NO. 08-

In The

Supreme Court of the United States

TROY ANTHONY DAVIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

Philip Horton*
Jason Ewart
Danielle Garten
ARNOLD & PORTER LLP
555 12th Street, NW
Washington D.C. 20004
(202) 942-5000

Thomas H. Dunn
GEORGIA RESOURCE CENTER
303 Elizabeth Street, NE
Atlanta, Georgia 30307
(404) 222-9202

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* Counsel of Record

CAPITAL CASE

QUESTION PRESENTED

Mr. Davis' request for an evidentiary hearing to examine his new innocence evidence sharply split the Supreme Court of Georgia. Since Mr. Davis' murder conviction, seven of nine State witnesses have recanted their trial testimony, and several new witnesses have identified or implicated a different individual, Redd Coles, as the shooter. A bare majority of four Georgia Supreme Court Justices denied Mr. Davis' motion for new trial and evidentiary hearing, citing a procedural requirement that witness recantations could never be material unless extrinsic evidence could show that the trial testimony of each recanting witness was the "purest fabrication" and that each piece of new evidence, standing alone, could prove Petitioner's innocence. Three of the seven justices argued that this case illustrates that the State's procedures for motions for new trial based on new evidence are "overly rigid and fail[] to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, in this case, might be put to death." App. A at 17a.

The questions presented are:

1. Does the Eighth Amendment to the U.S. Constitution create a substantive right of the innocent not to be executed so as to invoke the procedural requirements of the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution when substantial evidence of innocence is discovered?

2. Alternatively, the Due Process Clause of the Fourteenth Amendment protects State-created liberty interests when State law mandates a decision favorable to an individual based on a set of substantive predicates. Georgia law creates an Extraordinary Motion for New Trial that mandates a new trial

based on newly-discovered evidence if the defendant can show that the new evidence meets six substantive predicates. Does Georgia's Extraordinary Motion for New Trial create a liberty interest protected by procedural due process?

3. If either the Eighth Amendment or Georgia law creates a liberty interest protected by the Due Process Clause, does the Supreme Court of Georgia's failure to grant an evidentiary hearing to review the cumulative substance and credibility of Mr. Davis' admissible new innocence evidence violate the procedural requirements of the Due Process Clause?

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Appendix B -- Order Denying Extraordinary Motion For New Trial And Motion For Stay Of Execution By The Superior Court Of Chatham County Georgia Dated July 13, 2007

PETITION FOR A WRIT OF CERTIORARI

Petitioner Troy Davis respectfully petitions for a writ of certiorari to review the opinion of the Supreme Court of Georgia or a remand to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations of State witnesses.

OPINIONS BELOW

The opinion of the Supreme Court of Georgia, App. A, is reported at 283 Ga. 438, 660 S.E.2d 354 (2008). The opinion of the Superior Court of Chatham County Georgia, App. B, is unreported.

STATEMENT OF JURISDICTION

The opinion of the Supreme Court of Georgia was entered on March 17, 2008. *See* App. A. The Supreme Court of Georgia denied Mr. Davis' Motion for Reconsideration on April 14, 2008. *See* App. A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment of the United States Constitution states, in relevant part: "Nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

The Eighth Amendment of the United States Constitution states, in relevant part: "nor cruel and unusual punishments inflicted."

GA. CODE ANN. § 5-5-23 (2008) states: "A new trial may be granted in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial."

GA. CODE ANN. § 5-5-41(b) (2008) states, in relevant part: "[N]o motion for a new trial from the same verdict or judgment shall be made or received unless the same is an extraordinary motion or case."

INTRODUCTION

The Supreme Court of Georgia's decision presents an important question concerning the process due in capital cases when new evidence is acquired.

With the advent of DNA testing methods, the possibility of wrongful executions has been reduced and the causes of wrongful convictions have become more evident. Most convictions of prisoners later found to be innocent have resulted from eyewitness misidentification, false confession and perjury. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2545 (2006) (SOUTER, J., *dissenting*). Petitioner's case is a classic example of the unreliability of eyewitness testimony. Both the State and Petitioner agree that the murder was committed by one of two men: Mr. Davis or State witness Sylvester "Redd" Coles in a dimly-lit parking lot in the dark, early hours of the morning. New evidence has come to light that questions the core of the State's case in the form of eyewitness recantations, improper police tactics and testimony from multiple affiants that Redd Coles committed the murder. Yet, no court has ever examined Petitioner's new evidence to determine if he is innocent.

The number of DNA exonerations averaged twenty per year between 2000 and 2003,[1] and there is no reason to believe that the rate of wrongful convictions is lower in cases where DNA evidence is not available. When DNA evidence is not available, as it is not in this case, courts must resort to more judicial assurances of guilt by examining new evidence that has come to light since trial and testing its credibility. Since not all cases involve forensic evidence, courts must fulfill their duties as fact finders when petitioners present substantial non-forensic evidence of innocence. In this case, however, the State courts adopted procedures that rejected Mr. Davis' new recantation evidence without an evidentiary hearing.

This Court should grant certiorari to consider if either the State-created liberty interest in a new trial or the Eighth Amendment invokes the protections of procedural due process when a defendant in a capital case presents substantial new admissible evidence of innocence.

STATEMENT OF THE CASE

Petitioner appeals the denial of his Extraordinary Motion for New Trial filed pursuant to GA CODE ANN. §§5-5-23; 5-5-41(b) (2008).

In the early morning hours of August 19, 1989, Officer Mark MacPhail was murdered in a parking lot in Savannah, Georgia. The incident started when Sylvester "Redd" Coles began harassing a homeless man for a beer while Mr. Davis and others watched quietly from a distance. Coles verbally harassed and chased the homeless man to a nearby parking lot where Officer MacPhail was working. Coles threatened the retreating homeless man by exclaiming:

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[1] *See* Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003,* 95 J. Crim. L. & C. 523 (2006).

