No. 08-1443

In The
Supreme Court of the United States

In re TROY ANTHONY DAVIS,

Petitioner.

On Petition For A Writ Of Habeas Corpus

BRIEF IN OPPOSITION ON BEHALF OF RESPONDENT

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant Attorney General
Counsel of Record
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397
Facsimile (404) 651-6459

May 28, 2009

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether Petitioner's habeas corpus petition requesting extraordinary relief is merely an attempt to circumvent the statutory prohibition contained in 28 U.S.C. § 2244(b)(3)(E) against filing a petition for certiorari from the Circuit Court's denial of leave to file a second federal habeas corpus petition?

2. Whether this Court should deny this petition for a writ of habeas corpus when Petitioner has unquestionably failed to demonstrate the mandatory prerequisite that "adequate relief cannot be obtained in any other form or from any other court"?

3. Whether this Court should deny this petition for a writ of habeas corpus when Petitioner has failed to demonstrate the requisite "extraordinary circumstances" which would justify the granting of extraordinary relief?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

DENIAL OF SPECIFIC CLAIMS SET OUT IN PETITION

Respondent denies Petitioner's factual assertion that the lower federal courts denied Petitioner "any 'meaningful avenue to avoid a manifest injustice.'" The record clearly shows that Petitioner's offered affidavits were found unpersuasive by the State Board of Pardons and Paroles and in six separate court proceedings including: federal habeas corpus proceedings; an extraordinary motion for new trial proceeding in the state trial court; by the Georgia Supreme Court on appeal to that Court from the denial of Petitioner's extraordinary motion for new trial and by the Eleventh Circuit Court of Appeals both in Petitioner's appeal from the denial of federal habeas corpus relief and in his application for leave to file a second federal habeas petition.

Respondent also denies Petitioner's factual assertion that the "recantations in this case are rare and exceptional." Every court reviewing Petitioner's "recantation affidavits" has found them to be unpersuasive. After viewing the affidavits "with some skepticism," and in light of the "record as a whole," the Eleventh Circuit concluded that it "remain[ed] unpersuaded" by the affidavits. *In re Davis*, 2009 U.S. App. LEXIS 8101 *39-40 (11th Cir. Apr. 16, 2009).

In denying Petitioner relief, the federal habeas court concluded that these affidavits were unpersuasive "because the submitted affidavits are insufficient to raise doubts as to the constitutionality

of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim."

In denying Petitioner's extraordinary motion for new trial, the trial court found these "recantation" affidavits were unpersuasive and that "Defendant has failed to carry the burden on each and every submitted affidavit."

In reviewing these affidavits on appeal from the denial of Petitioner's extraordinary motion for new trial, the Georgia Supreme Court found Petitioner's "recantation" affidavits to be unpersuasive by holding:

> In weighing this new evidence, we do not ignore the testimony presented at trial, and, in fact, we favor that original testimony over the new. At least one original witness has never recanted his in-court identification of Davis as the shooter, which included a description of his clothing and the location he was in when he struck Larry Young. As we have noted above, most of the witnesses to the crime who have allegedly recanted have merely stated that they now do not feel able to identify the shooter. At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both Davis and Coles claiming the other was guilty. We simply cannot disregard the jury's verdict in this case.

Davis v. State, 283 Ga. 438, 447-448 (2008).

In reviewing Petitioner's application to file a second federal habeas corpus petition, the Eleventh Circuit found these "recantation" affidavits unpersuasive by stating: "When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail's murder." *In re Davis*, 2009 U.S. App. LEXIS 8101 *42-43 (11th Cir. Apr. 16, 2009).

After the Georgia State Board of Pardons and Paroles reviewed Petitioner's "recantation affidavits, as well as hearing any witnesses whom Petitioner desired to testify before the Board," the Board concluded that Petitioner's "recantation" witnesses were unpersuasive by finding, "After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board has determined that clemency is not warranted." (Statement of Georgia State Board of Pardons and Paroles).

Respondent also denies Petitioner's factual assertion that he was diligent in "discovering and presenting" new evidence in his first federal habeas proceeding, especially in light of the Eleventh Circuit's express finding to the contrary. *In re Davis*, 2009 U.S. App. LEXIS 8101 *36 (11th Cir. Apr. 16, 2009) ("In short, we are constrained by the statutory requirements found in § 2244(b)(2)(B) to conclude that Davis has not even come close to making a prima facie showing that his *Herrera* claim relies on . . .

facts that could not have been discovered previously through the exercise of due diligence.").

Respondent denies Petitioner's factual assertion that "the overwhelming evidence now shows that Redd [sic] Coles shot Officer MacPhail," especially in light of the Eleventh Circuit's finding that "Davis has not presented us with a showing of innocence so compelling that we would be obliged to act today." *In re Davis*, 2009 U.S. App. LEXIS 8101 *38 (11th Cir. Apr. 16, 2009). *See also Davis v. State*, 283 Ga. 438, 447 (2008) ("We simply cannot disregard the jury's verdict in this case.").

STATEMENT OF THE CASE

(a) Trial Proceedings (1989-1991)

Petitioner, Troy Anthony Davis, was indicted in the Superior Court of Chatham County, Georgia on November 15, 1989, for the murder of Police Officer Mark Allen MacPhail, obstruction, two counts of aggravated assault and possession of a firearm during the commission of a felony.

On August 28, 1991, Petitioner was found guilty of malice murder, obstruction of a law enforcement officer, two counts of aggravated assault and possession of firearm during the commission of a felony and was sentenced to death for the murder of Officer MacPhail on August 30, 1991.

(b) Motion for New Trial Proceedings (1991-1992)

On September 12, 1991, the trial court appointed attorneys to represent Petitioner at the motion for new trial and on appeal. The hearing on this motion for new trial was held on February 18, 1992. The trial court denied all portions of the motion for new trial, as amended.

