NO. 08-

In The

Supreme Court of the United States

In re TROY ANTHONY DAVIS, *Petitioner*

PETITION FOR A WRIT OF HABEAS CORPUS

CAPITAL CASE

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May 19, 2009

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CAPITAL CASE

QUESTIONS PRESENTED

Mr. Davis' habeas petition presents exceptional circumstances that have sharply divided the courts below. Since Mr. Davis' murder conviction, seven of nine State witnesses have recanted their trial testimony, and several new witnesses have identified or implicated Sylvester "Redd" Coles as the shooter. Despite substantial new evidence of his innocence, no court has ever held a hearing to assess the scores of new witnesses that show Mr. Davis is innocent.

The questions presented are:

1. Whether transfer to the district court for a hearing pursuant to this Court's original habeas jurisdiction is warranted in the exceptional capital case where the petitioner has raised a substantial case of innocence, the lower federal courts refused to address his innocence in his first federal habeas petition and no State or federal court has held an evidentiary hearing to examine his new evidence?

2. When federal courts fail to consider a petitioner's innocence in his first federal habeas petition, does the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") preclude stand-alone innocence claims raised for the first time in a successive habeas petition based on the same evidence the federal courts failed to review in the first petition?

PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which petitioner, Troy Anthony Davis, was the movant before the United States Court of Appeals for the Eleventh Circuit. Mr. Davis is a prisoner sentenced to death and in the custody of William Terry, Warden of the Georgia Diagnostic and Classification Prison.

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PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner Troy Davis respectfully requests that this Court transfer for hearing and determination his application for habeas corpus to the district court in accordance with its authority under 28 U.S.C. § 2241(b).

OPINION BELOW

The opinion of the Unites States Court of Appeals for the Eleventh Circuit is published at *In re Davis*, --- F.3d ----, 2009 WL 1025712 (11th Cir. 2009) and attached at Appendix A.

STATEMENT OF JURISDICTION

The order of the court of appeals denying authorization to file a successive petition was entered on April 16, 2009. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the U.S. Constitution.

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."

28 U.S.C. § 2241 (2009): Appendix D.

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STATEMENT OF FACTS

Since Mr. Davis' trial, evidence has surfaced that shows not only that Troy Davis is innocent, but that Sylvester "Redd" Coles murdered Officer MacPhail. Seven of the State's key witnesses against Mr. Davis have recanted their testimony. Moreover, new witnesses implicate Redd Coles as the man who murdered Officer MacPhail. No court has held an evidentiary hearing to assess Mr. Davis' new evidence.

In the early morning hours of August 19, 1989, Officer Mark MacPhail was murdered in a parking lot in Savannah, Georgia. Redd Coles – consistent with his reputation in the neighborhood – verbally harassed and chased Larry Young to a nearby Burger King parking lot where Officer MacPhail was working as on off-duty security guard. *See* T. at 798-99, 902-03. Troy Davis and Darrell Collins heard the commotion and silently followed the scuffle. In the parking lot, Redd Coles dug into his pants for a gun and threatened the retreating Young by stating: "you don't know me, don't walk away from me, I'll shoot you." T. at 799, 825, 845, 878-880. Mr. Davis approached Coles and Young to break up the fight when Young was struck on the head with a pistol. T. at 799, 825, 845, 878-880. In severe pain, Young yelled for help. Officer MacPhail responded and was shot dead with a .38 caliber revolver.

An hour before Officer MacPhail was killed, Michael Cooper was shot when the car in which he was riding came under fire in Savannah's Cloverdale neighborhood. Redd Coles and Troy Davis both were attending a party near the car shooting in Cloverdale. T. at 1364; *see also* Exhibit 23

(affidavit of April Hester at ¶ 2). Unlike Mr. Davis, Coles was a close neighbor to three of the car passengers who were fired upon. Coles and one of the car passengers engaged in a heated argument after the shootings. Redd Coles' sister, Valerie Gordon, told the police and testified that Coles and Joseph Blige, who was hanging out the window of the car immediately before Cooper was shot, quarreled and Blige exclaimed to Redd Coles "I thought y'all were trying to kill me," implying that Blige thought Coles had shot at him in the car. *See* Exhibit 19 at 5; T. at 1171-72.

One shell casing found by a homeless man near where Coles lived and Officer MacPhail was killed matched casings found near where the car shooting occurred. T. at 1268, 1294. The shell casings were fired from a .38 caliber revolver. *Id*. After searching Mr. Davis home, police never found any weapons or ammunition. *See* T. at 1292.

After initially denying it, Redd Coles was ultimately forced to admit that he was carrying a .38 caliber revolver on the night of the shootings. T. at 927. Coles was never able to produce the revolver for ballistics testing. T. at 931. New evidence shows that, contrary to his trial testimony, Coles hid his gun in an abandoned house shortly after the murder. *See* Exhibit 22. (affidavit of Tonya Johnson). The murder weapon was never found.

After a highly-visible police canvass of Coles' neighborhood, Redd Coles approached the police with his attorney to save himself and point the finger at Troy Davis. T. at 1313. Coles never mentioned that he was carrying a .38 caliber revolver, nor did he describe the clothing he was wearing that evening. *See* Exhibit 12 (8/18/1989 police statement of Redd Coles); T. at 1331.

Within an hour of Coles' visit to the police station, Detective Ramsey obtained an arrest warrant for Mr. Davis. T. at 1321. Before the detective learned that Coles had a .38 revolver, questioned Coles about his clothing or showed a

photo array to any of the eyewitnesses to the MacPhail murder, Detective Ramsey's superiors held a press conference, released Mr. Davis name and picture to the press and began a highly-publicized, city-wide campaign against Mr. Davis. *See* Trial Exhibit 1.

Only hours after the shooting, Detective Ramsey assembled a photo array that included Mr. Davis' picture, but no picture of Coles. T. at 1315. Detective Ramsey, however, did not show the photo array to any eyewitness to the MacPhail until at least five days after the shooting. T. at 1319-20.

