even the State can question that the Circuit Court believed that Christopher Dunn is innocent – Judge Hickle was clear that neither he nor any other person who heard the evidence that he heard would have convicted Christopher Dunn.

Our Constitution guarantees that the citizens of the United States have the right to life, liberty, and the pursuit of happiness. At least two of these rights have been stripped from Christopher Dunn, a man who has been declared innocent. The State, here, callously fails to

8. The State's position that Mr. Dunn should seek relief from Circuit Attorney Kim Gardner is especially hypocritical. The Attorney General's Office has just moved to relieve Ms. Gardner from her office and there is a bill pending within Missouri's state legislature attempting to limit Ms. Gardner's jurisdiction and authority. *See The effort to oust Kim Gardner could have widespread effects on Missouri prosecutors | KCUR 89.3 - NPR in Kansas City*

acknowledge that Christopher Dunn **has been sentenced to death**. He's been sentenced to live a life with no freedom, to not hold his mother's hand at the end of her life, to not procreate, to be completely separated from his family, to live in a disgusting cage where he could be killed at any moment, and to live a life wherein his daily choices are not made by him, but by guards. While poison won't run through his veins resulting in an immediate death, his slow, lonely death behind bars is assured, and likely hastened by heartbreak. To treat Christopher Dunn differently than an inmate sentenced to death is no less than a violation of Christopher Dunn's right to equal protection under the law.

WHEREFORE, this Court should grant habeas relief. Christopher Dunn has proven his innocence with an overwhelming amount of evidence. At least one court, who heard this evidence, agrees. Justice demands no less than habeas relief in the case at bar.

Dated: March 15, 2023
Forest Hills, NY

Respectfully submitted,

JUSTIN C. BONUS

Counsel of Record

JUSTIN C. BONUS ATTORNEY AT LAW

118-35 Queens Blvd., Suite 400

Forest Hills, NY 11375

(347) 920-0160

justin.bonus@gmail.com

Counsel for Petitioner