(c) Direct Appeal to the Georgia Supreme Court (1992-1993)

On direct appeal, the Georgia Supreme Court unanimously affirmed Petitioner's convictions and death sentence, specifically holding that "the evidence supports the conviction on all counts." *Davis v. State*, 263 Ga. 5, 7 (1993), *cert. denied, Davis v. Georgia*, 510 U.S. 950 (1993).

(d) State Habeas Corpus Proceedings (1994-1997)

Petitioner filed a state habeas corpus petition on March 15, 1994 and a 79 page amendment, raising 15 claims for relief, was filed on November 6, 1996. During the state habeas corpus evidentiary hearing on December 16, 1996, Petitioner presented 33 affidavits choosing not to present any live testimony from the affiants.

Petitioner's "innocence" affidavits were considered by the state habeas court in determining whether Petitioner's procedural default of certain

claims was excused under the "miscarriage of justice" exception and the court expressly noted the following:

> The court is mindful of the unique severity and finality of punishment by death. The court is likewise mindful of the importance of the habeas corpus process in avoiding the application of the death penalty in in-appropriate cases, even where problems with the trial do not fit neatly into any formulaic analysis of the accused's rights. Accordingly, the court bases the analysis of Claim XV on a thorough review of the entire trial record, the record on appeal, and the evidence introduced during the trial of the habeas petition . . . the court finds from a review of the record that many pieces of evidence supporting a finding that Coles was the shooter or highlighting inconsistencies of the testimony of witnesses who identified Davis as the shooter were indeed presented to the jury during Davis' trial. [Citations omitted]. The jury, in its rightful role as finder of fact during the trial, was responsible for evaluating the credibility of the witnesses and determining whether the state proved beyond a reasonable doubt that Davis shot and killed Officer MacPhail. This Court, although acting now as the finder of fact in this habeas proceeding, cannot supplant the role of the jury and find based on its own review of the record that the jury *should* have concluded that the state did not carry its burden at Davis' trial.

(e) Appeal to the Georgia Supreme Court (1997-2000)

Petitioner appealed to the Supreme Court of Georgia from the denial of state habeas corpus relief, alleging, *inter alia*, that the trial evidence showed that Red Coles was the shooter. The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000 in *Davis v. Turpin*, 273 Ga. 244 (2000), *cert. denied, Davis v. Turpin*, 534 U.S. 842 (2001).

(f) Federal Habeas Corpus Proceedings (2001-2004)

Petitioner filed his application for federal habeas corpus relief on December 14, 2001. Petitioner's motion for an evidentiary hearing, which requested, in part, that Petitioner be allowed to present evidence of alleged recantations of trial witnesses, was denied on March 10, 2003. Although the federal habeas court denied Petitioner's motion for an evidentiary hearing, the court extensively reviewed each affidavit relied on by Petitioner and, where applicable, compared the affiant's testimony to any testimony which was given during Petitioner's trial. The federal habeas court scrutinized each affidavit, both to determine if it could have been submitted during state habeas corpus proceedings and also to determine if the presentation of all of these affidavits would undermine the court's confidence in the outcome of the proceeding. The federal habeas court noted that all of

the "actual innocence" testimony offered by Petitioner was in affidavit form.

The federal habeas court expressly stated that it would consider all of the affidavits but would not permit Petitioner to re-offer these affidavits during a federal evidentiary hearing.

The federal habeas court reviewed the trial testimony, including Petitioner's testimony and found that even after Petitioner had been given a full opportunity to present any evidence in support of his "actual innocence" claim, he had failed to establish that he was "factually innocent."

The federal habeas court examined the post-trial affidavits relied upon by Petitioner, concluding that, "the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim."

The federal habeas corpus court denied Petitioner habeas corpus relief on May 13, 2004, specifically concluding that, "Petitioner has failed to show cause for the default. Furthermore, the Court finds that because the submitted affidavits are insufficient to raise doubts as to the constitutionality of the result at trial, there is no danger of a miscarriage of justice in declining to consider the claim." The federal habeas court denied Petitioner's motion to amend the judgment on June 3, 2004.

(g) Eleventh Circuit Appeal (2004-2006)

In its opinion affirming the denial of federal habeas corpus relief, the Eleventh Circuit found that, "in this case, Davis does not make a substantive claim of actual innocence. Rather, he argues that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence under *Schlup*." *Davis v. Terry*, 465 F.3d 1249, 1251 (11th Cir. 2006). The Eleventh Circuit found that Petitioner "concedes" that all of his claims are procedurally defaulted and that the federal habeas court actually considered the "merits" of Petitioner's constitutional claims, but nevertheless, "rejected them as a matter of law." *Id.* at 1252.

The Eleventh Circuit ultimately concluded that, "we cannot say that the district court erred in concluding that Davis has not borne his burden to establish a viable claim that his trial was constitutionally unfair." *Id.* at 1256.

(h) Petition for Certiorari (April 2007)

Petitioner's petition for a writ of certiorari seeking review of the Eleventh Circuit's decision affirming the denial of federal habeas corpus relief was filed in this Court on April 11, 2007, raising the following question:

> No court has examined Petitioner Troy Davis' compelling new evidence to determine if he is innocent. The Court of Appeals for

> the Eleventh Circuit affirmed the district court's refusal to examine Petitioner's evidence of innocence. If believed, the post-trial affidavits of numerous witnesses show that constitutional violations led to the conviction of an innocent man. In violation of this Court's precedent, no court has assessed the credibility of Mr. Davis' new evidence that underlies both his innocence and constitutional claims.
>
> The question presented was:
>
> Can a habeas court avoid its role as a fact finder in substantial innocence cases by skipping the innocence "gateway" inquiry and ruling on a petitioner's constitutional claims when the innocence and constitutional issues arise out of the same facts?