In the interim, Mr. Davis's picture – the same picture used in the witness photo array – appeared on television and on wanted posters near where the eyewitnesses lived and worked. *Compare* Exhibit 20 *with* 21; *see also* Trial Exhibit 1. Several other pictures of Mr. Davis appeared on the front page of the Savannah Evening News and in nightly news coverage. On August 21, 1989 - two days after the shooting - Mr. Davis' picture appeared in the paper under the headline: "POLICE PUSH HUNT FOR KILLER." Video of Mr. Davis surrendering to police was widely covered by all outlets of the Savannah media before any eyewitness was shown a photo array. *See* Trial Exhibit 1.

After five days of media coverage in which the police made a high profile, public commitment to the theory that Troy Davis was the shooter, investigators learned Coles was carrying a .38 caliber gun on the night of the shootings. T. at 931; 1331. When confronted, Coles admitted carrying the weapon but could not produce it for ballistics testing. *Id*. Nevertheless, the detectives never searched Coles' house or car for the murder weapon (T. at 937) and never included Coles' picture in witness photo spreads (T. at 1327-28).

On the day of Coles' revelation that he was carrying a .38 revolver, Detective Ramsey assembled three State eyewitnesses in a crime scene "reenactment" and allowed

Redd Coles to play the role of an innocent bystander. T. at 1324-25. Further, Coles was allowed to hear the witness recollections of the clothes the shooter was wearing. T. at 1327. Only after the reenactment, did Coles tell the police that he was wearing a yellow shirt – the color reenactment witnesses remembered the innocent bystander was wearing – but claimed he had given the shirt to Mr. Davis after the shooting. *See* Exhibit 12 (8/28/1989 transcript of interview with Coles). Coles' sister helped verify his story when she was interviewed 3 days later. T. at 1318. After the reenactment, Coles repeatedly claimed he was wearing the yellow shirt on the night of the shooting.

The State presented nine witnesses who testified against Mr. Davis. Seven of those witnesses have now recanted their testimony.

Dorothy Ferrell has clearly disavowed her identification of Mr. Davis by stating in her 2000 affidavit that she saw nothing and testified falsely. Exhibit 1. Ferrell, who was standing at least 160 feet away from the dark parking lot when the shooting occurred, explained that she felt compelled to identify Mr. Davis because she was on parole. *Id*. Ferrell further explains that Detective Ramsey showed her only one photograph and intimated that she "should say that Troy Davis was the one who shot the officer like the other witness had." *See id*.

Portions of trial record support Ferrell's recantation. In her affidavit, Ferrell recounts that she told a friend that she had testified falsely and the friend called Mr. Davis' trial counsel to report her perjury. *Id*. Indeed, the trial record shows that soon after Ms. Ferrell testified, Mr. Barker's wife received a call stating Ms. Ferrell lied at trial because the district attorney had promised to help her while she was in jail. T. at 1476. Soon after, the district attorney disclosed a letter (Exhibit 2) he received from Ms. Ferrell before trial. The letter from Ferrell asks for the district attorney's help getting out of jail. No one else knew about the request made

in the letter but Ferrell, the district attorney and the caller. Thus, there is credible evidence in the record that Ferrell recanted to a friend immediately after she testified.

Darrell Collins has recanted his trial testimony in clear and certain terms. At trial, Collins told the jury that Mr. Davis assaulted Larry Young in the Burger King parking lot. T. at 1123. In his 2002 affidavit, however, Darrell Collins renounced his trial testimony and stated instead that: "I never saw Troy hit or slap the man that Redd was arguing with . . . . I remember that I told the jury that Troy hit the man that Redd was arguing with. That is not true. I never saw Troy do anything to the man . . . ." Exhibit 3. Consistent with several other affidavits and testimony at trial, Collins' affidavit describes a harsh interrogation in which police threatened the 16 year-old with jail time if he did not parrot the story Coles had reported to Detective Ramsey.

Larry Young hesitantly implicated Mr. Davis as his attacker at trial. In his 2002 affidavit, however, Young admitted that at the time of the incident he could not remember "what different people were wearing . . . [and] just couldn't tell who did what." Indeed, he stated, "I never have been able to make sense of what happened that night. It's as much a blur now as it was then." Exhibit 5. Young explained that he had been drinking and had sustained a massive head injury from the brutal assault on the night of the shooting. *Id*. Young's recantation is not surprising in light of the fact that he initially confused Mr. Davis and Redd Coles when asked to identify who he was arguing with. See T. at 805, 831, 835.

Antoine Williams has clearly recanted his identification of Mr. Davis by stating that he had "no idea what the shooter looked like" and "couldn't really tell what was going on because he had the two darkest shades of tint that you could possibly have on the windows of [his] car" when the shooting occurred. Exhibit 4. Williams' recantation is not surprising considering he (1) saw Mr. Davis' picture (the same picture used in the photo array) on a

wanted poster before he was show the photo array (T. at 971); and (2) at trial, Williams identified Mr. Davis but admitted that he was only 60% sure when he was shown a photo array 5 days after the shooting. T. at 970.

Harriet Murray's affidavit clearly describes Redd Coles, not Troy Davis, as the shooter by Coles' self-confessed, belligerent actions toward Larry Young. Murray's affidavit is convincing in that it is consistent with both her initial police statement (taken 2 hours after the shooting) and her preliminary hearing testimony (given 3 weeks after the shooting). *Compare* Exhibit 8 *with* 10; PH at 70-71; *see also* P.H. at 8-9, 31-32, 33-34; T. at 799, 823, 902, 904, 906, 1422 (Coles description of his actions toward Young). Moreover, Murray identified Mr. Davis by process of elimination when she was shown a Coles-free photo array immediately after Detective Ramsey had Murray, Coles, Collins and Young "reenact" the shooting with Coles playing the innocent bystander. T. at 1324-25. According to Ms. Murray's August 24, 1989 police statement, she picked Mr. Davis' picture after the reenactment because Mr. Davis was "the only one left."