"You don't know me. Don't walk away from me. I'll shoot you." Mr. Davis and others silently followed the scuffle. During the altercation, the homeless man was struck on the head with a pistol and yelled for help. Officer MacPhail responded and was shot dead with a .38 caliber weapon by the same man who had pistol-whipped the homeless man. The parking lot was dark and the scene was chaotic. After the dust settled, the police took the statements of several onlookers but had no suspects. Redd Coles and Mr. Davis were both African-American males of similar age, height and weight.

The day after the shooting, another homeless man discovered a spent shell from a .38 caliber revolver near the scene of the murder. The shell was similar to -- and later found to match -- shell casings recovered near a shooting that occurred earlier that evening at a pool party not far from where Officer MacPhail was killed. The two hosts of the pool party confirm that Redd Coles was at the party. Mr. Davis was also at the party, but he was not with Coles. The pool party shooting occurred when four boys -- two of whom were Coles' neighbors -- were shot at as they drove away from the party. One of the car's passengers was shot in the face. Later that evening, as Coles' sister testified at trial, Coles got into a heated argument with Joseph Blige, one of the teenagers riding in the car. Although excluded from trial as hearsay, Coles' sister's police statements show that Blige exclaimed to Coles "I know y'all tried to kill me." Coles later admitted to carrying a .38 caliber revolver on the night of the shootings, but claimed that it was lost when the police attempted to recover the gun for testing. None of the boys riding in the car knew Mr. Davis or identified him as the pool party shooter; the police search of Davis' house less than 24 hours after the shooting turned up no gun.

After the police swarmed his neighborhood looking for suspects, Redd Coles and his attorney approached the

police to exonerate Coles and implicate Troy Davis. Before discovering that Coles had lied about carrying a .38 caliber gun – the same caliber as the murder weapon – on the night of the murder, the police had issued an arrest warrant for Davis without corroborating any part of Coles' story. After the warrant issued, Mr. Davis' picture was plastered on wanted posters and in the local Savannah media.

The police never searched Coles' house for the murder weapon, never included Coles' picture in witness photo spreads and paraded Coles in front of four State witnesses as a mere bystander in a crime scene "reenactment."

A jury convicted Mr. Davis of murder, aggravated assault, obstruction of a law enforcement officer and possession of a firearm during a felony and sentenced him to death. The State's case rested almost completely on the testimony of several witnesses, including Redd Coles.

All of the State witnesses -- save Redd Coles and Steve Sanders who first identified Mr. Davis at trial -- have recanted their testimony, claiming police coercion or questionable interrogation tactics (*e.g.*, showing the witness a single photo of Mr. Davis and asking if he was the shooter). Five new witnesses have now implicated Coles, not Troy Davis, in the murder of Officer MacPhail. One of these eyewitnesses has sworn that he was near the crime scene and saw Redd Coles shoot MacPhail. Another witness states she saw Coles hiding a gun in an empty house soon after the shootings. Three additional witnesses have stated that, since trial, Redd Coles has admitted to killing Officer MacPhail and escaping punishment.

The only remnants of the State's case against Petitioner are the self-serving testimony of Redd Coles and

Steve Sanders' dubious in-court identification of Mr. Davis that occurred two years after the crime.[2]

Following his state direct appeals and collateral review, Mr. Davis filed a petition for writ of habeas corpus in 2001, arguing that his innocence evidence allowed the habeas court to review his otherwise-defaulted constitutional claims. The habeas court refused to examine Mr. Davis' innocence claim or grant an evidentiary hearing. The Court of Appeals for the Eleventh Circuit affirmed the habeas court's decision, holding that habeas courts may reach the merits of constitutional claims without an examination of a petitioner's innocence claim.

Immediately after his federal habeas appeals, Mr. Davis filed for an Extraordinary Motion for New Trial provided for under Georgia law. The trial court rejected Mr. Davis' motion and refused to hold an evidentiary hearing, citing procedures that categorically reject recantation evidence without regard to its substance or credibility. A bare majority of the Supreme Court of Georgia affirmed, finding that an evidentiary hearing was unnecessary because State procedural rules for Extraordinary Motions for New Trial bar recantations unless extrinsic evidence shows that each recanting witness' trial testimony was the "purest fabrication." The court examined Mr. Davis' non-recantation evidence piecemeal and without reference to the cumulative effect of all of the evidence.

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[2] As of the date of this petition, Petitioner's counsel has been unable to interview Mr. Sanders. Sanders' police statement on the night of the shooting that he would not "recognize the shooter" directly contradicts his testimony two years later when he identified Mr. Davis for the first time at trial.

REASONS FOR GRANTING THE PETITION

Mr. Davis contends that both the Eighth Amendment and Georgia's Extraordinary Motion for New Trial create a liberty interest that requires the minimum due process of an evidentiary hearing in the State trial court to assess the cumulative effect of all his innocence evidence, including the State witness recantations.

I. Mr. Davis' Case Presents An Ideal Vehicle For this Court to Decide an Issue of Great Constitutional Import: Whether The Eighth Amendment Prohibits the Execution of the Innocent

Mr. Davis' case allows this Court an opportunity to determine what it has only before assumed: that the execution of an innocent man is constitutionally abhorrent. The Court need only determine if the Eighth Amendment bars execution of the innocent and then decide (*see infra* at III) whether Georgia's Extraordinary Motion for New Trial procedures afford sufficient due process protection. *Cf. Panetti v. Quarterman*, 127 S.Ct. 2842 (2007) (recognizing Eighth Amendment bars the execution of the insane, then finding that the State court procedures failed to provide the minimal due process for petitioner who had shown a "substantial threshold showing of insanity"); *Ford v. Wainwright*, 477 U.S. 399 (1986) (plurality opinion) (same for State executive procedures).

The Eighth Amendment's Cruel and Unusual Punishment Clause "draws its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). This Court takes into account "objective evidence of contemporary values before determining whether a particular punishment comports with fundamental human dignity that the [Eighth]

Amendment protects." *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality).

