No.

In The

Supreme Court of The United States

In re TROY ANTHONY DAVIS, *Petitioner*

On Original Writ Of Habeas Corpus To The United States Supreme Court

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* BOB BARR ET AL., FORMER PROSECUTORS AND MEMBERS OF THE JUDICIARY, AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER TROY ANTHONY DAVIS
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MOTION FOR LEAVE TO FILE BRIEF *OF AMICI CURIAE* IN SUPPORT OF PETITIONER TROY ANTHONY DAVIS

Pursuant to Supreme Court Rule 37, *Amici Curiae*, listed above and in the attached appendix, respectfully move for leave to file a brief in support of Petitioner, Troy Anthony Davis. *Amici Curiae* are former members of the judiciary and former prosecutors who have a deep and abiding interest in the administration of justice in criminal cases.

Amici have familiarized themselves generally with the circumstances of Mr. Davis' case, and particularly the judicial record that indicates that Mr. Davis has not had a full opportunity for an evidentiary hearing on his allegations of innocence, including his allegations that virtually all of the trial evidence implicating him now has been discredited through recantations and new evidence of his innocence.

Amici do not take a position on whether Mr. Davis is actually innocent. Rather, *Amici* write to urge the Court to consider his petition for an original writ of habeas corpus, in light of the quantum of asserted evidence of innocence and the lack of any other adequate remedy before a competent trier of fact. *Amici* share a common belief in the competence of trial courts as adjudicators of fact, and would suggest that the proper course would be for this Court to accept jurisdiction but then remand or transfer this action to the District Court for further proceedings.

CONCLUSION

For the reasons stated herein, above *Amici Curiae* hereby request that their motion for leave to file be granted.

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INTEREST OF *AMICI*[1]

Amici Curiae are former prosecutors and Members of the Judiciary from around the country. Each of the *Amici* has a particular interest in and experience with the administration of justice in criminal cases, as described further in the appendix attached and in the accompanying Motion for Leave to File *Amicus Curiae* Brief.

SUMMARY OF ARGUMENT

Amici write to urge the Court to exercise jurisdiction over Mr. Davis' petition for an original writ of habeas corpus, and remand the petition to the District Court for evidentiary proceedings. In examining whether exercising jurisdiction and demanding further evidentiary proceedings are warranted, this Court should consider the *sui generis* quantum of new evidence of "actual innocence" in Mr. Davis' case, the unavailability of further judicial or other remedies, and the profound consternation within the courts as to whether he is actually innocent but without an adequate opportunity for judicial review.

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[1] Counsel for the State of Georgia has not consented to the filing of this brief. Counsel for Mr. Davis has consented to this filing. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. Counsel Kathleen Behan previously served as counsel to Mr. Davis, but no longer serves in that capacity.

Amici believe that Mr. Davis' case presents the unusual scenario contemplated by Supreme Court Rule 20.4 governing original writs and consistent with the Antiterrorism and Effective Death Penalty Act ("AEDPA")[2] regarding successive habeas corpus petitions in actual innocence cases. These authorities confirm that the Court should look to the equitable considerations underlying access to the writ of habeas corpus where granting the writ is essential to preventing a miscarriage of justice, particularly the execution of an innocent defendant. *See, e.g., House v. Bell,* 547 U.S. 518 (2006) (remanding capital case for evidentiary development on whether petitioner met *Schlup* standard of review for miscarriage of justice, but rejecting *Herrera* claim; petitioner now has been fully exonerated); *Herrera v. Collins,* 506 U.S. 390, 419 (1993) (O'Connor, J., concurring, joined by Kennedy, J.) ("[T]he execution of a legally and factually innocent person would be a constitutionally intolerable event."); *Herrera,* 506 U.S. at 437 (Blackmun, J., dissenting, joined by Souter, J., and Stevens, J.) (because "it violates the Eighth and Fourteenth Amendments to execute a person who is actually innocent, there should be "no bar . . . to consideration of an actual innocence claim."); *see also Schlup v. Delo*, 513 U.S. 298, 319 (1995) (recognizing

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[2] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in various sections of 28 U.S.C.); for a description of the effects of AEDPA on federal habeas corpus review in capital cases, *see* Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002), and James S. Liebman, *Symposium: Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction: An "Effective Death Penalty"? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411 (2001).

that habeas corpus is, "at its core, an equitable remedy"). *Amici* believe that this case presents the very rare circumstance in which the need to prevent a potential miscarriage of justice outweighs the proscription of Supreme Court Rule 20.4(b) that the writ be "rarely granted."