This Court denied this petition on June 25, 2007. *Davis v. Terry*, 127 S. Ct. 3010 (2007).

(i) Extraordinary Motion for New Trial Proceedings in the Trial Court (July 2007)

On July 9, 2007, Petitioner filed an Extraordinary Motion for New Trial alleging that "this is a case of mistaken identity" and that "Red Coles – not Davis – murdered Officer MacPhail."

Relying solely on state law, the trial court denied Petitioner's extraordinary motion without a hearing

on July 13, 2007.[1] However, although no evidentiary hearing was conducted, the trial court having recognized "the attendant gravity" of the motion, "exhaustively reviewed" each submitted affidavit "and considered in great detail the relevant trial testimony, if any, corresponding to each." The trial court specifically concluded that under state law the "recantation" affidavits of Young, Murray, Ferrell, Williams, Collins, McQueen, and Sapp, containing their post-trial declarations that their former testimony was false, "is not cause for a new trial." The trial court concluded that the Hargrove, Riley and Taylor affidavits contained inadmissible hearsay and that the Hargrove, Saddler and Kinsman affidavits were not so material that they would have produced a different result if introduced at Petitioner's trial and that Petitioner was not diligent in obtaining their testimony. The trial court aptly observed that "the majority of affidavits submitted by Defendant were sworn over five years ago and a few affidavits were sworn over ten years ago."

The trial court denied the request for a hearing and denied the extraordinary motion for new trial, concluding that, "Defendant has failed to carry the burden on each and every submitted affidavit."

---

[1] "Moreover, an extraordinary motion for new trial that fails to show 'any merit' may be denied a requested hearing. *Dick*, 248 Ga. at 899."

(j) Discretionary Appeal to the Georgia Supreme Court (July-August 2007)

On July 17, 2007, Petitioner filed a Notice of Appeal from the denial of this extraordinary motion for new trial, alleging that "the application will specifically address why the lower court's denial of the extraordinary motion for new trial was erroneous."

While that application was pending, the Georgia Board of Pardons and Paroles granted a temporary stay of execution and scheduled a clemency proceeding on July 16, 2007. On August 3, 2007, the Georgia Supreme Court granted Petitioner's application for a discretionary appeal.

In light of the Supreme Court's grant of Petitioner's application for a discretionary appeal, the Pardons and Paroles Board rescinded its stay and suspended its clemency consideration, pending the outcome of Petitioner's discretionary appeal.

(k) Georgia Supreme Court Decision (March 2008)

On March 17, 2008, the Georgia Supreme Court concluded that the trial court did not abuse its discretion in denying Petitioner's extraordinary motion for new trial without a hearing. *Davis v. State*, 283 Ga. 438 (2008). The Georgia Supreme Court reviewed the evidence presented at trial and found that, "at trial, Davis' defense centered on the theory that Coles was the murderer. Both Davis and

Coles testified, each claiming their innocence. The evidence at trial authorized the jury to conclude beyond a reasonable doubt that Davis was the man who struck Larry Young and shot Officer MacPhail." *Id.* at 440.

The Georgia Supreme Court extensively reviewed each category of "affidavit testimony" on which Petitioner's extraordinary motion relied, including: "recantations by trial witnesses," "statements recounting alleged admissions of guilty by Coles," "statements that Coles disposed of a handgun following the murder" and "alleged eyewitness accounts." *Id.* at 441-447.[2]

In reviewing Petitioner's extraordinary motion, in light of the trial evidence, the evidence presented at the extraordinary motion for new trial and controlling state legal principles, the Georgia Supreme Court expressly noted, "particularly in this death penalty case where a man might soon be executed, we have endeavored to look beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis' allegedly-new testimony would probably find

[2] "The supreme court nonetheless painstakingly detailed each of the seven post-trial affidavits by the State's eyewitnesses, as well as six affidavits from additional witnesses Davis located, and explained how each affidavit failed to support Davis' extraordinary motion for a new trial." *In re Davis*, 2009 U.S. App. LEXIS 8101 *7 (11th Cir. Apr. 16, 2009).

him not guilty or give him a sentence other than death." *Davis v. State*, 283 Ga. at 447.

The Georgia Supreme Court held that, "Upon our careful review of Davis' extraordinary motion for new trial and the trial record, we find that Davis failed to present such facts in his motion and, therefore, that the trial court did not abuse its discretion in denying that motion without a hearing." *Id.* at 448.

(l) Petition for Certiorari (July 2008)

Petitioner filed a petition for a writ of certiorari in this Court seeking review of the Georgia Supreme Court's decision on July 14, 2008, which petition was ultimately denied, thereby terminating the stay of execution. *Davis v. Georgia*, 129 S. Ct. 397 (2008).

(m) Commutation Denied (September 2008)

After the Georgia Supreme Court affirmed the decision of the trial court, the Pardons and Paroles Board rescinded its stay and denied Davis' application for clemency on September 12, 2008.

The complete statement of the State Board of Pardons and Paroles reads as follows:

> The Parole Board does not generally comment on death penalty cases it has considered for clemency. However, the Troy Davis case has received such extensive

publicity that the Board has decided to make an exception.

Davis' attorneys have argued that the Board should grant him clemency because a number of witnesses against Davis changed their earlier statements to the police and their testimony at the trial. Moreover, the attorneys have brought forward other people who now claim to have information that raises doubt as to the guilt of Davis.

Because of these claims, the Parole Board stopped Davis' execution last year. The Board has now spent more than a year studying and considering this case.