The "objective evidence of contemporary values" that informs the Eighth Amendment are evidenced in many ways. Public opinion, *Weems v. United States*, 217 U.S. 349, 378 (1910), jury verdicts, *McGautha v. California*, 402 U.S. 183, 199 (1971), and legislation, *Penry v. Lynaugh*, 492 U.S. 302 (1989), can all reflect the evolving standards of a maturing society. This Court has often looked to state statutes to determine contemporary values for purposes of Eighth Amendment analysis. *See Kennedy v. Louisiana*, --- S.Ct. ----, 2008 WL 2511282, *13 (2008) (citing cases). A consensus of State laws on the issue "is entitled to great weight." *Id*. at 18. Additionally, this Court has found that the Eighth Amendment "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems*, 217 U.S. at 378.

In the fifteen years since *Herrera v. Collins*, 506 U.S. 390, 417 (1993), the basis for this Court's Eighth Amendment analysis has eroded. In *Herrera*, this Court assumed without deciding that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional." *Id*. at 417. The Court in *Herrera* based its Eighth Amendment analysis on the idea that "constitutional provisions [] have the effect of ensuring against the risk of convicting an innocent person." *Id*. at 398-99. And it held that "[o]ur society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent." *Id*. at 420 (O'Connor, J. *concurring*).

Since *Herrera* was decided, the country has become skeptical of the infallibility of our criminal system as shown by State statutory enactments and public opinion. The impact

of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. Since 1989, there have been 218 post-conviction DNA exonerations. When *Herrera* was decided in 1993, DNA had proven only 15 convictions to be erroneous.[3] Eyewitness misidentification testimony was a factor in 77 percent of post-conviction DNA exoneration cases, making it the leading cause of these wrongful convictions.[4]

Since *Herrera* and the influx of DNA exonerations, the States have come to a general consensus that criminal trials are imperfect. Starting in 1994 (one year after this Court's decision in *Herrera*), the vast majority of States have enacted statutes mandating DNA testing for the potentially innocent. Now, forty states, the District of Columbia and the United States have DNA statutes that mandate that courts compel DNA testing if the results would have a sufficient exculpatory effect.[5] Another three states have a State

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3 *See* www.innocenceproject.org/know; Gross, Jacoby, Matheson, Montgomery & Patil, *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & C. 523, 555 (2006).

4 *See* www.innocenceproject.org/Content/351.php

5 See 18 U.S.C. 3600(a)(6)-(8) (2008); ARIZ. REV. STAT. ANN. § 13-4240(A)-(B) (2008) ; ARK. CODE ANN. § 16-112-202(6)-(8) (West 2008) ; CAL. PENAL CODE § 1405 (West 2008) ; CONN. GEN. STAT. ANN. § 54-102kk(b) (West 2008) ; DEL. CODE ANN. tit. 11 § 4504 (2008) (requiring tests if the statutory requirements are met, as interpreted by Anderson v. Delaware, 831 A.2d 858, 865 (Del. Super. Ct. 2003)); D.C. CODE § 22-4133(d) (2008); GA. CODE ANN. § 5-5-41(c)(7) (2008) ; HAWAII REV. STAT. § 844D-123(a) (2008) ; IDAHO CODE ANN. § 19-4902(d)(2008) ; 725 ILL. COMP. STAT. ANN. 5/116-3 (West 2008) ; IND. CODE ANN. § 35-38-7-8 (West 2008; id. § 35-38-7-9 (2008); IOWA CODE ANN. § 81.10(2)(e) (West 2008) ; KAN. STAT. ANN. § 21-2512(c) (2008) ; KY. REV. STAT. ANN. § 422.285(1)-(2) (West 2008) ; LA. CODE CRIM. PROC.

(Continued…)

constitutional requirement or common law procedure to determine if DNA testing is mandatory.[6]

The fact that forty-seven U.S. jurisdictions have developed mandatory DNA procedures in the wake of 218 DNA exonerations shows a post-*Herrera* general consensus that the criminal system is fallible. The impact of the DNA revolution had not begun to affect public confidence in the outcome of criminal trials when *Herrera* was decided. *Herrera's* assumptions that "our society has a high degree of confidence in criminal trials" and that existing constitutional protections "have the effect of ensuring against the risk of convicting an innocence person" are plainly contrary to the large number of recent exonerations, contemporary norms and

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ANN. art. 926.1(A)(1)-(2) (2008) ; ME. REV. STAT. ANN. tit. 15 § 2138 (2008) ; MD. CODE. ANN., CRIM. PROC. § 8-201(c) (West 2008) ; MINN. STAT. ANN. § 590.01 (West 2008) ; MO. REV. STAT. § 547.035(7) (West 2008) ; MONT. CODE ANN. § 46-21-110 (2008) ; NEB. REV. STAT. § 29-4120(5) (2008) ; NEV. REV. STAT. ANN. 176.0918(5)(a) (West 2008) ; N.J. STAT. ANN. § 2A:84A-32a(4)-(5) (West 2008) ; N.M. STAT. ANN. § 31-1A-2(C) (West 2008) ; N.Y. CRIM. PROC. LAW § 440.30(1-a) (McKinney 2008) ; N.C. GEN. STAT. ANN. § 15A-269(a) (West 2008) ; N.D. CENT. CODE § 29-32.1-15(3) (2008) ; OHIO REV. CODE ANN. § 2953.71-.84 (West 2008) ; OR. REV. STAT. ANN. § 138.692(2) (West 2008) ; PA. CONS. STAT. ANN. § 9543.1 (West 2008) ; R.I. GEN. LAWS § 10-9.1-12(a)-(b) (2008) ; TENN. CODE ANN. § 40-30-304 (West 2008) ; TEX. CODE CRIM. PROC. ANN. art. 64.03 (Vernon 2008) ; UTAH CODE ANN. § 78-35a-301(6)(b) (West 2008) ; VT. STAT. ANN. tit. 13 § 5566 (2008) ; VA. CODE ANN. § 19.2-327.1(D) (West 2008); WASH. REV. CODE ANN. § 10.73.170(3) (West 2008); W. VA. CODE ANN. § 15-2B-14(e) (West 2008) ; WIS. STAT. ANN. § 974.07(7)(a)(2) (West 2008) ; FLA. R. CRIM. P. 3.853 ;. see also OKLA. STAT. ANN. tit. 22 § 1371.1-1371.2 (West 2008).