Amici urge that the Court accept jurisdiction over the Petition for an Original Writ and transfer or remand to the District Court for further proceedings to effectuate the historic remedial purposes of the Writ.

ARGUMENT

I. THIS COURT'S ORIGINAL HABEAS CORPUS WRIT JURISDICTION IS VITAL TO SAFEGUARDING LIBERTY AND REMEDYING MISCARRIAGES OF JUSTICE.

Although rarely utilized, the "original" writ of habeas corpus remains vital to the Supreme Court's jurisdiction to safeguard liberty and to remedy miscarriages of justice. *See Felker v. Turpin*, 518 U.S. 651, 661, 666-67 (1996) (affirming the Court's authority to exercise jurisdiction over original writs of habeas corpus after the passage of AEDPA, but denying the writ). While the Court's Rules specify that an extraordinary writ is not a matter of right "but of discretion sparingly exercised," a writ of habeas corpus may proceed originally in the Supreme Court if a petitioner can meet the heavy burden of demonstrating "exceptional circumstances" and that petitioner cannot obtain

"adequate relief" "in any other form or from any other court." Supreme Court Rule 20.4(a). As set forth below, such exceptional circumstances are present here, and a thorough evaluation of Mr. Davis' potential innocence prior to his imminent execution is fundamental to the integrity of the *Great Writ*.[3]

Simply stated, Mr. Davis' petition for an original writ meets this Court's exceptional circumstances test because Mr. Davis can make an extraordinary showing through new, never reviewed evidence that strongly points to his innocence, and thus his execution would violate the Constitution. Indeed, the Eleventh Circuit majority opinion recognizes that Mr. Davis approaches this Court with no other form of adequate relief – this *is* his Court of last resort. *See In Re Troy Anthony Davis*, No. 08-16009, slip op. at 34 (11th. Cir. Apr. 16, 2009) (invoking Mr. Davis' ability to file an original writ); *see also* Section II, *infra.*

While the remedial use of the writ of habeas corpus in the federal courts has evolved since first embodied in the Constitution, it remains firmly

[3] Historically, application of the Great Writ has served the unique purpose of securing a petitioner's "release from illegal custody." *Presier v. Rodriguez*, 411 U.S. 475, 484 (1973); *see also Engle v. Issac*, 456 U.S. 107, 126 (1982) (describing the Great Writ as "a bulwark against convictions that 'violate fundamental fairness'") (quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977)); *United States v. Frady*, 456 U.S. 152, 165 (1982) (explaining that the Great Writ "is designed to guard against extreme malfunctions in the criminal justice system"); *Harris v. Nelson*, 394 U.S. 286, 291 (1969) (holding that the essence of the Great Writ "demands that it be administered with the initiative and flexibility essential to ensure that miscarriages of justice within its reach are surfaced and corrected").

established today that the writ is essential to remedy unconstitutional detentions, particularly where a petitioner alleges actual innocence while under a sentence of death. *See Schlup*, 513 U.S. at 319 (recognizing that habeas corpus is "at its core, an equitable remedy"); *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) ("executing the innocent is inconsistent with the Constitution"); *In Re Troy Anthony Davis*, slip op. at 37 (Barkett, J., dissenting) (noting that the writ should be utilized for "precisely this type of occasion that warrants judicial intervention"). Both the procedural and equitable posture of Mr. Davis' case indicates that the original writ should be invoked here.[4]

Therefore, where a petitioner asserts that his detention or execution violates the Constitution, the Supreme Court has adequate original authority to discharge the petitioner or remand to a lower court for further examination of the facts, and, while exercising this authority has been limited, this Court has done so in order to prevent constitutional

[4] Indeed, as Judge Barkett's dissenting opinion explained (consistent with the understanding of other circuit courts), judicial or statutory bars to the exercise of habeas corpus jurisdiction "cannot possibly be applied when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed." *In Re Troy Anthony Davis*, slip op. at 37. *See also, Wolfe v. Johnson*, No. 08-8, slip op. at 2 (4th. Cir. May 11, 2009) (discussing Chief Justice Rehnquist's plurality opinion in *Herrera* that "assum[ed] . . . that in a capital case a truly persuasive demonstration of actual innocence made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim") (internal quotation marks omitted).

injustices. *See*, *e.g., Ex Parte Grossman,* 267 U.S. 87 (1925) (granting original writ to discharge petitioner serving a sentence for which he had already received a presidential pardon); *Ex Parte Hudgings,* 249 U.S. 378, 385 (1918) (discharging petitioner under judicial contempt to effectuate "the liberty of the citizen when called upon as a witness in court").[5] The execution of an innocent man without federal review of his new evidence of actual innocence is such a plain constitutional injustice, and it compels utilization of the original writ in this case.

