No. 06-954

IN THE

Supreme Court of the United States

THOMAS D. ARTHUR,

Petitioner,

—v.—

RICHARD F. ALLEN,
Commissioner, Alabama Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In denying Mr. Arthur's requests for a hearing and discovery to establish a gateway claim of actual innocence, the Eleventh Circuit failed to apply the governing standards set forth in *Schlup* v. *Delo*, 513 U.S. 298 (1995), and *Bracy* v. *Gramley*, 520 U.S. 899 (1997). The appellate court also erred in failing to apply statutory or equitable tolling to Mr. Arthur's otherwise time-barred constitutional claims. Although the State of Alabama argues that Mr. Arthur's case is not a "truly important case[] with wide ranging impact" (Opp. at 10), this Court has recognized that the "writ of habeas corpus plays a vital role in protecting constitutional rights," *Slack* v. *McDaniel*, 529 U.S. 473, 483 (2000), and that the "[d]ismissal of a *first* federal habeas petition is a particularly serious matter, for that dismissal denies the petitioner the protections of the Great Writ entirely." *Lonchar* v. *Thomas*, 517 U.S. 314, 324 (1996). If the Eleventh Circuit's erroneous decision is allowed to stand, Mr. Arthur will likely be executed—for a crime that he did not commit—without *any* state or federal collateral review of his trial and death sentence.

I. The Eleventh Circuit Erred in Failing to Grant Mr. Arthur's Requests for a Hearing and Discovery.

A. Under *Schlup*, Mr. Arthur Is Entitled to a Hearing.

The State of Alabama argues that Mr. Arthur is not entitled to a hearing because "[s]ignificant evidence demonstrates [his] guilt." (Opp. at 12) Although it concedes that the affidavits of Alphonso High and Ray Melson "tend to contradict" the testimony of Judy Wicker, the State insists that "her testimony was supported by significant evidence." (*Id*.) In light of such evidence, the State argues that even if Mr. Arthur's alibi witnesses "were unwavering in their recollection," their testimonies cannot satisfy *Schlup*'s "more

likely than not" standard. (*Id.*) The State's argument lacks support in both the factual record and the law.

As detailed in Mr. Arthur's Petition, Judy Wicker's testimony was the only direct evidence that tied Mr. Arthur to the murder of Troy Wicker. At the time she testified against Mr. Arthur, Judy Wicker was serving a life sentence for the same crime. Although she had previously testified at her own trial that Mr. Arthur was not involved in the murder of her husband, *Wicker* v. *Alabama*, 433 So. 2d 1190, 1192-94 (Ala. Crim. App. 1983), she changed her story, implicated Mr. Arthur, and obtained early parole. None of the physical evidence collected at the crime scene or in Judy Wicker's car linked Mr. Arthur to the murder. The State of Alabama nevertheless insists that Judy Wicker's testimony was supported by "significant evidence," including "testimony from multiple witnesses that Arthur had a relationship with Judy, had acquired ammunition the day before the murder, and that Judy's purse and a wig matching that used in the crime were found in his car." (Opp. at 12) Such "significant evidence," however, cannot bolster the testimony of a convicted murderer and admitted perjurer.

First, whether Mr. Arthur had a relationship with Judy Wicker does not bear on whether he murdered Troy Wicker. Indeed, such personal relationship could equally provide a motive for Judy Wicker to falsely accuse Mr. Arthur of this crime. Second, although Patricia Green testified that she provided Mr. Arthur with .22 caliber mini magnum long rifle bullets the day before the murder, the State's criminologist was unable to match such bullets with the spent shell casings recovered from the crime scene. (R.1-22-T.R. 406-07) And third, contrary to the State's assertion, the wig was found in Judy Wicker's car—not Mr. Arthur's car—and such wig was never directly linked to the crime scene. In fact, no hair was found inside the wig, *Wicker*, 433 So. 2d at 1193, and it was

only Judy Wicker who testified that Mr. Arthur wore such wig.

The State's reliance on such "significant evidence" is therefore unfounded. As the Eleventh Circuit recognized, the "affidavits of High and Melson contradict the testimony that Judy Wicker gave at trial that Arthur was with her, and would show that Arthur was about an hour away on the morning of the murder." (A47) If Messrs. High and Melson "were unwavering in their recollection" that Mr. Arthur was with them in Decatur on the morning of Troy Wicker's murder (Opp. at 12), the State of Alabama cannot seriously dispute that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327.

The State of Alabama arrives at a contrary conclusion by misconstruing *Schlup*. To establish a gateway claim of actual innocence, Mr. Arthur need not present new facts that "unquestionably establish" his innocence. *Id*. at 317. To justify a hearing to develop his gateway claim, Mr. Arthur need only demonstrate that a "showing of 'actual innocence' *may* be made out." *Id*. at 341-42 (emphasis added) (Rehnquist, C.J., dissenting). Mr. Arthur has made such a showing entitling him to a hearing. Because the Eleventh Circuit applied the wrong standard in rejecting Mr. Arthur's request, however, it arrived at the wrong result.