Kevin McQueen has clearly admitted that his testimony was a complete fabrication. McQueen testified at Mr. Davis' trial that Troy had confessed to him in the Chatham County jail. McQueen had been a "snitch" in other prosecutions (T. at 1228), and his version of Troy's "confession" differed wildly from established facts (*e.g.*, Mr. Davis was eating breakfast at the Burger King in the morning when a drug deal went bad). *See* T. 1227. McQueen subsequently admitted, "[t]he truth is that Troy never confessed to me or talked to me about the shooting of the police officer. I made up the confession from information I had heard on TV. and from other inmate's talk about the crimes. Troy did not tell me any of this." Exhibit 6.

Jeffrey Sapp has clearly recanted his testimony in full. Sapp testified at trial that the day after the shooting Mr. Davis confessed to him that he assaulted Larry Young and shot

Officer MacPhail. T. at 1249-52, 1259. Sapp explains that his false testimony was the result of police pressure. Similar to Darrell Collins' interrogation, Sapp's affidavit states that "the police came to me and talked to me and put a lot of pressure on me to say 'Troy said this' or 'Troy said that.' They wanted me to tell them that Troy confessed to me about killing that officer. The thing is, Troy never told me anything about it. I got tired of them harassing me, and they made it clear that the only way they would leave me alone is if I told them what they wanted to hear." Exhibit 7.

The only remnants of the State's case against Troy Davis are the self-serving testimony of Redd Coles and Steven Sanders' dubious courtroom identification of Mr. Davis. Four hours after the shooting, Sanders told the police "I wouldn't recognize [the assailant or the other two men] again except for their clothes." Exhibit 11 at 2. Two years after the incident and one day after seeing Troy Davis' picture in the newspaper, Sanders identified Troy as the assailant for the first time in the courtroom. T. at 984-985.

The overwhelming evidence now shows that Redd Coles shot Officer MacPhail. Gary Hargrove, who knew Redd Coles well, places Coles by name in the position of the shooter when the shots were fired. *Compare* Exhibit 16. *with* PH at 83; T. at 849-50. Hargrove's affidavit supports trial testimony from Joseph Washington, who identified Coles as the shooter. *See* T. at 1343.

Since trial, Redd Coles has admitted to four separate friends and family that he — not Troy Davis — murdered Officer MacPhail.

Benjamin Gordon, who is a member of Coles' family, has sworn that Coles confessed to him. In his 2008 affidavit, Benjamin Gordon recounts that he had a conversation with Coles in 1995 or 1996 about the murder of Officer MacPhail. Exhibit 13. In response to the conversation about the MacPhail shooting, Coles confessed that he "shouldn't have

done that shot. That shot was [expletive deleted] up." *Id*. Gordon recounts that Coles then began to cry. *Id*.

Anthony Hargrove, a long-time friend of Redd Coles, heard Coles admit to killing an officer and letting a man named "Troy" take the fall for it. Exhibit 16. Redd Coles, according to Hargrove, had a "nasty temper" and often carried a gun. Hargrove has seen Coles use the gun to pistol-whip and shoot those with whom he got into altercations. *Id*.

Shirley Riley, another friend of Coles, heard Redd Coles admit he "did shoot the officer . . . but he said it was an accident." Exhibit 17. Redd told Riley that he had shot MacPhail after he had been drinking. *Id*.

Darold Taylor stated that he heard Coles admit to shooting Officer MacPhail. Exhibit 18. Taylor , who was a friend of Coles, asked Coles if the rumors that he had shot MacPhail were true. Coles admitted that he had killed the officer, but told Taylor to stay out of his business. *Id*.

A. The Court of Appeals Decision

On March 16, 2009 a divided panel of the court of appeals denied Mr. Davis permission to file a second habeas petition asserting a stand-alone innocence claim in the district court. The lower court held that Mr. Davis "failed to meet the procedural requirements of 28 U.S.C. § 2244(b)(2)." Appendix A at 8a. Specifically, it held that stand-alone innocence claims pursuant to this Court's opinion in *Herrera v. Collins* could never be the subject of a second or successive petition. Second, it held that under § 2244(b)(2)(B)(i), Mr. Davis should have supplemented his *Schlup* innocence claim with a *Herrera* innocence claim.

The dissent found that "[t]o execute Davis, in the face of a significant amount of proffered evidence that may establish his actual innocence, is unconscionable and unconstitutional." *Id*. at 26a. Mr. Davis' case does "not fit neatly into the

narrow procedural confines delimited by AEDPA. But it is precisely this type of occasion that warrants judicial intervention." The dissent disagreed with the majority's view that AEDPA's procedural bars should be read to preclude Mr. Davis' case. *Id*. at 31a.

REASONS FOR GRANTING THE WRIT

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.2. 258, 260 (1947). Title 28 U.S.C. 2244(b)(3)(E) prevents this Court from reviewing the court of appeals' order denying Mr. Davis leave to file a second habeas petition by appeal or writ of certiorari. The provision, however, has not repealed this Court's authority to entertain original habeas petitions, *Felker v. Turpin*, 518 U.S. 651, 660 (1996), nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction." Further, this Court's authority to grant relief is limited by 28 U.S.C. § 2254, and any considerations of a second petition must be "inform[ed]" by 28 U.S.C. § 2244(b). *See Felker*, 518 U.S. at 662-63.

Mr. Davis' last hope for an evidentiary hearing to prove his innocence lies with this Court. His case presents exceptional circumstances that warrant exercise of this Court's discretionary powers.

I. STATEMENT OF REASONS FOR NOT FILING IN THE DISTRICT COURT

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Davis states that he has not applied to the district court because the circuit court prohibited such an application. *See* Appendix A. Mr. Davis exhausted his State remedies for his stand-alone innocence claim when a sharply-divided Georgia Supreme Court denied his Extraordinary Motion for New Trial and an evidentiary hearing on March 17, 2008 (Appendix B) and the Georgia Board of Pardons and Paroles denied his application for clemency on September 12, 2008. Since Mr. Davis exhausted his State remedies and was denied permission by the court of appeals to file a second habeas petition, he cannot obtain relief in any other form or any other court.