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[5] *See also Matter of Heff,* 197 U.S. 488 (1905) (granting original writ and discharging petitioner where federal court had no jurisdiction of the offense of which petitioner had been convicted); *Ex parte Wilson*, 114 U.S. 417 (1885) (granting original writ of habeas corpus and discharging petitioner who had been sentenced to an "infamous" crime without indictment by a grand jury in violation of the Fifth Amendment); *Ex Parte Lange*, 85 U. S. 163 (1873) (granting original writ of habeas corpus and overturning consecutive sentences for the same crime in violation of double jeopardy).

II. WHERE A CONDEMNED INMATE PRESENTS A FACTUALLY COMPELLING BUT UNADJUDICATED ACTUAL INNOCENCE CLAIM, AND WHERE NO OTHER STATE OR FEDERAL JUDICIAL REMEDIES ARE AVAILABLE, THIS COURT CAN AND SHOULD ACCEPT JURISDICTION.

Because Mr. Davis has exhausted all remaining avenues of relief other than this Court, and because his factually compelling actual innocence claim still has not been properly adjudicated, this Court can and should accept jurisdiction.

To fall within that rare category of cases that meets the standard for original writ review, a petitioner must have exhausted any adequate remedy that might exist "in any other form, or any other court of law." *See* Supreme Court Rule 20.4.[6] Mr. Davis has fully exhausted his procedural state and federal remedies so as to meet the requirements of this Court. *Id.*[7]

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[6] *See also,* Robert L. Stern, *Supreme Court Practice* (8th. Edition) (2002) at 11.3 (noting that the few original writ cases that have been granted do not discuss the "critical jurisdictional or procedural prerequisites for the grant," so that "one must read [Supreme Court] Rule 20. . . .").

[7] Because Mr. Davis has no effective opportunity for a pardon after his first application was denied, it does not amount to another "form" of adequate relief under Rule 20. The Court did suggest that a clemency hearing might offer relief to the actually innocent in *Herrera.* 506 U.S. at 410-15. However, a plurality of this Court has since reaffirmed that clemency proceedings are not "an integral part of the . . . system for

In denying Mr. Davis' extraordinary motion for a new trial to consider the evidence of actual innocence, the Georgia Supreme Court invoked a virtually impossible standard for defendants to meet in an effort to obtain a new trial based upon witness recantations. In order to obtain a new trial under Georgia's extraordinary motion standard, there must be "*no doubt of any kind that the State's witness' testimony in every material part is purest fabrication*." *Davis v. State*, 283 Ga. 438, 441 (2008) (italics added).[8] The *Davis* opinion effectively precluded the possibility that Mr. Davis could have presented exculpatory evidence, thereby depriving him of an "adequate remedy" by which he could have obtained relief in the Georgia Supreme Court. Indeed, the dissenting opinion of Chief Justice Sears in *Davis* posited that Georgia's new trial standard was "overly rigid" and "fails to allow an adequate inquiry into the fundamental question, which is whether or not an innocent person might have been convicted or even, as in this case, might be put to

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finally adjudicating the guilt or innocence of a defendant." *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 285 (1998) (plurality opinion) (internal quotation marks omitted) (denying appeal regarding constitutionality of state's clemency hearing since clemency is a "matter of grace" rather than a fact-finding proceeding).

[8] However, in a case the Georgia Supreme Court cited for the "purest fabrication" standard, *Drake v. State*, 287 S.E.2d 180 (1982), their denial of an extraordinary new trial under that standard was followed by a federal evidentiary hearing, and ultimately, a pardon by Georgia Board of Pardons and Paroles. *See* David Kaplan, *Death Row Dilemma*, NAT'L L.J. 35 (Jan. 25, 1988).

death." *Id.* at 448-49 (Sears, C.J., dissenting).[9] Nevertheless, that "rigid" standard is currently the law in Georgia and precludes further relief.[10] Thus, Mr. Davis remains without a remedy to mount "a truly persuasive demonstration of actual innocence" in the Georgia courts. *Herrera,* 506 U.S. at 417.