6 *See Osborne v. Alaska*, 110 P.3d 986, 995 (Alaska Ct. App. 2005); *Lambert v. Mississippi*, 777 So.2d 45, 49 (Miss. 2002); *Davis v. Class*, 609 N.W.2d 107 (S.D. 2000).

public opinion. *Herrera*, 506 U.S. at 398, 420. For example, the Harris polling agency has stated that:

> There is one issue almost all Americans agree on – ninety-five percent of U.S. adults say that sometimes innocent people are convicted of murder while only five percent believe that this never occurs. This is a number that has held steady since 1999. Among those who believe innocent people are sometimes convicted of murder, when asked how many they believe are innocent, the average is 12 out of 100 or twelve percent.[7]

Forty-six States have enacted mandatory DNA testing in possible innocence cases. Ninety-five percent of Americans believe the innocent are often convicted and at least 218 persons have been wrongly convicted. Such "objective evidence" shows that this Court must revisit its analysis in *Hererra* and conclusively hold that the Eighth Amendment bars the execution of defendants with substantial reliable innocence evidence acquired since trial.

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[7] *See www.harrisinteractive.com/harris_poll/index.asp?PID=882 The Harris Poll* was conducted by telephone within the United States between February 5 and 11, 2008 among a nationwide cross section of 1,010 adults (aged 18 and over). Similarly, in a 2000 poll conducted for Newsweek by Princeton Survey Research Associates found that 82% of those polled agreed that "states should make it easier for Death Row inmates to introduce new evidence that might prove their innocence, even if that might result in delays in the death penalty process?" *See* www.pollingreport.com/crime.htm.

II. Georgia's Extraordinary Motion for New Trial Creates A Liberty Interest In A New Trial That Requires Fundamentally Fair Due Process Under the Fourteenth Amendment

Liberty interests protected by the Fourteenth Amendment may arise from State law. *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974). This Court has found State-created liberty interests for prisoners, including -- among others -- the rights to: parole,[8] good-time credits for satisfactory behavior,[9] and the freedom from involuntary transfer to a mental hospital.[10] State-created liberty interests protected by the Due Process Clause are found in "statutes or other rules defining the obligations of the [State authority charged with granting the liberty interest]." *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *see also Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980) (finding prisoner's liberty interest in right to be free from mental hospital transfer was derived from "state law and official penal complex practice" as well as the U.S. Constitution.)

State law creates a liberty interest protected by the Due Process Clause by mandating a certain individual right or benefit once certain "substantive predicates" have been met. *See Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 10 (1979) (liberty interest created under State law where "there is [a] set of facts which, if shown, mandate a decision favorable to the defendant."); *Board of Pardons v. Allen*, 482 U.S. 369 (1987) (same). In *Greenholtz* and *Allen*, this Court

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[8] *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1 (1979).

[9] *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

[10] *Vitek v. Jones*, 445 U.S. 480, 489-91, 493 (1980).

found that the State parole statutes at issue created a due process liberty interest in release from prison. *See Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. The State parole statutes created a protected liberty interest by conferring "broad discretion" upon the state parole boards to make parole decisions using prescribed substantive predicates that, once satisfied, mandated a certain result (conditional release from prison). *Id*. at 375 (interpreting *Greenholtz*).

Since the State parole boards had to make a "necessarily subjective" decision using substantive predicates that could "not be applied mechanically," the process by which those decisions were made required fundamentally fair due process. *See id*. at 375-376 (interpreting *Greenholtz*). Since parole was mandatory upon a favorable determination of substantive predicates, release from prison was more than a mere unilateral hope, but a constitutionally protected expectation. *See id*. at 375-376 (interpreting *Greenholtz*).

Although determinations of whether a State statute creates a constitutionally protected liberty interest are questions of federal law, this Court defers to State court interpretations in determining whether the State statue at issue is mandatory. *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). In *Greenholtz*, the Court noted with regret that it was denied the benefit of the Nebraska courts' interpretation of whether the State law at issue was mandatory. 442 U.S. at 12 (citing approvingly); see also *Allen*, 482 U.S. at 369, 377 n. 8 (implying that a Montana Supreme Court interpretation of whether the relevant parole statute was mandatory would have been instructive if there had been a decision on point).

Here, Georgia State law grants Mr. Davis a liberty interest in a new trial. Georgia's Extraordinary Motion For New Trial mandates a new trial if the defendant can show

new evidence that meets six substantive predicates.[11] Although the relevant statute provides that a new trial "may be granted,"[12] the controlling interpretation of the Georgia Supreme Court is that:

> While the statute states that a new trial 'may be granted,' this does not mean that in a proper case, where all the rules of law have been met, a new trial may or may not be granted, but on the contrary it means that in such a case a new trial *must* be granted." *Bell v. State*, 227 Ga. 800, 805, 809, 183 S.E.2d 357, 362 (1971) (*citing Werk v. Big Bunker Hill Mining Corp.*, 193 Ga. 217, 228, 17 S.E.2d 825 (1941); *Matthews v. Grace*, 199 Ga. 400, 405, 34 S.E.2d 454, 457 (1945)) (emphasis added).

Georgia law prescribes six substantive predicates for the trial judge to determine whether a new trial must be granted. It is incumbent on a defendant to show: "(1) the newly discovered evidence has come to [the defendant's] knowledge since the trial; (2) want of due diligence was not the reason that the evidence was not acquired sooner; (3) the evidence was so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the affidavit of the witness is attached to the motion or its absence accounted for; and (6) the new evidence does not operate

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[11] Due process protections do not turn on whether State law uses a shall/unless formula. *Board of Pardons v. Allen*, 482 U.S. 369, 378 (1987) (finding state parole statute mandatory for purposes of due process protection where the statute mandated release "if" or "when" the substantive predicates had been found.).

solely to impeach the credit of a witness." *Bell v. State*, 227 Ga. 800, 805, 183 S.E.2d 357, 360-61 (1971).