As a part of its proceedings, the Board gave Davis' attorneys an opportunity to present every witness they desired to support their allegation that there is doubt as to Davis' guilt. The Board heard each of these witnesses and questioned them closely.

In addition, the Board has studied the voluminous trial transcript, the police investigation report and the initial statements of the witnesses. The Board has also had certain physical evidence retested and Davis interviewed.

After an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board has determined that clemency is not warranted.

(n) Application to File Second Federal Petition (October 2008-April 2009)

On October 22, 2008, Petitioner Davis filed an application in the Eleventh Circuit Court of Appeals seeking permission to file a second or successive federal habeas petition pursuant to 28 U.S.C. § 2254, "raising for the first time a freestanding actual innocence claim." *In re Davis*, 2009 U.S. App. LEXIS 8101 (11th Cir. Apr. 16, 2009). In this application, Petitioner claimed that his execution would allegedly violate the Eighth and Fourteenth Amendments because he claims that he is "actually innocent" of the offense of murder. The Eleventh Circuit "took the unusual step" of entering a stay of execution and ordering further briefing and subsequently scheduled oral argument for December 9, 2009.

On April 16, 2009, the Eleventh Circuit denied Petitioner leave to file a second or successive petition, by concluding as follows:

> In short, we are constrained by the statutory requirements found in § 2244(b)(2)(B) to conclude that Davis has not even come close to making a prima facie showing that his *Herrera* claim relies on (i) facts that could not have been discovered previously through the exercise of due diligence, *and* that (ii), if proven, would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B) (2006).

> He, therefore, cannot file a successive petition.

However, the Eleventh Circuit continued the stay of execution for 30 days from the date of the filing of this opinion, at which time the stay would be automatically lifted.

After the 30-day extension of the stay of execution expired, Petitioner Davis filed the instant petition for a writ of habeas corpus asserting that "exceptional circumstances warrant the exercise of this Court's jurisdiction."

STATEMENT OF THE FACTS

At approximately 1:00 a.m. on August 19, 1989, a Savannah, Georgia police officer responded to an "officer down" call at the Greyhound bus station. The victim, Mark MacPhail, a 27-year-old Savannah police officer, was found lying face down in the parking lot of the Burger King restaurant next to the bus station. Officer MacPhail's mouth was filled with blood and bits of his teeth were on the sidewalk and his firearm was still snapped into his holster.

Larry Young told police that between midnight and 1:00 a.m. he walked from the Burger King parking lot convenience store to purchase beer. Sylvester "Red" Coles saw Young leave the pool hall next door and began following Young, demanding a beer. Coles continued to harass Mr. Young all the

way back to the Burger King. When Young arrived at the parking lot, Harriet Murray was sitting on a low wall by the restaurant. Petitioner, and Daryl Collins, who had taken a shortcut to the parking lot, came out from behind the bank and surrounded Mr. Young. Mr. Coles, who was facing Mr. Young, told him not to walk away "cause you don't know me, I'll shoot you," and began digging in his pants. Ms. Murray ran to the back door of the Burger King, but it was locked.

Petitioner, who was behind Young and to his right, blindsided him, striking him on the side of the face with a snub-nosed pistol, inflicting a severe head injury. Mr. Young began to bleed profusely. He stumbled to a van parked in front of the Burger King drive-in window, asking the occupants for help. When he received no response, Young went to the drive-in window, but it was shut in his face.

In response to the parking lot disturbance, Officer MacPhail, working as a security guard at the restaurant, walked rapidly from behind the bus station, with his nightstick in his hand and ordered the three men to halt. Collins and Petitioner fled, and Officer MacPhail ran past Sylvester Coles in pursuit of Petitioner. Petitioner looked over his shoulder, and when the officer was five to six feet away, shot him. Officer MacPhail fell to the ground, and Petitioner walked towards him and shot him again while he was on the ground. Eyewitness Harriet Murray testified that when Petitioner "was shooting the police he had a little smile on his face, a little smirky-like smile on

his face." The victim died of gunshot wounds before help arrived.

Harriet Murray testified that she identified Davis from a photographic lineup as being the man "who hit [her friend] Larry and shot the police" and she also made an in-court identification of Petitioner as the shooter.

Thirty minutes after the shooting, Coles appeared at his sister's house a few blocks from the bus station and asked his sister for another shirt. Shortly thereafter, Petitioner appeared and asked Coles for the yellow t-shirt Coles had been wearing. After changing his shirt, Petitioner left, fleeing to Atlanta the following day and surrendering to authorities on August 23, 1989.

On the night prior to the shooting, Petitioner had attended a party on Cloverdale Drive, and during the party, Petitioner had been annoyed that some girls ignored him, so he told his friends something about "burning them." Petitioner walked around saying, "I feel like doing something, anything." When Michael Cooper and his friends were leaving the party, Petitioner was standing out front. Cooper was in the front passenger seat, and as the car pulled away, several of the men in the car leaned out the window, shouting and throwing things. Petitioner shot at the car from a couple of hundred feet away and the bullet shattered the back windshield and lodged in Cooper's right jaw. The shooting incident took place approximately an hour before Officer MacPhail was shot.

An autopsy revealed that Officer MacPhail was shot twice and his cause of death was a gunshot wound to the left side of his chest. A ballistics expert testified that the bullet that wounded Cooper could have been fired from a .38 special revolver or a .357 magnum. The bullet from MacPhail's body was of the same type and was possibly fired from the same weapon as used in the Cooper shooting. Four .38 special casings recovered from Cloverdale were fired from the same gun as casings found at the murder scene.