Similarly, Mr. Davis has fully exhausted his federal remedies and has no remaining adequate federal remedy except the original jurisdiction of this Court. Therefore, Mr. Davis qualifies for a hearing on his unadjudicated evidence. *See Ex Parte Hawk*, 321 U.S. 114 (1944) (finding that petitioner may be entitled to a hearing on ineffective counsel and perjured trial evidence if he had exhausted available remedies in the state courts). When the Eleventh Circuit denied Mr. Davis the right to pursue a second petition based upon actual innocence under AEDPA, 28 U.S.C. § 2244(b)(2)(b), the majority opinion took note of Mr. Davis' final federal option to file a petition in the Supreme Court "pursuant to its original jurisdiction." *In re Troy Anthony Davis*, slip

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[9] While questioning the Majority's use of the purest fabrication standard, Chief Justice Sears also objected to the Majority opinion's skepticism of recantation evidence: "To the extent that this phrase cautions that trial testimony should not be lightly disregarded, it has obvious merit. However, it should not be corrupted into a categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear. *If recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically*." *Davis v. State*, 283 Ga. at 449 (italics added).

[10] Moreover, the Georgia Supreme Court also rejected Mr. Davis' contention that applying such a rigid standard to preclude a hearing violates his rights under *Herrera. Davis v. State,* 283 Ga. 438, 448 n.6 (2008).

op. at 34. The dissenting opinion of Judge Rosemary Barkett vigorously contested Davis' inability to proceed under AEDPA, citing to the substantial evidence of actual innocence, but those arguments were rejected. *Id.* at 36-39.

In both of those strongly contested opinions, one similarity is evident: extensive compelling evidence that demonstrates Mr. Davis' innocence has not been given an adequate remedy of an evidentiary hearing.[11] Both Mr. Davis and the State do not seriously dispute that the trial testimony now has been thoroughly contradicted. As Judge Barkett's dissent noted, Mr. Davis' second petition submitted to the Eleventh Circuit contended the following: seven of nine key witnesses who testified against Mr. Davis, including two witnesses who initially claimed that he confessed to the killing, have since recanted their testimony. *Id.* at 38.[12] Three witnesses have sworn under oath that Mr. Coles confessed to them that he, not Mr. Davis, killed Officer MacPhail, including one witness who did not previously come forward because he is related to Mr. Coles. *Id.* at 38-39.

The quality and quantity of the evidence raise the extraordinary likelihood that Mr. Davis is actually innocent. He plainly meets the original writ requirements of this Court, as this truly is a case of

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[11] Mr. Davis' exhaustion of state and federal remedies signifies that he has passed the test for review by this Court "that other available sources of judicial power may not be passed by for the purpose of obtaining relief by resort to the original jurisdiction of this Court." *Ex Parte Hudgings*, 249 U.S. at 379.

[12] In addition, Mr. Davis' petitions allege that Mr. Coles, who owned a gun of the same caliber as the one used in the crime, was in possession of the gun shortly after the murder.

"exceptional circumstances" under Supreme Court Rule 20.

Mr. Davis' support for his actual innocence claim in this original petition for relief can be described as *sui generis*. As there was no physical evidence connecting Mr. Davis to the crime and the gun was never recovered, the case against Mr. Davis rests entirely on eyewitness testimony. The Supreme Court has long recognized the pitfalls of relying exclusively upon eyewitness testimony. *United States v. Wade*, 388 U.S. 218, 230 (1967) ("The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."). Inaccurate eyewitness identifications reportedly contributed to the convictions of 79% of the first 200 prisoners later exonerated by DNA evidence. *See* Brandon L. Garrett, *Judging Innocence*, 108 Colum.L.Rev.55, 60 (2009). The Eleventh Circuit's paper review of the recanting witnesses' affidavits without proper consideration of the totality of this evidence in a plenary hearing simply does not afford Mr. Davis the process he should be due.[13] In light of the fact that