II. THE EXCEPTIONAL CIRCUMSTANCES OF THIS CASE WARRANT THE EXERCISE OF THIS COURT'S JURISDICTION

The courts that have reviewed Mr. Davis' innocence case have been sharply divided. Nevertheless, the bare majority of the court of appeals and Georgia Supreme Court denied Mr. Davis relief without a hearing based on the oft-cited rule that recantations are "inherently suspect." Mr. Davis' new evidence, however, is an exception to that rule.

Few - if any - recantation cases involve consistent, multiple recantations from State witnesses who were innocent bystanders to the crime. Moreover, recantations from innocent bystanders are even more rare in States such as Georgia where the penalty for perjury in a capital case is a mandatory life sentence.

A. The Recantations In This Case Are Rare and Exceptional

This Court has held that "[a]ll perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." *In re Michael*, 326 U.S. 224, 227 (1945). A study of federal habeas case law reveals no case in which seven State witnesses have recanted their testimony, much less a case with seven recantations supplemented by four confessions from the alternative suspect. Moreover, the recantations presented to this Court are of the rare variety: recantations from State witnesses who were innocent bystanders.

The outcomes of federal habeas recantation cases usually - if not invariably - hinge on the recanting witness' relationship to the defendant and the materiality of the recantation. Federal courts have found that recantations are "viewed with great suspicion" because they are often "given for suspect motives" and do not serve to "undermine the accuracy of the conviction." *See Dobbert v. Wainwright*, 468 U.S. 1231 (1984) (Brennan, J., *dissenting* to denial of a motion for stay of execution based on a single recantation from petitioner's son). However, an exhaustive review of federal habeas cases in the past ten years shows that almost all recantation cases summarily rejected without an

evidentiary hearing involved recantations from defendant's accomplice or a family member.[1] This is not such a case.

Recantations by innocent bystanders with no relation to the defendant are rare. Indeed, when innocent bystander witnesses recant their testimony, federal courts have often granted an evidentiary hearing or, in many instances, habeas relief. *See, e.g., Douglas v. Workman*, 560 F.3d 1156 (10th Cir. 2009) (habeas relief granted on second habeas petition based on recantation of State witness-victim); *Alexander v. Smith*, 2009 WL 426261 at *8 (6th Cir. 2009) (hearing held to examine recantation of fellow inmate); *In Re McDonald*, 514 F.3d. 539, 547 (6th Cir. 2008) (single recantation of State witness who knew defendant sufficient for §2244 permission to file successive habeas petition); *Souter v. Jones*, 395 F.3d 577, 592 (6th Cir. 2005) (finding actual innocence based on recantations of 2 of 3 State forensic experts); *Dixon v. Snyder*,

[1] Under certain circumstances courts have nevertheless suggested that a hearing may be appropriate where the recantation was made by an accomplice. *See Wolfe v. Johnson*, -- F.3d --, 2009 WL 1272651 at *25 (4th Cir. 2009). However, recantations by accomplices or family members are generally viewed with skepticism. *See, e.g., U.S. v. Calles*, 271 Fed. Appx. 931 (11th Cir. 2008) (denying motion for new trial based on recantation of defendant's brother who, because he was defendant's brother "had a motive to lie"); *Haouari v. U.S.*, 510 F.3d 350 (2d. Cir 2007) (denying successive habeas petition based on recantation of co-defendant, finding recantations are more suspicious "when, as here, the recanting witness is one who was involved in the same criminal scheme and, having received the benefit of his cooperation agreement, now sits in jail with nothing to lose by recanting"); *Smith v. Baldwin*, 510 F.3d 1127, 1142 (9th Cir. 2007) (en banc) (overturning panel to deny habeas relief because defendant was not actually innocent based on recantation of accomplice who "thought he could recant, and possibly help his partner in crime, without any personal consequences"); *U.S. v. Jasin*, 280 F.3d 355 (3d Cir. 2002) ("Courts generally consider exculpatory testimony offered by codefendants after they have been sentenced to be inherently suspect.").

266 F.3d 693, 704-705 (7th Cir. 2001) (granting habeas relief on trial recantation of bystander witness); *Amrine v. Bowersox*, 128 F.3d 1222 (8th Cir. 1997) (en banc) (remand for evidentiary hearing as a result of three recantations from State eyewitnesses who were bystanders); *see also State ex rel Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (granting habeas relief); *Imbler v. Craven*, 298 F. Supp. 795 (D.C. Cal. 1969) (habeas relief granted on recantation of passer-by eyewitness).

In *McDonald*, for example, the Sixth Circuit recently held that a second habeas petition was appropriate where a single innocent bystander witness recanted, explaining that "given the lack of direct evidence linking [the defendant] to the underlying crimes, [the affiant's] recanting of her trial testimony looms large." 514 F.3d. at 547.

Moreover, State perjury laws have made recantations by innocent bystanders even more rare in Georgia. Georgia law provides harsh penalties for perjury, 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."). An exhaustive search of Georgia Extraordinary Motion for New Trial cases shows that recantations invariably come from 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.

The recanting witnesses in this case are not accomplices or family members. Recanting witnesses Larry Young, Dorothy Ferrell, Antoine Williams, Kevin McQueen and Harriet Murray have no connection to Mr. Davis and nothing to gain from their recantations. These witnesses were merely present at the scene because they lived or worked

adjacent to the parking lot in which Officer MacPhail was killed.