Kevin McQueen, who was incarcerated with Petitioner, testified that Petitioner told him there had been a party in Cloverdale, that Petitioner had argued with some boys and that in an exchange of gunfire, Petitioner had done some of the shooting. After the party, Petitioner stated that he was with a friend and they ran into a guy who "owed money to buy dope." There was a fight, Officer MacPhail appeared, and Petitioner shot him in the face. As Officer MacPhail attempted to get up, Petitioner shot him again, because he was afraid MacPhail had seen him that night at Cloverdale.

Jeffrey Sapp testified that Petitioner told him he did the shooting at Burger King, but that it was self-defense. Mr. Sapp noted that Petitioner's street name was RAH, standing for "Rough As Hell."

Steve Sanders, an Air Force serviceman, testified that he was in the front passenger seat of a van in the Burger King parking lot. Sanders identified Davis as

the shooter and on cross-examination, Sanders reiterated his positive identification of Davis as the shooter by stating, "[Y]ou don't forget someone that stands over and shoots someone."

Petitioner testified at trial, admitting that he was present at the scene of the shooting on the night in question, but denying that he was involved in the shooting of Cooper or the victim or the assault on Young.

REASONS FOR NOT GRANTING THE WRIT

I. THIS COURT SHOULD SUMMARILY DENY THIS PETITION FOR A WRIT OF HABEAS CORPUS AS SIMPLY AN ATTEMPT TO CIRCUMVENT THE STATUTORY PROHIBITION CONTAINED IN 28 U.S.C. § 2244(b)(3)(E) AGAINST FILING AN APPEAL OR A PETITION FOR CERTIORARI FROM THE CIRCUIT COURT'S DENIAL OF LEAVE TO FILE A SECOND FEDERAL HABEAS CORPUS PETITION.

On April 16, 2009, the Eleventh Circuit Court of Appeals denied Petitioner leave to file a second federal habeas corpus petition "having the benefit of the parties' briefs and after hearing extensive oral argument." *In re Davis*. Applying the provisions of 28 § 2244(b)(2)(B), the Eleventh Circuit concluded:

> In short, we are constrained by the statutory requirements found in § 2244(b)(2)(B) to

> conclude that Davis has not even come close to making a prima facie showing that his *Herrera* claim relies on (i) facts that could not have been discovered previously through the exercise of due diligence, *and* that (ii), if proven, would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B) (2006). He, therefore, cannot file a successive petition.

In re Davis, at *36.

As this Court stated in *Felker v. Turpin*, 518 U.S. 651, 665 (1996), "'[a] petition seeking the issuance of a writ of habeas corpus shall comply with the requirements of 28 U.S.C. §§ 2241 and 2242, and in particular with the provision in the last paragraph of § 2242 requiring a statement of the 'reasons for not making application to the district court of the district in which the applicant is held.'" Although Petitioner included in his petition the required statement of why he did not file an application in the district court,[3] this statement does not justify the filing of this petition for a writ of habeas corpus but, in fact, shows that Petitioner is not entitled to relief.

As just noted, Petitioner sought permission to file a second petition in the district court, but the

[3] Of course, § 2244(b) provides that the application for leave to file shall be filed in the Circuit Court.

Eleventh Circuit Court of Appeals denied permission to file. Therefore, the fact that Petitioner was not authorized to file a second federal habeas petition in the district court is significant because he was not granted permission to file, thereby demonstrating that this petition is an impermissible petition for certiorari from the denial of leave to file a second petition in violation of 28 U.S.C. § 2244(b)(3)(E).

28 U.S.C. § 2244(b)(3)(E) expressly prohibits the filing of such a pleading as it mandates that "[t]he grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Petitioner's violation of this statutory provision authorizes the denial of this "petition for a writ of habeas corpus."

This Court has upheld the validity of the statutory prohibition contained in § 2244(b)(3)(E) by holding, "[t]he Act does remove our authority to entertain an appeal or a petition for a writ of certiorari to review a decision of a court of appeals exercising its 'gatekeeping' function over a second petition." *Felker v. Turpin*, 518 at 661. *See also Hohn v. United States*, 524 U.S. 236, 249 (1998) (recognizing "the clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari").

The true nature of this petition is clearly demonstrated by Section III of the petition, in which

Petitioner alleges that "THE COURT OF APPEALS ERRED IN BARRING MR. DAVIS' SECOND PETITION." Under this heading, Petitioner alleges that he has met the requirements for filing a second petition and claiming that he met the "due diligence" requirement contained in 28 U.S.C. § 2244(b)(2)(B). Since the Eleventh Circuit found that Petitioner had failed to demonstrate the requisite "due diligence," it is clear that Petitioner is improperly attempting to appeal the Eleventh Circuit's finding.

Section IV of the petition also confirms that the filing of this "petition for a writ of habeas corpus" is an improper attempt to file a petition for certiorari from the denial of leave to file a second petition, as Petitioner alleges in that his "SECOND PETITION MEETS THE REQUIREMENTS OF 28 U.S.C. § 2254." Since the Eleventh Circuit rejected this contention in reviewing Petitioner's application, after thorough briefing on the issues and holding oral argument, it is unmistakable that this petition represents Petitioner's impermissible attempt to file a petition for certiorari seeking review of the Eleventh Circuit's decision.