[13] The degree of confidence that a witness manifests in his identification is the largest factor affecting whether jurors believes that the observation is accurate. *See* Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 Law & Hum. Behav. 603, 619-20 (1998) (meta-analysis demonstrating that people believe that the confidence and accuracy of an eyewitness's testimony are strongly related). However, studies suggest that there is no meaningful correlation between the confidence and accuracy of an eyewitness's identification. Kenneth A. Deffenbacher, *Eyewitness Accuracy and Confidence*, 4 Law & Hum. Behav. 243, 258 (1980) (confidence in identifying faces correlates to accurate matching only where the witness was exposed to the

this case rests so heavily upon eyewitness testimony, the evidence that overwhelmingly discredits that testimony is enormously consequential, and should be fully evaluated in its totality at an evidentiary hearing.[14]

Thus, because Mr. Davis faces the exceptional circumstances of his impending execution despite compelling evidence of innocence, this Court can and should accept jurisdiction.

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original face for an extended period of time). Repeatedly questioning a witness regarding matters on which the witness is mistaken will increase his level of certainty. Geralda Odinot et al., *Repeated Partial Eyewitness Questioning Causes Confidence Inflation but not Retrieval-Induced Forgetting*, 23 Applied Cognitive Psychol., 90, 96 (2009) (discouraging repeated police questioning in order to prevent witnesses from mistakenly testifying with false confidence).

[14] Moreover, where the witness is of a different race than the identified party, the "other-race" effect (or "own-race" bias) also contributes to misidentification. *See* Garrett, *supra*, at 67 (though 37% of persons convicted for rape are minorities, 73% of those exonerated of rape charges by DNA evidence were minorities). Additionally, a witness to a crime who sees the perpetrator brandishing a weapon, as is the case here, will later remember less about the perpetrator than he or she would have if no weapon had been present. *See generally* Nancy Mehrkens Steblay, *A Meta-Analytic Review of the Weapons-Focus Effect*, 16 Law & Human Behav. 413 (1992) (examining 19 studies of the "weapons-focus" effect, finding significant accuracy decrease in lineup identification). Studies also suggest that eyewitnesses are not likely to retain accurate memories of events involving heightened levels of violence. *See generally* Elizabeth F. Loftus & Terrence E. Burns, *Mental Shock Can Produce Retrograde Amnesia*, 10 Memory & Cognition 318 (1982) (increased violence in videotaped reenactment decreases a witness's identification accuracy). *See also* Stuart Taylor, *Probably Innocent, Almost Executed*, Legal Times (Jan. 1, 1996) (discussing the history of *Schlup* and the risk of executing the innocent due to procedural obstacles).

III. BECAUSE PETITIONER TROY DAVIS HAS SET FORTH A SUFFICIENTLY COMPELLING ACTUAL INNOCENCE CLAIM, THIS COURT SHOULD ACCEPT JURISDICTION, AND REMAND TO A DISTRICT COURT FOR AN EVIDENTIARY HEARING.

As set forth above, the wealth of evidence concerning Mr. Davis' innocence and the failure of any court to hold an evidentiary hearing to review that evidence, when combined with his lack of any further remedies under AEDPA and Supreme Court Rule 20.4, render this case appropriate and necessary for review.

In determining whether to accept review, this Court should interpret its jurisdiction consistent with the mandate of Supreme Court Rule 20 that the discretion to entertain writs is sparingly exercised, but that the Court's discretion to exercise its jurisdiction is warranted here; the Court should not avoid such jurisdiction simply because of the potential difficulties in managing the necessary fact finding responsibilities. See, e.g., *House*, 547 U.S. at 537 (describing the types of evidence available for review on remand); *Schlup*, 513 at 318-19, 324 (recognizing the validity of "judicially managed equitable considerations" in successive petitions involve the potential for a "fundamental miscarriage of justice," with the caveat that the evidence be "new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts,

or critical physical evidence – that was not presented at trial”).[15]

With few exceptions, such as the Eleventh Circuit decision in Mr. Davis’ case below, the appellate courts readily have recognized the critical importance of maintaining access to the writ of habeas corpus in actual innocence cases. See *Mize v. Hall*, 532 F.3d 1184, 1196 n.9 (11th. Cir. 2008) (“[I]f a petitioner in fact has a freestanding innocence claim, he would be entitled to have all his procedural defaults excused as a matter of course under the fundamental miscarriage of justice exception.”); *Arthur v. Allen*, 452 F.3d 1234, 1245 (11th. Cir. 2006) (finding that the district court may hold an evidentiary hearing on a habeas corpus claim based on actual innocence if the new facts could not have been previously discovered through due diligence and if no reasonable jury considering the new facts would have delivered a guilty verdict); *United States v. Barrett*, 178 F.3d 34, 53 (1st. Cir. 1999) (finding that petitioner may file second habeas claim under