In *Herrera v. Collins* this court denied habeas relief because petitioner's new evidence failed to show he was innocent. 506 U.S. 390, 396 (1993). The contrast between the evidence in *Herrera* and Mr. Davis' petition could not be more stark. Herrera pled guilty to one of the two murders for which he was convicted, left his bloody social security card at the scene of the murder, was identified by two police officers as the shooter and -- when he was arrested -- was found with the victim's blood on his clothes and a handwritten confession in his pocket. *Id*. at 394. In an attempt to prove his innocence, Herrera offered only affidavits from family members and their associates attempting to show that Herrera's brother, who had died seven years earlier, had confessed to the crime. *Id*. at 396-97. The Court emphasized that the affidavits were inconsistent and failed to undercut the strong physical evidence tying Herrera to the murders. *Id*. at 418.

In contrast, Mr. Davis' new evidence eviscerates the State's case against him. Seven of the State's witnesses have recanted their testimony in a fashion consistent with both the record and the recantations of other witnesses. These recanted witnesses included five innocent bystanders who have no connection with Mr. Davis and can only suffer under the laws of Georgia for renouncing their testimony. The alternative suspect -- Redd Coles -- undisputedly was at the scene and had the motive, weapon and opportunity to commit the crime. Moreover, the only physical evidence (a single shell casing) connects back to a gun that police never found (or a gun that Coles conveniently lost) and a party that both Coles and Mr. Davis attended. Moreover, Coles confessed -- not to relatives of Mr. Davis -- but to his own friends and family. Unlike Herrera's brother, Coles is still alive and available for subpoena to testify at an evidentiary hearing.

The facts that Mr. Davis has asserted, when proven in a hearing, will show that no credible inculpatory evidence remains.

B. Extraordinarily, the Lower Federal Courts Denied Mr. Davis Any "Meaningful Avenue to Avoid a Manifest Injustice" in His First Habeas Petition

Only rarely - if ever - does a substantial case of innocence slip through the cracks of the federal habeas system and require the petitioner to bring a stand-alone innocence claim in a second habeas petition. Ordinarily, petitioners with substantial cases of innocence obtain review of their evidence at their first federal habeas proceeding by alleging innocence as a "gateway" to hearing their otherwise-defaulted constitutional trial errors under this Court's opinion in *Schlup v. Delo*, 513 U.S. 298 (1995)

Mr. Davis' case represents an extreme aberration of how innocence cases are normally reviewed in federal court. The district court and the court of appeals utterly ignored Mr. Davis' *Schlup* innocence claim during his first federal habeas petition. This failure compelled him to file a second habeas petition asserting a stand-alone innocence claim. This Court has held that a *Schlup* claim is designed to provide the "petitioner a meaningful avenue by which to avoid a manifest injustice" *Schlup*, 513 U.S. at 327. The procedural history of this case and the most recent decision of the court of appeals show that Mr. Davis has been denied any such meaningful avenue to justice.

III. THE COURT OF APPEALS ERRED IN BARRING MR. DAVIS' SECOND PETITION

The court of appeals denied Mr. Davis permission to file a second petition, holding that he "failed to meet the procedural requirements of [28 U.S.C.] § 2244(b)(2)." Although these procedural requirements "inform" this Court's

consideration of original habeas petitions, this Court has not decided whether it is bound by them. *See Felker*, 518 U.S. at 663 (pretermitting the question of whether the Court is bound by § 2244(b)(2) finding that the provision "informs" its decision).

The purposes of § 2244(b)(2) that "informs" this Court's consideration of Mr. Davis original habeas petition are twofold: Section 2244(b)(2)(B)(ii) requires that the petitioner diligently discover and present his new evidence in his first habeas petition. Mr. Davis has diligently done so. Section 2244(b)(2)(B)(i) requires that the claim raised in a second petition "impugn" the reliability of the underlying conviction. Mr. Davis' stand-alone innocence claim does exactly that.

A. Mr. Davis Diligently Discovered and Presented His New Evidence to the District Court in His First Federal Habeas Proceedings

Section 2244(b)(2)(B)(i) requires that a claim brought in a second petition must be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." The clear purpose of this provision is to ensure that petitioner's diligently discover all evidence and present it to the district court in the first federal habeas petition.

Here, all of the evidence underlying Mr. Davis' *Herrera* claim (save the 2008 Affidavit of Benjamin Gordon) was discovered before or during Mr. Davis' first federal habeas proceeding and submitted to the court in support of his *Schlup* actual innocence claim.

The court below did not find that Mr. Davis failed to discover and present his new evidence in his first federal habeas petition. Instead, the court of appeals read into §

2244(b)(2)(B)(i) a requirement that Mr. Davis should have supplemented his *Schlup* innocence claims with a stand-alone *Herrera* innocence claim in the first federal petition. *See* Appendix A at 13a.

The only reason Mr. Davis now raises a *Herrera* claim in a second petition is because the district court and the court of appeals failed to consider his *Schlup* innocence claim in his first petition. At the time of Mr. Davis' first petition, this Court and the Eleventh Circuit had mandated that courts decide *Schlup* claims before they reach a petitioner's procedurally-defaulted constitutional claims. *See Bousley v. U.S.*, 523 U.S. 614, 623 (1998) (remanding Schlup issue when district court failed to address it); *see also Clisby v. Jones*, 960 F.2d 925, 936 (11th Cir.1992) (en banc) (instructing district courts to resolve all claims presented in § 2254 petitions). Neither the district court nor the court of appeals in its 2006 opinion addressed Mr. Davis' innocence. *See* Appendix A at 3a ("The district court did not rule on his actual innocence claim".); *Davis v. Terry*, 465 F.3d 1249, 1251-53 (11th Cir. 2006) (explaining that a *Schlup* claim is a "procedural claim" and a *Herrera* claim is a "substantive claim" and since Mr. Davis "did not make a substantive [*Herrera*] claim of actual innocence," the "true gravamen of this appeal [is] the question of whether the district court erred in concluding that Davis' constitutional claims of an unfair trial.").