Alternatively, this "petition for a writ of habeas corpus" is clearly an attempt to "appeal" the Eleventh Circuit's denial of leave to file a second petition. Petitioner alleges that, "[t]he Court of Appeals **Erred in Holding** that Stand-Alone Innocence Claims Can Never Be the Subject of Second or Successive

Petition" and this contention is clearly an effort to "reverse" an alleged holding of the Eleventh Circuit.[4]

The relief which Petitioner seeks also illustrates that although Petitioner's pleading is styled as a petition for a writ of habeas corpus, in actuality it is an appeal from the Eleventh Circuit's denial of leave to file a second petition. Petitioner claims that if this Court were to "transfer" his petition to the district court, he would be entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2), but he has been denied leave to file a second petition. Therefore, Petitioner must be appealing the denial of leave to file, so that he can be authorized to file a second petition and receive a federal evidentiary hearing.[5] In the absence

---

[4] Respondent disputes Petitioner's assertion that the Eleventh Circuit held that free-standing actual innocence claims can never be raised in successive petitions, as the Eleventh Circuit found that Petitioner had failed to meet the statutory requirements under the specific circumstances of his case by holding, "The statute undeniably requires a petitioner seeking leave to file a second or successive petition to establish actual innocence by clear and convincing evidence *and* another constitutional violation. Simply put, Davis has not met the statute's procedural requirements for leave to file a second or successive petition." *In re Davis*, at *34.

[5] The first federal habeas court found that Petitioner had failed to establish the requirements for conducting an evidentiary hearing on his "innocence" claim brought under *Schlup v. Delo*, 513 U.S. 298 (1995). Therefore, insofar as Petitioner is attempting to relitigate the denial of a federal evidentiary hearing in his initial federal habeas proceeding by claiming that this evidence has never been the "subject of a federal court evidentiary hearing," this would clearly constitute "an appeal" of that denial even though the Eleventh Circuit

(Continued on following page)

of an appeal to allow him to file a second federal petition, his request for a federal evidentiary hearing appears nonsensical, unless Petitioner is seeking to cast this Court in the role of the gatekeeper under 28 U.S.C. § 2244(b)(2) in violation of the provisions of § 2244(b)(3)(E).

Insofar as Petitioner is seeking for a transfer to the district court to conduct an evidentiary hearing due to the fact that the state courts held it was unnecessary to conduct a hearing on his "innocence" claims, this also illustrates that this petition is simply another petition for certiorari to this Court in which Petitioner continues to raise issues rejected by the lower state and federal courts.

In fact, in filing a writ of certiorari from the decision of the Georgia Supreme Court affirming the trial court's denial of Petitioner's extraordinary motion for new trial, without the necessity of conducting a hearing, Petitioner previously made the same argument now being presented, requesting that this Court review, *inter alia*, the question of whether "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[ed] the procedural requirements of the Due Process Clause." *See Davis v.*

---

previously rejected that "appeal" in *Davis v. Terry*, 465 F.3d 1249 (11th Cir. 2006) and this Court denied certiorari in *Davis v. Terry*, 127 S. Ct. 3010 (2007).

Georgia, 129 S. Ct. 397 (2008). This question posed in Petitioner's earlier petition for certiorari is remarkably similar to that contained in this petition in which Petitioner alleges that "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 presented."

Petitioner's clear attempt to seek this Court's review of issues already extensively litigated in the lower state and federal courts, which issues have also been presented to this Court in earlier petitions for certiorari, warrants the conclusion that this petition for a writ of habeas corpus constitutes an impermissible appeal of these lower court decisions under § 2244(b)(3)(E). Both the content and prayer for relief of this petition demonstrate that this is an attempt by Petitioner to seek certiorari review of the Eleventh Circuit's denial of leave to file a second federal petition which is definitely prohibited under § 2244(b)(3)(E) and this petition should be summarily denied by this Court.

II. PETITIONER HAS FAILED TO JUSTIFY THE GRANT OF RELIEF AS HE HAS FAILED TO DEMONSTRATE THAT "ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM OR FROM ANY OTHER COURT."

Assuming, but in no way conceding, that this petition does not constitute an impermissible attempt

to appeal from the Eleventh Circuit's denial of Petitioner's application to file a second federal habeas petition, Petitioner has clearly failed to "justify" the granting of his writ of habeas corpus. As this Court stated in *Felker*, 518 at 665, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted."

Petitioner cannot meet either requirement so as to justify this Court's grant of relief. Supreme Court Rule 20.1 requires that "'[t]o justify the granting of any writ under that provision, it must be shown . . . that adequate relief cannot be obtained in any other form or from any other court.'" *In re Blodgett*, 502 U.S. 236, 240 (1992). Petitioner has alleged, but failed to demonstrate, that he has made the requisite showing under Rule 20.1.

The extensive procedural history of Petitioner's case establishes that Petitioner's "innocence" claim has been thoroughly reviewed by both state and federal courts. Significantly, the fact that Petitioner is seeking review from this Court of both lower federal court decisions and the lower state court decisions shows that he has availed himself of repeated opportunities for review of his claims.

The fact that Petitioner did not receive the relief requested in the state and federal courts, nor from

the State Board of Pardons and Paroles, is not equivalent to a showing that he did not have relief "available" to him in "other forms" or "from other courts." In each state and federal forum in which Petitioner has presented his affidavit evidence, the evidence has been extensively and carefully reviewed, but ultimately, Petitioner's "innocence" claim has been rejected.

Relief was available to Petitioner in numerous forms and forums, Petitioner simply failed to establish that the relief which he sought should be granted. Petitioner seeks "one more bite at the apple" which is antithetical to AEDPA principles[6] as validated by this Court in such cases as *Felker*, 518 U.S. at 665.

As Petitioner has failed to establish "that adequate relief cannot be obtained in any other form or from any other court," as required to justify the grant of relief, this Court should deny this petition for habeas corpus relief.

---

[6] "Plainly the statute was designed, among other reasons, to bring some finality and certainty to the seemingly never-ending collateral attack process . . . Indeed, a common theme found throughout the congressional debates was the desire to prevent habeas petitioners from having successive 'bites at the apple.'" *In re Davis* at *14.

III. PETITIONER HAS FAILED TO DEMONSTRATE "EXTRAORDINARY CIRCUMSTANCES" SO AS TO WARRANT THE GRANT OF EXTRAORDINARY RELIEF BY THIS COURT.