The State of Alabama argues that the Eleventh Circuit properly applied *Schlup*'s "more likely than not" standard instead of the "sufficiency of the evidence" standard set forth in *Jackson* v. *Virginia*, 443 U.S. 307 (1979). The State points out that the appellate court's opinion "never discussed" and "never cited *Jackson*." (Opp. at 10) Such a cursory argument, however, ignores the relevant question whether the court below actually applied *Jackson*. In fact, the Eleventh Circuit essentially concluded that Mr. Arthur failed to demonstrate that the evidence at trial was insufficient to

support his guilty verdict. Even without an explicit reference to *Jackson*, it is clear from the opinion that the Eleventh Circuit applied the "sufficiency of the evidence" standard instead of *Schlup*.

Discounting the detailed affidavits submitted by Mr. Arthur's investigator and counsel (Pet. at 10-12), the Eleventh Circuit concluded that the credibility of Mr. Arthur's alibi witnesses, Alphonso High and Ray Melson, was "fundamentally wounded by the affiants' own substantial retraction of the very content advanced to support Arthur's new alibi."[1] (A63) But the Eleventh Circuit should not have "impugn[ed] the reliability of petitioner's evidence on the ground that [the witnesses'] credibility has not been tested when the reason [their] credibility has not been tested is that petitioner's habeas proceeding has been truncated by the Court of Appeals." *Herrera* v. *Collins*, 506 U.S. 390, 445 (1993) (Blackmun, J., dissenting); *see also Martin* v. *Baldwin*, No. 99-35252, 2000 U.S. App. LEXIS 21031, at *5 (9th Cir. May 2, 2000) (where district court denied request for hearing, finding that court "improperly determined the credibility of evidence without allowing [petitioner] to fully present it").

In addition, the Eleventh Circuit concluded that due to the alibi witnesses' "substantial retraction," their "affidavits do not furnish good cause to believe that the facts, if fully developed through the discovery sought, would be any different from those found at trial." (A63) This conclusion is

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[1] In affirming the district court, the Eleventh Circuit held that Mr. Arthur was not entitled to a hearing because he failed to comply with the due diligence requirement of 28 U.S.C. § 2254(e)(2). (A51-52) In its opinion denying Mr. Arthur's petition for rehearing, the Eleventh Circuit conceded that § 2254(e)(2) is inapplicable but did not remand the case to the district court.

based on the Eleventh Circuit's implicit finding that even the "fully developed" facts regarding Mr. Arthur's alibi could not change the outcome of the trial because the evidence presented during Mr. Arthur's trial was sufficient to convict him. But *Schlup* specifically instructs that "a petitioner's showing of innocence is not insufficient solely because the trial record contained sufficient evidence to support the jury's verdict." 513 U.S. at 331. By failing to recognize that a viable *Schlup* claim can be made despite the sufficiency of the evidence to convict, the Eleventh Circuit erroneously denied Mr. Arthur's request for a hearing.

B. Under *Schlup* and *Bracy*, Mr. Arthur Is Entitled to Discovery.

The State of Alabama argues that because Mr. Arthur "has never pled specific allegations demonstrating how any of the evidence would show that he is actually innocent of killing Troy Wicker," Mr. Arthur has not shown "good cause for the discovery he seeks." (Opp. at 13) The State again misconstrues the relevant law.

In support of his gateway claim of actual innocence, Mr. Arthur seeks discovery of physical evidence that has never been subjected to DNA testing, including a rape kit, blood-stained and torn clothing, and hair samples. Based on the testimony of the State's star witness, testing of this evidence should link Mr. Arthur to the crime scene and the events leading up to Troy Wicker's murder. Such testing thus could wholly discredit the testimony of Judy Wicker—the only direct testimony linking Mr. Arthur to the murder—and demonstrate that her previous sworn testimony that someone other than Mr. Arthur shot her husband was truthful.

The State of Alabama does not dispute that DNA testing could undermine Judy Wicker's testimony, but argues that Mr. Arthur has not demonstrated "how any of the evidence would show that he is actually innocent of killing

Troy Wicker." (Opp. at 13) *Schlup*, however, does not require such showing. A petitioner need not "unquestionably establish" his innocence, and "newly presented evidence may indeed call into question the credibility of the witnesses presented at trial." *Schlup*, 513 U.S. at 317, 330 (petitioner presented affidavits to discredit testimony of two eyewitnesses who testified at his trial); *see also House* v. *Bell*, 126 S. Ct. 2064, 2078 (2006) ("If new evidence so requires, [a *Schlup* inquiry] may include consideration of the credibility of the witnesses presented at trial.") (citation omitted); *Amrine* v. *Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (granting hearing to develop gateway claim of actual innocence where petitioner obtained affidavits of witnesses recanting their trial testimony and claiming that they were threatened by law enforcement officials).