These predicates for a new trial require the same -- if not more -- subjective discretion as required by the parole statutes at issue in *Greenholtz* and *Allen*.[13] The trial court must determine the nature of the evidence, compare it to the evidence adduced at trial and judge whether the new evidence would materially affect the jury's verdict. *Id.* Similar to the relevant factors for parole in *Allen* and *Greenholtz*, Georgia cases show that the predicates for a new trial cannot "be applied mechanically." *See, e.g.*, *Bell*, 227 Ga. at 807 (the materiality element "cannot be reduced to a mathematical probability"). Instead, Georgia courts are tasked to make "necessarily subjective" credibility determinations of new witnesses and weigh the probative effect of new evidence.

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[13] In *Allen*, the Montana parole statute at issue mandated parole "Subject to the following restrictions … when in its opinion there is reasonable probability that the prisoner can be released without detriment to the prisoner or to the community … A parole shall be ordered only for the best interests of society and not as an award of clemency or a reduction of sentence or pardon. … A prisoner shall be placed on parole only when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen." 482 U.S. at 376 (quoting Mont.Code Ann. § 46-23-201 (1985)).

In *Greenholtz*, the Nebraska parole statute mandated parole unless "(a) there is a substantial risk that he will not conform to the conditions of parole; (b) his release would depreciate the seriousness of his crime or promote disrespect for law; (c) his release would have a substantially adverse effect on institutional discipline; or (d) his continued correctional treatment, medical care, or vocational or other training in the facility will substantially enhance his capacity to lead a law-abiding life when released at a later date." The statute also set forth a list of 14 factors that the Nebraska parole board must consider in reaching a decision. *Greenholtz*, 442 U.S at 11-129 (quoting Neb.Rev.Stat. § 83-1, 114(1) (1981)).

See, *e.g.*, *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1983) (assessing the credibility of a recanted State witness' testimony given at an evidentiary hearing); *Humphrey v. State*, 207 Agape. 472 (475), 428 S.E.2d 362, 364 (1993) (finding an abuse of discretion for the trial court to "pass[] upon the credibility" of a exculpatory new witness).

The liberty interest in a new trial created by Georgia law is more substantial than other State-created interests this Court has recognized. In *Wolff, Greenholtz and Allen*, this Court recognized that the loss of good-time credits for early release or the possibility of parole implicates a State-created liberty interest even though the forfeiture only deprived the prisoner of freedom he expected to obtain sometime in the future.[14] Mr. Davis' State-created liberty interest in a new trial is more substantial than an interest in parole. If, after an evidentiary hearing, the trial court determines Mr. Davis' new evidence meets the six substantive predicates, Mr. Davis' conviction must be overturned. Mr. Davis will enjoy the rights and benefits of the accused, which include the right to pre-trial release (or at least non-punitive pre-trial incarceration), the right of presumed innocence, the right to counsel and the right to have a jury of his peers determine whether he is guilty beyond a reasonable doubt.

Unlike the reversal of a conviction, parole -- the liberty interest at issue in *Greenholtz* and *Allen* -- does not affect the prisoner's conviction but instead is only "an established variation on imprisonment of convicted criminals" that allows for release from prison "on the condition that the prisoner abide by certain rules during the balance of the

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[14] In *Wolff v. McDonnell*, this Court held that the State created a liberty interest by mandatory statute that provided for good time credits toward early release. 418 U.S. at 557.

sentence." *Morrissey v. Brewer*, 408 U.S. 471, 477-78 (1972). Parole necessarily restricts a parolee's liberty "substantially beyond" those who have not been convicted of a crime, and the Constitution does not entitle parolees to "the full panoply of rights due a defendant" when the State seeks re-incarceration through parole revocation. *Id*. at 478, 480.

By contrast, the liberty interest at issue in this case involves the imminent execution of an inmate in spite of the existence of new innocence evidence that has never been tested in a hearing. The State-created liberty interests in *Wollf, Greenholtz* and *Allen* involved only the expectation for conditional release from prison. Here, Georgia law creates an expectation that the innocent will not be executed upon a showing of newly-discovered material evidence that meets certain substantive criteria.

A. This Court Should Decide Whether A Positivist Approach to Finding State-Created Rights Is Still Viable After Sandin

This Court should clarify the analytical framework applied to determine when State-created rights require due process protections.

In *Wolff, Greenholtz,* and *Allen*, discussed *supra*, the Court recognized that the liberty interests protected by procedural due process can be created by State law. In *Wolff*, inmates earned good time credits under a State statute that mandated sentence reductions for good behavior revocable only for "flagrant or serious conduct." 418 U.S. at 545-546. Although the Due Process clause itself did not create a liberty interest in good time credits, this Court found that a mandatory State statute created an interest in a "shortened prison sentence" that was protected by due process. *Id*. at 557. This Court characterized the prisoner's State-created expectation of a shortened prison sentence as a liberty interest with "real substance." *Id*. at 557.

After *Wolff*, this Court in *Greenholtz* and *Allen* found that nearly identical mandatory State parole statutes created a protected liberty interest in conditioned release by using "language of an unmistakably mandatory character" subject to discretion set out in "specified substantive predicates." *Greenholtz*, 442 U.S. at 12; *Allen*, 482 U.S. at 377-78. In *Allen*, this Court went on to note that parole decisions implicated an interest "at the heart of the liberty protected by the Due Process Clause." *Allen*, 482 U.S. at 373 n.3. Unlike in *Wolff* and *Allen*, this Court in *Greenholtz* did not analyze whether the expectation created by State law was a liberty interest of "real substance" or "at the heart" of due process.

After *Greenholtz* and *Allen* were decided, this Court and the lower federal courts wrestled with various mandatory State statutes and regulations to determine whether due process extended to relatively mundane aspects of prison life, including rights associated with visitation privileges, tray lunches, paperback dictionaries and the provision of electrical outlets for televisions.[15] The liberty interests involved in these cases were far from substantial. Hence, it was not surprising that the Court in 1995 held that "the time has come to return to the due process principles we believe were correctly established in *Wolff* …" when interpreting State-created liberty interests. *Sandin v. Conner*, 515 U.S. 472, 483 (1995).