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[15] *See also Kuhlmann v. Wilson,* 477 U.S. 436, 452 (1986) (Powell, J., plurality opinion) (“The prisoner may have a vital interest in having a second chance to test the fundamental justice of incarceration. Even where, as here, [many judges] have reviewed the prisoner’s claim[s] . . . a prisoner retains a powerful and legitimate interest in obtaining his release from custody if he is innocent of the charge for which he was incarcerated.”); *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (“[C]omity and finality . . . must yield to the imperative of correcting a fundamentally unjust incarceration.”) (quotation marks omitted); *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (finding that when federal appellate court recalls its mandate to review prior habeas denial to state prisoner, it has not abused its discretion if its decision prevents a “miscarriage of justice as defined by our habeas corpus jurisprudence”).

AEDPA if the appellate court decides that the new evidence is sufficiently "clear and convincing" such that no reasonable fact-finder would return a guilty verdict).

Accepting original writ jurisdiction in this rare case need not require the Court or a specially appointed master to conduct the evidentiary hearing and related proceedings that Mr. Davis has sought for his claims of actual innocence. Rather, it is consistent with 28 U.S.C. § 2241(a) that "[w]rits of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions." Indeed, the Court has long favored fact-finding at the federal district court level, where due attention can be provided consistent with the need for a thorough and accurate record. See, e.g., Stevenson, *supra*, 77 N.Y.U.L.Rev at 785 ("Remand to the district court would advance the interest of efficiency, as the district court already has some familiarity with the case and the parties [and so] will be able to address the factual issues without the additional case review that would be required of a Special Master.").[16]

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[16] To determine factual issues, courts may remand or transfer an actual innocence question so that it may be "addressed and disposed of in the district court." *Wolfe v. Johnson,* No. 08-8, slip op. at 40 (remanding habeas petition to district court for determination of whether petitioner was entitled to evidentiary hearing of actual innocence). *See also* 28 U.S.C. § 2241(b) (permitting the Court to "transfer the application for hearing and determination" to the District Court); *Bousley v. United States*, 523 U.S. 614, 620 (1998) (overturning denial of habeas petition, remanding for new factual finding to determine whether petitioner was actually innocent where his original guilty plea did not state facts necessary to establish his guilt);

In *House v. Bell*, 547 U.S. 518, where the petitioner now has been fully exonerated by the prosecution and released, the Supreme Court contemplated this type of hearing when it remanded an actual innocence claim for further proceedings.[17] Similarly, in Mr. Davis' case, the district court has not heard the totality of the compelling evidence, warranting remand for a hearing on innocence. See *Schlup*, 513 U.S. at 324, 329.

Finally, while Mr. Davis presents a "freestanding" innocence claim at this juncture, pursuant to Herrera (rather than a *Schlup* claim, as he has in the past), this Court need not determine what quantum of evidence he needs to produce in order to satisfy his burden of demonstrating actual innocence in violation of the Constitution – whether it be *Herrera*, *Schlup*, or some other standard. Rather, the Court should simply remand or transfer for further factual proceedings, retaining its original jurisdiction, and then conduct further proceedings upon a full evidentiary record.

Clisby v. Jones, 960 F.2d 925, 936 (11th Cir. 1992) (remanding for further fact-finding where district court raised multiple constitutional claims but court merely addressed one). *See also Moore v. Dempsey*, 261 U.S. 86, 91-92 (1923) (remanding to district court for evidentiary hearing where, due to procedural error, "the whole proceeding [was merely] a mask").

[17] *See* also H*ouse v. Bell*, 287 Fed. Appx. 439, 440 (6th. Cir. 2008) (finding that the petitioner's new evidentiary claims, including the State's destructive handling of evidence, must be further developed in the record by the district court as that court had already reviewed and rejected certain of these allegations).

CONCLUSION

For the reasons set forth herein, *Amici* urge the Court to entertain Mr. Davis' petition for an original writ of habeas corpus and remand or transfer to the District Court for evidentiary proceedings.

Respectfully submitted,

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Appendix

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