Assuming, but in no way conceding, that this petition does not constitute an impermissible attempt to appeal from the Eleventh Circuit's denial of Petitioner's application to file a second federal habeas petition, Petitioner has clearly failed to "justify" this Court's granting of his writ of habeas corpus, as he has failed to "show exceptional circumstances warranting the exercise of the Court's discretionary powers."

Simply because Petitioner raises a free-standing "actual innocence" claim under *Herrera v. Collins*, 506 U.S. 390, 417 (1993), does not suffice to establish "extraordinary circumstances" which would justify the issuance of what this Court has specifically declared is a "rarely granted" writ. *See Felker*, 518 U.S. at 665. This Court in *Felker* found no extraordinary circumstances to exist even in the face of an "innocence" allegation.[7] *Felker v. Turpin*, 518 at 657.

In *Felker*, this Court characterized Felker's claims, including an "innocence" claim, as claims

---

[7] In contrast to Petitioner's case, *Felker* was purely a circumstantial evidence case, with no eyewitness testimony being presented at trial. *See Felker v. State*, 252 Ga. 351, 368 (1984) ("evidence was circumstantial.").

which "do not materially differ from numerous other claims made by successive habeas petitioners which we have had occasion to review on stay applications to this Court." Further, this Court concluded that "neither of them satisfies the requirements of the relevant provisions of the Act, let alone the requirement that there be 'exceptional circumstances' justifying the issuance of the writ." *Felker*, 518 U.S. at 665. Similarly, Petitioner's attempt to have this Court direct that additional review be conducted of Petitioner's affidavit evidence offered in support of his *Herrera* claim, when these affidavits have been extensively reviewed by both state and federal courts, fails to constitute sufficient "exceptional circumstances" which would warrant this Court's grant of the writ.

Additionally, Petitioner's unfounded assertion that he was "denied any 'meaningful avenue to avoid a manifest injustice' in his first federal habeas petition" does not establish the requisite extraordinary circumstances to warrant the granting of extraordinary relief. The Eleventh Circuit carefully reviewed Petitioner's application to file a second petition and properly considered Petitioner's conduct during his initial federal habeas proceedings in performing its gatekeeping function under § 2244(b).

The Eleventh Circuit found that Petitioner had made a significant concession undermining his application to file a second petition by noting that,

> Davis concedes that almost all of the factual predicate for his claim *could have been* discovered previously, and in fact, was discovered previously. Davis possessed the "factual predicate" for his *Herrera* "claim" during his first federal habeas corpus proceeding, and could have presented the claim, but chose not to do so.

In re Davis, at *22.

The Eleventh Circuit also properly found that, in light of state law provisions, Petitioner had given an insufficient explanation for failing to exhaust his state remedies concerning his *Herrera* claim by stating:

> As he freely admits, he had the "lion's share" of information he needed to perfect a *Herrera* freestanding actual innocence claim at the time he filed his first federal habeas petition. As a result, he could have brought his *Herrera* claim earlier in the state courts, which would have allowed him to exhaust his claim prior to filing his first federal habeas petition. In fact, Georgia law expressly provides that he could have brought an extraordinary motion for a new trial to the Georgia courts at any time.

In re Davis, at *25.

Therefore, in determining whether Petitioner has shown extraordinary circumstances, the Eleventh Circuit's analysis of Petitioner's conduct is informative. The Eleventh Circuit found that at the time of

his first federal petition, Petitioner possessed the affidavit evidence upon which his current *Herrera* claim is based (with the exception of the Gordon affidavit),[8] but he chose not to present his *Herrera* claim, nor had he exhausted his state remedies as to this claim even though he could have filed an extraordinary motion for new trial "at any time." Petitioner could also have filed a petition for clemency with the State Board of Pardons and Paroles at "any time after conviction." *In re Davis*, at *28, n.8.

The Eleventh Circuit also found that even assuming Petitioner had not exhausted his *Herrera* claim, he could have raised it in his first federal petition and attempted to excuse his procedural default of the claim. *In re Davis*, at *26.

Turning to the due diligence component of 28 U.S.C. § 2244(b)(2)(B)(i), the Eleventh Circuit found that Petitioner "does not argue that this evidence could not have been discovered previously through due diligence. Rather, he attempts to skirt the due diligence requirement in a variety of ways." *In re Davis*, at *21. Ultimately, the Eleventh Circuit conducted a thorough analysis of Petitioner's assertions in light of the statutory requirements and

[8] "Davis concedes that of the 27 exhibits in support of his *Herrera* claim that he submitted along with his application to file a second or successive habeas petition, only one satisfies this procedural requirement: a September 2008 affidavit of trial witness Benjamin Gordon." *In re Davis*, at *28-29.

concluded that, "we are constrained by the statutory requirements found in § 2244(b)(2)(B) to conclude that Davis has not even come close to making a *prima facie* showing that his *Herrera* claim relies on (i) facts that could not have been discovered previously through the exercise of due diligence." *In re Davis*, at *36.

It is clear that Petitioner is not entitled to the grant of extraordinary relief on a *Herrera* claim which he could have exhausted and presented in his first federal habeas petition, but which he chose not to present.

Petitioner claims that unless this Court grants his request for extraordinary relief that he will not receive "meaningful review" of his *Herrera* claim, but the record is clear that his claim and his factual assertions in support of his claim, presented in affidavit form, have been exhaustively reviewed by state and federal courts. Petitioner disagrees with the results of the lower courts' review of his "innocence" claim, but the record belies his assertion that absent the grant of evidentiary hearings, he did not receive meaningful review of his claims.