In *Sandin v. Conner*, this Court altered the analytical framework to be used to determine State-created liberty interests. The prisoner in *Sandin* challenged his 30-day solitary confinement, arguing that a mandatory State prison regulation created a liberty interest in being free from disciplinary segregation. *Id*. at 476. In overturning the Court

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[15] *See Sandin v. Conner*, 515 U.S. 472, 483 (1995).

of Appeals decision, this Court explicitly eschewed *Greenholtz*'s use of the mandatory/discretionary analysis of State law. Instead of focusing on the mandatory language of the State regulation at issue this Court held that States "under certain circumstances" create liberty interests entitled to due process but that those interests "will be generally limited to freedom from restraint which … imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life" or "inevitably affect[s] the duration of his sentence." *Id*. at 484, 487.

Sandin did not overturn the mandatory/discretionary framework used in *Greenholtz* and *Allen* but found that due process protected only State-created liberty interests of "real substance." The Court characterized the mandatory/discretionary determination as a "somewhat mechanical dichotomy" that failed to look at "whether the State created an interest of 'real substance' comparable to the good time credit scheme of *Wolff*." *Id*. at 479-80. What is telling is that after Court found that *Greenholtz*'s mandatory/discretionary analysis was misguided, it approvingly cited *Allen* for the proposition that "we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause." *Id*. at 484. *Sandin's* explicit rejection of *Greenholtz's* analysis and its favorable citation to *Allen* 's application of the same mandatory/discretionary framework to nearly identical parole statutes can only be explained by the sole difference between those opinions: *Allen* ensured that the State-created liberty interest was "at the heart" of due process while *Greenholtz* confined its analysis to the State statute.

Recently in *Wilkinson v. Austin*, 545 U.S. 209 (2005), this Court once again addressed the issue of the mandatory/discretionary framework. This Court reiterated that "after *Sandin*, it is clear the touchstone of the inquiry into the existence of a protected, state-created liberty interest in avoiding restrictive conditions of confinement is not the

language of regulations regarding those conditions . . .." *Id*. at 223. In *Wilkinson* this Court noted that "in *Sandin's* wake the Courts of Appeals have not reached consistent conclusions for identifying the baseline from which to measure" whether a hardship imposed on a prisoner amounts to a due process violation. *Id*. at 223. While acknowledging that inconsistencies were already apparent across the circuits, this Court declined to define further the baseline for determining whether a liberty interest exists for certain conditions of confinement, or to elaborate further on the breadth of *Sandin*'s reach. *Id*.

Circuit courts have had difficulty in deciding whether *Sandin* supplants or supplements the mandatory/discretionary framework previously utilized to determine the existence of a liberty interest protected by due process. Read narrowly, *Sandin* found only that the mandatory/discretionary analytical framework is "a good deal less sensible in the case of a prison regulation primarily designed to guide correctional officers in the administration of a prison . . . [as] such regulations are not designed to confer rights on inmates." *Sandin*, 515 U.S. at 481-82. More broadly, however, *Sandin* sharply criticized the positivist approach to determining State-created liberty interests and advocated for a return to the natural rights theory of due process.

Perhaps the most illustrative case on point, *Ellis v. District of Columbia*, 84 F.3d 1413 (D.C. Cir. 1996), discussed both the issue of whether *Sandin* applies in the parole context, as well as the proper analysis for determining if a due process right exists with regard to parole. The court in *Ellis* re-stated the proposition set forth in *Greenholtz* and *Allen* that the language of certain state-promulgated statutes and regulations could give rise to a state-created liberty interest. *Id*. at 1417. However, after the decision in *Sandin*, the court noted that "where the Supreme Court stands on this subject is no longer certain." *Id*. The court discussed the *Sandin* test and how it appeared "ill-fitted to parole eligibility

determinations" and went on to pose the question, "where does this leave us?" *Id*. at 1418. Ultimately, the court held that the tests set forth in *Greenholtz* and *Allen* were still applicable "until the court instructs us otherwise." *Id*.

As the Court held in *Wolff*, "the State having created the right [and] the prisoner's interest ha[ving] real substance," he is entitled to "those minimal procedures appropriate under the circumstances … to insure that the State-created right is not abrogated." 418 U.S. at 557.

III. Procedural Due Process Requires That Mr. Davis Have the Opportunity to Present Witnesses to the State Trial Court in an Evidentiary Hearing

The procedural safeguard proposed by Mr. Davis to protect his Eighth Amendment or State-created interest is simple: an evidentiary hearing in the State trial court to assess the cumulative materiality and credibility of his new innocence evidence. Whether Mr. Davis' liberty interest arises from the Eighth Amendment or Georgia State law, the Due Process Clause of the Fourteenth Amendment requires that the State trial court hold a hearing.

Due process analysis provides that once the Court has determined that the U.S. Constitution or State-law creates a due process requirement by recognizing a protected liberty interest, the question becomes "what process is due." *Morrissey,* 408 U.S. at 481. The cornerstone for all analysis of procedural adequacy has become Justice Powell's opinion in *Mathews v. Eldridge*, 424 U.S. 319 (1976). *Mathews* requires consideration of three distinct factors: (1) the private interest that will be affected by the State action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional or substitute procedural safeguards; and (3) the State's interest, including the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

A. Application of the Mathews Factors Shows that an Evidentiary Hearing is the Minimum Due Process Required

Mr. Davis' private interest in his Extraordinary Motion for New Trial proceedings -- the first *Mathews* factor -- is weighty. Simply put, Mr. Davis' motion for new trial proceedings determines whether he will live and be free or die. No interest could be more important. *See Wolff*, 418 U.S. at 560 (finding that the deprivation of good time credits for early release "are unquestionably a matter of considerable importance" for *Mathews*-balancing purposes); *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion) (Marshall, J.) ("In capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability.... This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.").

The second *Mathews* factor addresses (a) the risk of an erroneous execution under the current procedures in place to evaluate an Extraordinary Motion for New Trial and (b) the probable value of an evidentiary hearing to consider Mr. Davis' new evidence, including the recantations of seven State witnesses.