Indeed, new evidence could demonstrate that Judy Wicker lied when she testified that Mr. Arthur wore a wig, rode in her car, assaulted her, ransacked her home, and shot Troy Wicker. Consistent with the testimonies of Mr. Arthur's alibi witnesses and Judy Wicker during her trial, DNA test results could show that Mr. Arthur was not with Judy Wicker during the morning of Troy Wicker's murder. Mr. Arthur's allegations provide reason to believe that he "*may*, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy*, 520 U.S. at 908-09 (emphasis added) (internal quotation marks omitted); *cf. Toney* v. *Gammon*, 79 F.3d 693, 700 (8th Cir. 1996) (where petitioner alleged "throughout his postconviction proceedings that he is innocent of the crime and that his counsel was ineffective," he is entitled to discovery "to prove the prejudice prong of his ineffective assistance claim").

"Where, as here, there are claims of constitutional error, there has been an advancement in DNA technology that could demonstrate a viable claim of actual innocence, and the habeas petitioner faces execution," there exists good cause for

discovery. *Cherrix* v. *Braxton*, 131 F. Supp. 2d 756, 775 (E.D. Va. 2001), *aff'd sub nom. In re Braxton*, 258 F.3d 250 (4th Cir. 2001).

II. The Eleventh Circuit Erred in Failing to Toll the Statute of Limitations.

The State of Alabama advances several arguments to oppose the application of statutory or equitable tolling to Mr. Arthur's habeas petition. None is persuasive.

First, the State of Alabama argues that in the courts below Mr. Arthur "challenged only the adequacy of the death row reading room," and made no allegations regarding the adequacy of his access to the general population library. (Opp. at 13) The State is wrong. In rejecting his statutory tolling claim, the Eleventh Circuit noted Mr. Arthur's argument that the State failed to provide him "access to an adequate law library," and held that the district court did not clearly err in finding that Mr. Arthur failed "to show that he was provided inadequate access to the prison law library." (A53, A56)

The State, however, does not dispute that Holman Prison failed to provide a list or description of books available from the general population library to death row inmates who are required to request books by title or volume, or that it utilizes a "book paging" system similar to those found to be constitutionally inadequate by other courts. (Pet. at 17-18)

Second, the State of Alabama argues that if Mr. Arthur "wanted legal representation to pursue either state or federal post-conviction relief, all he had to do was request counsel." (Opp. at 15) According to the State, in order to obtain appointed counsel in state post-conviction proceedings, a "petitioner need only fill in the form Rule 32 petition." (*Id*.) However, as noted by the Eleventh Circuit, "that form does not provide any information or questions regarding the need for appointment of counsel." (A54) Contrary to the State's

suggestion, Alabama courts have not appointed counsel to every indigent petitioner upon request. *See, e.g.*, *Dallas* v. *Haley*, 228 F. Supp. 2d 1317 (M.D. Ala. 2002).[2] Moreover, a *pro se* petitioner must first survive summary dismissal before he can request counsel. (Pet. at 19-20) To do so, his petition must include "full disclosure of the factual basis" of his claims. (*Id*. (citing ALA. R. CRIM. P. 32.6(b))) There is no allowance for an indigent death-row inmate who lacks resources to research the law or the facts.

Third, although the State of Alabama acknowledges "a possible split among the circuits in the equitable tolling standards applicable to capital cases," it opposes application of the "less than extraordinary" standard set forth in *Fahy* v. *Horn*, 240 F.3d 239 (3d Cir. 2001). (Opp. at 16-17) The State's reasoning is flawed.

The State of Alabama argues that this Court has "demonstrated a general reluctance to create dual standards for post-conviction proceedings in capital and noncapital cases." (Opp. at 19) None of the cases cited by the State, however, addresses the issue presented here: Whether a different standard should apply to toll otherwise time-barred claims of a petitioner who faces execution without *any* collateral review of his habeas petition challenging the constitutionality of his trial or death sentence.

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[2] The Circuit Court of Montgomery County did not appoint counsel for death-row petitioner Donald Dallas upon his request, despite Mr. Dallas' timely filing of a *pro se* Rule 32 petition. *Id*. at 1319. It was only after Mr. Dallas made "several requests" from his cell on death row that the trial court finally appointed counsel pursuant to Ala. R. Crim. P. R. 32.7(c). *See id*. Before counsel was appointed, however, the trial court had already dismissed certain of Mr. Dallas' claims.

The State's reliance on *Coleman* v. *Thompson*, 501 U.S. 722 (1991), is misplaced. Citing *Murray* v. *Giarratano*, 492 U.S. 1 (1989), the *Coleman* court noted that there is no constitutional right to counsel in state post-conviction proceedings for death row inmates. *See* 501 U.S. at 752. *Coleman*, however, explicitly left unanswered the question whether an exception exists to the *Giarratano* rule where state post-conviction proceedings are the first opportunity for a capital defendant, as in Mr. Arthur's case, to raise a claim of ineffective assistance of trial or appellate counsel. *See id*. at 755-56. The Court therefore has left open the possibility that a different rule may apply to a capital defendant seeking for the first time collateral review of his claims.

Fahy's "less than extraordinary" equitable tolling standard should apply here so that Mr. Arthur's claims can be reviewed on the merits for the very first time. As this Court has recognized, collateral review of convictions and sentences is integral to the death penalty appellate process. *See Giarratano*, 492 U.S. at 14 (Kennedy, J., concurring in the judgment).

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant a writ of certiorari and reverse the decision of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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