Mr. Davis' second petition would have been unnecessary or moot had the lower courts followed the mandate of this Court and decided the innocence issue in his first federal petition. Once a petitioner is found to be innocent under *Schlup*, relief based on the petitioner's underlying constitutional claims invariably follows. Indeed, once a court finds that "it is more likely than not that no juror would convict petitioner in light of the new evidence," it defies all logic and morality that he would be executed

nonetheless. Conversely, if a petitioner fails to meet the "more likely than not" *Schlup* innocence standard, he necessarily cannot meet *Herrera's* higher standard. *See Schlup*, 513 U.S. at 316. Thus, had the lower courts decided Mr. Davis' innocence in his first petition, his conviction would have been overturned or his *Herrera* claim would be moot.

Moreover, Mr. Davis' counsel diligently sought to include a *Herrera* claim in his first petition but was denied by the district court. Mr. Davis amassed new evidence sufficient to plead a *Herrera* claim after he filed his first habeas petition but before the district court had ruled on any substantive motion. During the time of Mr. Davis' first federal habeas proceedings, it was common for district courts to employ a "stay-and-abeyance" procedure to allow petitioners to return to State court and pursue previously unexhausted claims. *See Rhines v. Weber*, 544 U.S. 269, 274 (2005). Mr. Davis requested a stay and abeyance so that he could exhaust his stand-alone innocence claim in State court. Exhibit 34 at 5-7. The State opposed Mr. Davis' motion and the federal habeas court denied Mr. Davis' request. Exhibit 35. Had Mr. Davis included his unexhausted *Herrera* claim in his first federal habeas petition alongside his exhausted claims, the habeas court would have been compelled to dismiss his entire petition after the AEDPA's 1-year statute of limitations had run. *See Rhines*, 544 U.S. at 275 (under this Court's total exhaustion requirement, inclusion of unexhausted claims alongside exhausted claims will result in dismissal of the entire petition, usually after AEDPA's statute of limitations has run); *see also Panetti v. Quarterman*, 127 S. Ct. 2842, 2854 (2007) (noting the "problem" created by AEDPA's statute of limitations and the total exhaustion requirement).

B. The Court of Appeals Erred In Holding that Stand-Alone Innocence Claims Can Never Be the Subject of a Second or Successive Petition

The court below arrived at the counterintuitive conclusion that AEDPA closes the door to petitioners who are innocent but cannot show any constitutional deficiency at trial. Section 2244(b)(2)(B)(ii) requires "clear and convincing evidence that, but for the constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense." The court of appeals held that the statute's language requires both clear and convincing evidence of actual innocence as well as another constitution violation. Appendix at 18a.

In holding that innocence is not enough, the court of appeals has turned § 2244(b)(2)(B)(ii) on its head with no regard for its purpose, legislative history or this Court's prior construction of the statute. This Court has held that "AEDPA's central concern [is] that the merits of concluded criminal proceedings not be revisited *in the absence of a strong showing of actual innocence*." *Calderon v. Thompson*, 523 U.S. 538, 558 (1998) (emphasis added). Other circuits have similarly held that 2244(b)(2)(B)(ii)'s restricts second petitions to claims that "impugn" the underlying conviction, not the sentence.[2]

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[2] *See, e.g.*, *In re Williams*, 330 F.3d 277, 283 n.3 (4th Cir. 2003) (The purse of AEDPA was to restrict second petitions to "claims impugning the reliability of the petitioner's conviction for the underlying offense."); *In re Vial*, 115 F.3d 1192, 1198 (4th Cir. 1997) (The identical provision in § 2255 applies only "to challenges to the underlying conviction; it is not available to assert sentencing error.").

The House Conference Report on AEDPA explained that AEDPA "limited [second petitions] to those petitions that contain newly discovered evidence that would seriously undermine the jury's verdict."[3]

The Senate legislative history clearly shows that 244(b)(2)(B)(ii) was meant to contain a "safety valve" for innocence. Senator Hatch, the co-sponsor of the Specter-Hatch bill that contained the language of §2244(b)(2)(B)(ii), addressed the concerns about the provision to his colleagues by stating:

> [T]he Specter-Hatch bill permits successive habeas corpus petitions in death penalty cases where the petitioner may be innocent. If the petitioner is innocent, he or she can have successive habeas corpus petitions and our bill contains a safety valve which permits Federal courts to hear legitimate claims. We have provided for protection of Federal habeas corpus, but we do it one time and that is it-unless, of course, they can truly come up with evidence of innocence that could not have been presented at trial. There we allow successive petitions. Any time somebody can show innocence, we allow that.

141 Cong.Rec. S7803-01, S7825 (1995) (emphasis added). The Specter-Hatch bill containing the language in §2244(b)(2)(B)(ii) was passed by the Senate and became part of AEDPA in 1996. *Id*. at S7857; 142 Cong.Rec. H3305 (1996).

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[3] *See* H.R. Conf. REP. 104-518, at 111 (1996), *reprinted in* U.S.C.C.A.N. 944, 944.

Here, the court of appeals shut off the innocence "safety valve" for Mr. Davis. To hold that a successive petition requires a technical constitutional error in addition to innocence turns the purpose of §2244(b)(2)(B)(ii) on its head. Such strict statutory construction is unwarranted in this case. *See Schlup*, 513 U.S. at 319 n. 35 (habeas law involves "an interplay between statutory language and judicially managed equitable considerations.")

Even in cases where the petitioner's guilt was not questioned, this Court has resisted interpretations of § 2244 that "would produce troublesome results, create procedural anomalies and close our doors to a class of habeas petitioners seeking review without any clear indication that such was the intent of Congress." *Panetti*, 127 S. Ct. at 2854 (holding that Eighth Amendment incompetency to be executed was not "second or successive" under § 2244 because the claim would have been premature in petitioner's first federal habeas petition); *see also Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998) (holding that a petition filed second in time was not "second or successive" as such a literal reading of § 2244 would lead to a "perverse" result); *Slack v. McDaniel*, 529 U.S. 473, 483 (2000) (finding that a petition filed second in time is not a "second or successive petition" so as to protect the "vital role" that the "writ of habeas corpus plays in protecting constitutional rights").