The "lodestar" of any effort to devise a procedure when the defendant's life is at stake is the "clear need for trustworthiness in any factual finding that will prevent or permit the carrying out of an execution." *See Ford,* 477 U.S. at 424 (1986) (Powell, J. *concurring* in the order of an evidentiary hearing on the question of petitioner was competent to be executed). When the stakes are so high, "it is

all the more important that the adversary presentation of relevant information be as unrestricted as possible." *Id*. at 417.

In *Ford*, Justice Powell's controlling opinion found that Florida's refusal to consider relevant evidence of insanity before an execution of a defendant who had made a substantial showing of incompetence violated due process. *Id*. The Florida statute at issue left insanity determinations to its Governor. *Id*. at 424. Florida's Governor had a stated policy of excluding from his consideration any evidence submitted by the prisoner. *Id*. This Court held that Florida's fact-finding procedure to exclude a prisoner's insanity evidence from consideration "invites arbitrariness and error … [and] does not, therefore, comport with due process." *Ford*, 477 U.S. at 424.

Similarly in *Panetti*, the Court recently held that the procedures used by a State court to determine insanity violated due process by failing to allow the defendant to submit relevant evidence (expert psychiatric evidence). *Panetti v. Quarterman*, 127 S.Ct. at 2842, 2857-58 (2007). The exclusion of relevant evidence which was sure to "invite arbitrariness and error" in the state court's competency determination and, thus, violated due process. *Id*.

Here, Georgia's Extraordinary Motion for New Trial procedures creates a substantial risk of an arbitrary and erroneous execution by excluding recantation evidence without regard to its credibility or substance. The Supreme Court of Georgia held that recantation evidence is immaterial unless the defendant can show that the recanted witness' trial testimony was the "purest fabrication" by "extrinsic proof that the witness' prior testimony was physically impossible." App A at 6a. As the Georgia Supreme Court dissenting opinion stated, application of majority's "categorical rule" against recantation evidence "fails to allow an adequate inquiry into

the fundamental question, whether or not an innocent person might have been convicted or even, as in this case, might be put to death." App. A at 17a.

In barring relevant recantation evidence, the Supreme Court of Georgia confuses materiality with reliability. Materiality is a well-defined legal concept. This Court has held that evidence is material if it "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Georgia courts have held that materiality turns on whether the evidence would "probably produce a different verdict." *Bell*, 227 Ga. at 805. It follows that a recantation lacks materiality only if it has been determined to be unreliable. Otherwise, a reliable recantation may sufficiently undercut the evidence at trial so as to "undermine the confidence in the verdict" or "probably produce a different verdict." Neither the trial court nor the Supreme Court, however, concluded that Mr. Davis' recantation evidence was unreliable. To do so would have required an evidentiary hearing or at least a facial evaluation of the affidavits' credibility.

Any trustworthy fact-finding procedure must require cumulative analysis of "all the evidence." The trial court and the Georgia Supreme Court exacerbated the risk of an erroneous execution by considering each piece of Mr. Davis' new evidence in isolation. This Court has repeatedly instructed that federal habeas courts evaluate new innocence evidence cumulatively, requiring "a holistic judgment about all the evidence." *House v. Bell*, 547 U.S. 518, 538-40 (2007). It is clear that this Court believes that review of innocence evidence "in isolation" from other exculpatory evidence might allow courts to make erroneous innocence determinations. *See id.* at 552 (finding that the victim's husband's post-trial demeanor and actions might have been

erroneously disregarded if "considered in isolation" from other exculpatory evidence).

However, the trial court and the Georgia Supreme Court did just what this Court cautioned against in *House*. The Georgia Supreme Court considered each of Mr. Davis' sixteen affidavits in isolation, dismissing each one as immaterial because none, standing alone, conclusively proved Mr. Davis' innocence. *See generally* App A; *see*, e.g., at 7a (rejecting evidence because "even if the recantations of Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was [innocent]"). Had either court considered the evidence cumulatively, both courts would likely have seen that each recantation is reinforced by recantations of other unrelated witnesses and that the recantations, in turn, are reinforced by four affidavits implicating Redd Coles as the shooter.

The need and probable value of an evidentiary hearing -- part (b) of *Mathews'* second factor -- is also shown by the Georgia Supreme Court's inaccurate *obiter dictum* observations about Mr. Davis' new evidence. After holding that the recantation evidence was immaterial *per se*, the court observed that "most" of Mr. Davis' recantation affidavits were merely statements that the eyewitness "now do not feel able to identify the shooter." App. A at 15a. The majority's mistake is an error attributable to the lack of an evidentiary hearing. The submitted affidavits clearly show that none of the four recanting eyewitness (the other 3 recanting witnesses were not eyewitnesses) was able to identify the shooter at trial or on the night of the crime.[16] If the court had the benefit of

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[16] Dorothy Ferrell's affidavit clearly states that she was not able to identify the shooter at trial or on the night of the crime:

(Continued…)

an evidentiary record, it would not have made such erroneous observations.

The State's interests in finality and preserving scarce judicial resources -- the final *Mathews'* factor -- is far outweighed by the potential for an erroneous conviction created by the lack of an evidentiary hearing. This Court or

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> "I didn't see who was doing the shooting, I just heard the gunshots. I didn't want to get up there and [testify] that I saw who did the shooting because I didn't see that part. But I felt like I had to say that."

D.D. Collins' affidavit shows that he "never" saw Mr. Davis do anything:

> "I testified against Troy at his trial. I remember that I told the jury that Troy hit the man Redd was arguing with. That is not true. I never saw Troy do anything to the man."