IV. MR. DAVIS' SECOND PETITION MEETS THE REQUIREMENTS OF 28 U.S.C. § 2254

A. Mr. Davis is Entitled to An Evidentiary Hearing

If this Court transfers Mr. Davis' habeas petition to the district court, Mr. Davis would be entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). Subject to

the requirements of § 2254, a federal evidentiary hearing is required "unless the state-court trier of fact has after a full hearing reliably found the relevant facts," *Townsend v. Sain*, 372 U.S. 293, 313 (1963) (*overruled on other grounds*).

Section 2254(e)(2) does not preclude an evidentiary hearing in this case because Mr. Davis consistently, but unsuccessfully, sought an evidentiary hearing to prove his innocence in State court. By the terms of its opening clause, § 2254(e)(2) bars an evidentiary hearing only to prisoners who have "failed to develop the factual basis of a claim in State court proceedings." In *Williams v. Taylor*, this Court held that a petitioner who did not receive a hearing in State court may receive an evidentiary hearing in federal court "unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." 529 U.S. 420, 435 (2000). The Court held that "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." To no avail, Mr. Davis asserted his innocence and requested an evidentiary hearing at every level of the State proceedings in connection with his Extraordinary Motion for New Trial. *See* Appendix B at 52a (Georgia Supreme Court opinion) ("Davis argues that the trial court should not have denied his extraordinary motion for new trial without first holding a hearing."); Appendix C at 58a (Trial court order) ("Defendant moves this Court to convene a hearing on Defendant's Extraordinary Motion for New Trial.").

B. The Georgia Supreme Court's Minimal Factual Findings Deserve No Deference under § 2254

The Georgia Supreme Court's review of Mr. Davis' Extraordinary Motion for New Trial is entitled to no deference under § 2254 since the state courts failed to conduct an evidentiary hearing and the Georgia Supreme Court made

an unreasonable determination of the facts in light of the evidence Mr. Davis had presented.

Under AEDPA's amendments to § 2254, a federal court may grant habeas relief if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2). Factual determinations made by State courts are presumed correct unless rebutted by "clear and convincing evidence." § 2254(e)(1). When the state court conducted an evidentiary hearing, this Court has held that these standards are "demanding but not insatiable" as "deference does not by definition preclude relief." *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005).

AEDPA's provisions deferring to State court factual determinations are inapplicable where, as here, the petitioner did not have the opportunity for a full and fair hearing in State court. There is a split among the circuits as to whether § 2254(d)(2) and § 2254(e)(1) apply when the State court failed to conduct an evidentiary hearing. The Tenth and Ninth Circuits have held that the presumption of correctness contained in § 2254(d)(2) and (e)(1) does not apply if the habeas petitioner did not receive a full, fair and adequate hearing on factual determination sought to be raised in the habeas petition. *Bryan v. Mullin*, 335 F.3d 1207, 1215-16 (10th Cir. 2003) (en banc); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003). In *Bryan v. Mullin*, for example, the Tenth Circuit, sitting en banc, afforded no deference to the State court factual findings, reasoning that "because the state court did not hold an evidentiary hearing, we are in the same position to evaluate the factual record as it was." 350 F.3d at 1216.

Conversely, the Fifth Circuit has held that a "full and fair hearing is not a precondition" to accord the State court's factual determinations deference under § 2254(d)(2) or (e)(1).

Valdez v. Cockrell, 274 F.3d 941, 951 (2001). The First and Third Circuits have taken the middle ground, finding that the lack of an evidentiary hearing in State Court should be a consideration in applying deference under § 2254(d)(2) and (e)(1). *Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007) ("While it might seem questionable to presume the correctness of material facts not derived from a full and fair hearing in state court, the veracity of those facts can be tested through an evidentiary hearing before the district court where appropriate"); *Rolan v. Vaughn*, 445 F.3d 671, 679-80 (3d Cir. 2006) ("after AEDPA, state fact-finding procedures may be relevant when deciding whether the determination was 'reasonable' or whether a petitioner has adequately rebutted a fact, the procedures are not relevant in assessing whether deference applies to those facts."); *see also Simpson v. Norris*, 490 F.3d 1029, 1035 (8th Cir. 2007) ("Where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court.").

Regardless of the applicable level of deference afforded the Georgia Supreme Court, the court's conclusions about Mr. Davis' new evidence are rebutted by the affidavits to a clear and convincing degree, showing that the court's conclusion of "immateriality" was unreasonable.

The sharply divided Georgia Supreme Court concluded that an evidentiary hearing was unnecessary because, under Georgia law, recantations are immaterial regardless of credibility or substance unless the defendant can show that the recanted witness' testimony is the "purest fabrication" by "extrinsic proof that the witness' prior testimony was physically impossible." Appendix B at 42a.

In response to Chief Justice Leah Ward Sears' characterization of the majority's categorical rule barring recantations as "immoral and illogical," the majority

attempted to show some semblance of substantive review by crediting Steve Sanders' first-time identification of Mr. Davis at trial two years after the shooting (despite his police statement on the night of the shooting that he "wouldn't recognize" the shooter again) and noting that it believed Mr. Davis' recantation affidavits were merely statements that the eyewitness "*now* do not feel able to identify the shooter." Appendix B at 51a. The majority's last-ditch attempt at showing some appearance of substantive review was unreasonable and is rebutted by the text of each affidavit to which the court was referring. The submitted affidavits clearly show that each recanting eyewitness was unable to identify the shooter *at trial* and *on the night of the crime*.

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

> "I didn't see who was doing the shooting, I just heard the gunshots. … I don't know which of the guys did the shooting because I didn't see that part. … 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." Exhibit 1.

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." Exhibit 3.

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." Exhibit 5.

Antoine Williams' affidavit also clearly states that he was "totally unsure of his identification" on the night of the shooting and at trial:

> "Even today I know that I could not honestly identify with any certainty who shot the officer that night. *I couldn't then either*. 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." Exhibit 4 (emphasis added).

The majority's unreasonable factual determinations in light of the clear language of the affidavits is an error attributable to the lack of an evidentiary hearing examining the new evidence and deserves no deference.

V. EXECUTION OF MR. DAVIS WITHOUT AN EVIDENTIARY HEARING WOULD RAISE SERIOUS CONSTITUTIONAL ISSUES

Mr. Davis' execution without a full and fair hearing in which he could make a truly persuasive demonstration that he is actually innocent will violate his federal constitutional rights to due process and freedom from cruel and unusual punishment as guaranteed by the Eighth and Fourteenth Amendments *See Herrera*, 506 U.S. at 417 (assuming a "truly persuasive demonstration of actual innocence made after trial would render execution of a defendant unconstitutional"); *House v. Bell*, 547 U.S. 518, 554 (2007). (same).

A. The Eighth Amendment Bars the Execution of the Innocent

In *Herrera v. Collins*, five Justices unequivocally found that the execution of an innocent person violates the Constitution. *See* 506 U.S. at 419 ("the execution of a legally and factually innocent person would be a constitutionally intolerable event") (O'Connor, J., joined by Kennedy, J., *concurring*); *id*. at 431 ("the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence.") (Blackmun, J., joined by J.J. Stevens and Souter, *dissenting*). Nevertheless, this Court has only "assume[d]", without deciding that the execution of an innocent man is unconstitutional. *Id*. at 417 (opinion of Rehnquist, C.J.).

In the sixteen years since the Court assumed that the execution of the innocent is unconstitutional, the basis for this Court's Eighth Amendment analysis has eroded. 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. Public consensus now shows that, in some cases, constitutional protections are insufficient to protect the innocent from an erroneous capital conviction.

The "objective evidence of contemporary values" that informs the Eighth Amendment is evidenced in many ways. This Court has often looked to state statutes to determine contemporary values for purposes of Eighth Amendment analysis. *See Kennedy v. Louisiana*, 128 S. Ct. 2641, 2652 (2008). A consensus of State laws on the issue "is entitled to great weight." *Id*. at 2658.

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 erode public confidence in the outcome of criminal trials when *Herrera* was decided. Since 1989, there have been 238 post-conviction DNA exonerations. When *Herrera* was decided in 1993, DNA had proven only 15 convictions to be erroneous.[4] Eyewitness misidentification testimony was a factor in 77 percent of post-conviction DNA exoneration cases, making it the leading cause of these wrongful convictions.[5]

In response to the public's concern about the growing number of erroneous convictions based on faulty eyewitness identifications, Wisconsin, New Jersey, Maryland, and North Carolina enacted state statutes requiring law enforcement agencies to reform the administration of eyewitness identifications.[6] In 2007, Vermont, West Virginia and

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[4] *See* www.innocenceproject.org/know.

[5] *See* www.innocenceproject.org/Content/351.php

[6] See http://www.innocenceproject.org/news/LawView5.php.

Georgia created task forces to review eyewitness identification procedures. *Id*. Starting in 1994 (one year after this Court's decision in *Herrera*), the vast majority of States have enacted post-conviction DNA testing access statutes to the potentially innocent. Now, forty-six states, the District of Columbia and the United States have DNA statutes that compel DNA testing if the results would have a sufficient exculpatory effect.[7] Additionally, Pennsylvania, North Carolina, Connecticut and California have all created criminal justice reform commissions to address the causes of wrongful convictions.[8]

Several states have passed laws severely limiting the use of the death penalty. For example, on May 7, 2009 the Governor of Maryland signed into law a capital punishment reform bill that limits the imposition of the death penalty to first-degree murder cases with biological or DNA evidence, videotaped voluntary confessions, or video linking defendants to a crime. *See* 2009 Md. Laws 186. In March 2009, the State of New Mexico banned the death penalty in all cases, citing concerns over imperfections in the criminal justice system and the potential for innocent people to be put to death. *See* 2009 N.M. Laws 11. In a similar vein, legislators and governors in the states of Montana, Kansas, Connecticut and Colorado have all recently initiated reviews of their states' death penalty statutes.[9]

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[7] *Id*. (providing links to each State's DNA access statute).

[8] *See* http://www.innocenceproject.org/news/LawView6.php.

[9] *See* www.deathpenaltyinfo.org; www.kansascity.com/news/breaking_news/story/1190748.html; www.ncadp.org/news.cfm?articleID=227.

In the wake of 238 DNA exonerations and the resulting myriad of legislative actions, the post-*Herrera* consensus is that the existing procedural protections currently provided by the Constitution are insufficient to avoid the execution of the innocent. *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 innocent person" are plainly contrary to the large number of recent exonerations and contemporary norms. *Herrera*, 506 U.S. at 398, 420.

In the rare case of seven recantations, four of whom were innocent bystanders, four confessions from Redd Coles and at least one new eyewitness implicating Coles as the shooter, the Eighth and Fourteenth Amendments require that Mr. Davis have an evidentiary hearing to prove that he is innocent.

B. An Evidentiary Hearing is Required to Assess Mr. Davis' *Herrera* Claim

This Court has recognized that "[i]n capital proceedings generally, this Court has demanded that fact-finding procedures aspire to a heightened standard of reliability" *Ford v. Wainwright*, 477 U.S. 399, 411 (1986) (plurality opinion). 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*.

Similarly in *Panetti*, this Court recently held that failing to allow the defendant to submit relevant evidence of insanity violated due process. 127 S. Ct. at 2857-58. The exclusion of relevant evidence was sure to "invite arbitrariness and error" in the state court's determination of

whether the Eighth Amendment barred execution and, thus, violated due process. *Id.*

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 that has never been the subject of a State or federal court evidentiary hearing.

CONCLUSION

The petition for a writ of habeas corpus should be transferred to the district court for a hearing and determination.

Respectfully submitted.

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May 19, 2009