Larry Young's affidavit shows that he "never" — at trial or the night of the shooting — was able to identify the shooter or what he was wearing:

> "[The Police] kept asking me what had happened at the bus station and I kept telling them that I didn't know. Everything happened so fast down there. I couldn't honestly remember what anyone looked like or what different people were wearing. Plus, I had been drinking that night so I just couldn't tell who did what. … I was *never* able to make sense of what happened that night. It's as much of blur now as it was then." (emphasis added)

Antoine Williams' affidavit also clearly states that:

> "At Troy Davis' trial, I identified him as the person who shot the officer. Even when I said that, I was totally unsure whether he was the person that shot the officer. I felt pressure to point at him because he was the only one sitting in the courtroom." (emphasis added).

the State court may fashion rules to limit the need for evidentiary hearings to truly substantial innocence cases. In *Ford* and *Panetti*, this Court limited the strain that non-meritorious insanity claims may have on the judicial system by requiring "a substantial threshold of insanity" before requiring a hearing. *Panetti*, 127 S.Ct at 2856 (*citing Ford*, 477 U.S. at 426, 424). Similarly, the facts of this case limit the requirement of a hearing to instances where the defendant faces imminent execution despite substantial new admissible innocence evidence (*i.e.*, recantations from seven of nine State trial witnesses and four new witnesses implicating the alternative suspect who had the motive and means to have committed the crime) that has never been the subject of a State or federal evidentiary hearing. Lastly, Mr. Davis does not request the grant of a new trial at this juncture, but only an evidentiary hearing in State court.

Moreover, State perjury laws have prevented an influx of non-meritorious recantation cases. Georgia law, similar to other States, provides harsh penalties that ensure against spurious recantations, especially in capital cases. *See* GA. CODE ANN. § 16-10-70(b) ("A person convicted of the offense of perjury that was a cause of another's being punished by death shall be punished by life imprisonment."); *see also* § 17-3-2(2) (tolling statute of limitations until government discovers the crime). Thus, it is not surprising that the only Georgia recantation cases that Mr. Davis' counsel could find involved either accomplices who had little to lose after their own convictions or family members (or close relations) of the defendant who had the inclination risk a perjury charge for a loved one.[17] No doubt the State could

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[17] Courts have declared that accomplice testimony is "inherently suspect" because "there is very little to deter the pleading co-defendant from untruthfully swearing out an affidavit in which he purports to shoulder the entire blame" after his conviction is final or inevitable. *U.S. v. La*

(Continued…)

fashion a less restrictive recantation rule that eschews accomplice or family member recantations as inherently unreliable.

This Court has found evidentiary hearings designed to protect far less substantial private interests "should not impose a great burden on ant State[]." *See Morrissey*, 408 U.S. at 490 (a hearing required by due process to protect a parolee's interest in continued conditional release would not burden State parole systems, as the State can fashion rules to prevent abusive litigation tactics and the parolee could not re-litigate issues determined in other forums); *Wolff*, 418 U.S. at 566 (requiring a hearing to protect a prisoner's right to good-time credits as long as not "unduly hazardous to institutional safety or correctional goals"). In fact, a study of the case law cited by the Georgia Supreme Court shows that Georgia courts often hold evidentiary hearings to determine credibility issues in cases with far less evidence than presented here.[18]

Duca, 447 F.Supp. 779 (D. N.J. 1978); *see also Steve Davis v. State*, 221 Ga.App. 375, 471 S.E.2d 307 (1996) ("[Accomplice's] attempt to exculpate [Defendant] is inherently suspect. Credibility will almost always be suspect when newly available evidence is the testimony of a fellow participant in the crime who attempts to testify helpfully to a colleague only after his own case has been adjudicated. It comes with little reliability to rescue it from its tainted circumstances."); *U.S. v. Carlin*, 573 F.Supp. 44 (D. Ga. 1983) ("a defendant who now seeks to exculpate his co-defendant lacks credibility, since he has nothing to lose by testifying untruthfully regarding the alleged innocence of the defendant seeking a retrial."). Likewise, courts are skeptical of recantations from State witnesses with close relationships with the defendant. *See* Shawn Armbrust, *Reevaluating Recanting Witnesses*, B.C. Third World L.J. 75, 85 (2008).

[18] *See, e.g., Hester v. State*, 282 Ga. 239, 647 S.E.2d 60 (2007) (hearing held based on single out-of-court confession by third-party); *Drake v. State*, 248 Ga. 891, 287 S.E.2d 180 (1982) (hearing held based on one recantation - defendant's accomplice); *Brown v. State*, 209 Ga.App. 314, 433 S.E.2d 321 (1993) (hearing held based on one recantation -

(Continued…)

Lastly, the public interest in ensuring that the innocent are not executed is a substantial factor that a simple hearing would vindicate. *See, e.g., Morrissey*, 408 U.S. at 484 (finding that societal interests are relevant for *Mathews* balancing). As previously discussed, the public has become increasingly pessimistic about the accuracy of the judicial system as many believe that the innocent have been convicted or even executed. DNA exonerations have flamed that fire, proving the fallibility of eyewitness testimony and the abundance of coerced State witnesses. The State's case was made up almost entirely of this type of questionable evidence. Society, thus, has an interest in ensuring that the executed who can produce substantial, admissible new evidence of their innocence are not executed without the opportunity to vindicate themselves through the minimal process required by our Constitution. A hearing to determine the cumulative materiality and credibility of Mr. Davis' new evidence is the minimal process that is due.

CONCLUSION

The petition for a writ of certiorari should be granted or remanded with an order to the State court to order an evidentiary hearing to consider the cumulative materiality of Mr. Davis' new evidence, including the recantations.

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defendant's daughter); *Young v. State*, 269 Ga. 490, 500 S.E.2d 583 (1998) (hearing held based on two out-of-court confessions by third party); *Stroud v. State*, 247 Ga. 395, 276 S.E.2d 597 (hearing held where witness, defendant's girlfriend, renounced immaterial portion of her testimony but did not recant the fact that the defendant confessed to committing the crime); *Crowe v. State*, 265 Ga. 582, 458 S.E.2d 799 (1995) (this Court ordered an evidentiary hearing on single affidavit submitted by the defendant himself).

Respectfully submitted,

Philip Horton
Jason Ewart
Danielle Garten
ARNOLD & PORTER LLP
555 12th Street, NW
Washington D.C. 20004
(202) 942-5000

Thomas H. Dunn
GEORGIA RESOURCE CENTER
303 Elizabeth Street, NE
Atlanta, Georgia 30307
(404) 222-9202

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