The Eleventh Circuit properly found:

> We are also unpersuaded by Davis' suggestion that his claim of innocence has not been and will never be heard. As the record shows, both the state trial court *and* the Supreme Court of Georgia have painstakingly reviewed, and rejected, Davis' claim of innocence. Likewise, the Georgia State Board of Pardons and Paroles thoroughly reviewed,

> and rejected, his claim, even conducting further research and bringing in witnesses to hear their recantations in person.

In re Davis, at *43.[9]

Petitioner has had repeated opportunities to have his "innocence claim" reviewed and has failed to demonstrate to this Court that this Court should grant him the extraordinary relief of being the "gatekeeper" and direct that a second federal petition be allowed filed and transfer the second federal proceeding to the district court to conduct a hearing.

Petitioner asserts that this Court should grant extraordinary relief because he contends that there will be due process violation and Eighth Amendment violations if this Court does not direct that a federal evidentiary hearing be conducted at this point in the lengthy history of Petitioner's case. Petitioner relies on this Court's statement in *Herrera* that "a truly persuasive demonstration of actual innocence" would render execution of a defendant unconstitutional. *Herrera*, 506 U.S. 417. Petitioner bases his "innocence" claim primarily on his "recantation" affidavits, but fails to acknowledge that in *Herrera*, this Court expressly criticized the use of affidavits in attempting

[9] The seven "recantation affidavits" have each been reviewed in five separate court proceedings, including FHC 2003; 11th Cir. 2006; EXMT 2007; Ga. S. Ct. 2008 and 11th Cir. 2009. The McQueen affidavit was also reviewed during those proceedings and was also reviewed during state habeas corpus proceedings in 1996.

to establish actual innocence, stating that "affidavits alone are not a promising way to demonstrate actual innocence. Though sworn, they are not convincing evidence of innocence because 'the affiants' statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations.'" *Herrera*, 506 U.S. at 417. Therefore, alleged recantations in affidavit form are generally viewed as "non-convincing" by reviewing courts and were found to be unpersuasive by the trial court and by the Georgia Supreme Court in reviewing the affidavits in the context of Petitioner's extraordinary motion for new trial and by the Eleventh Circuit in reviewing Petitioner's application to file a second federal petition.

Further, every court that has reviewed Petitioner's "innocence" claim has found that Petitioner's assertions did not constitute a "truly persuasive demonstration of actual innocence." Both the trial court and the Georgia Supreme Court found that Petitioner's recantation affidavits failed to establish "actual innocence." The Georgia Supreme Court found that the affidavits lacked "the type of materiality required to support an extraordinary motion for new trial, as they do not show the witnesses' trial testimony to have been the 'purest fabrication.'" *See Davis v. State*, at 442-443. The Georgia Supreme Court further noted that Petitioner's affidavits failed to show that Petitioner "was not in fact the perpetrator" or was not guilty. *Id.*

The Georgia Supreme Court further concluded, with regard to the affidavits that Red Coles was the actual perpetrator:

> These three affidavits must be considered, if at all, in light of the evidence presented at trial, including Coles' own testimony. Even the statements about the alleged admissions **themselves contain evidence that they are not trustworthy**, as the statements show that Coles was someone who wanted to be feared and that at least one of the persons to whom he made his admissions doubted his account. Although the jury clearly would not have deemed these statements utterly irrelevant, the affidavits, if considered at trial, would have merely forced the jury to weigh Davis' guilt or innocence in ways that were independent of the trustworthiness of Davis and Coles, who both actually testified at trial and proclaimed their innocence.

Davis v. State, 283 Ga. at 445 (2008).

The Georgia Supreme Court further held:

> In weighing this new evidence, we do not ignore the testimony presented at trial, and, in fact, we favor that original testimony over the new. At least one original witness has never recanted his in-court identification of Davis as the shooter, which included a description of his clothing and the location he was in when he struck Larry Young. As we have noted above, most of the witnesses to the crime who have allegedly recanted

> have merely stated that they now do not feel able to identify the shooter. At trial, the jury had the benefit of hearing from witnesses and investigators close to the time of the murder, including both Davis and Coles the other was guilty. We simply cannot disregard the jury's verdict in this case.

Davis v. State, 283 Ga. at 447.

Following its review of Petitioner's affidavits, as well as giving consideration to the state courts' rejection of Petitioner's "innocence" claim, the Eleventh Circuit found:

> All told, the testimony by Murray and Sanders remains; the two other eyewitnesses do not now implicate anyone, much less Coles; Coles continues to implicate Davis; and the testimony of Larry Young and Valerie Coles still collides with Davis'. When we view all of this evidence as a whole, we cannot honestly say that Davis can establish by clear and convincing evidence that a jury would not have found him guilty of Officer MacPhail's murder.

In re Davis, at *42.

Petitioner has not met the "extraordinarily high" standard for showing "actual innocence" which would justify the grant of extraordinary relief in this case. *See Herrera*, 506 U.S. at 417.

Petitioner fails to acknowledge the portion of this Court's holding in *Herrera*, in which this Court stated:

> We may assume, for the sake of argument in deciding this case, 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.**

Herrera, 506 U.S. at 417.

It is clear that Petitioner had state avenues to process his "actual innocence" claim, including an extraordinary motion for new trial and a clemency petition reviewed by the State Board of Pardons and Paroles. Therefore, this Court has designated the state avenues as the appropriate forums for litigating "innocence claims" and should not grant the extraordinary relief of ordering a federal hearing on an "innocence" claim when state processes were available for litigating this claim, but the claims were simply decided adversely to Petitioner.

As this Court stated in *Felker*, 518 U.S. at 665, "[t]o justify the granting of a writ of habeas corpus, the petitioner must show exceptional circumstances warranting the exercise of the Court's discretionary powers and must show that adequate relief cannot be obtained in any other form or from any other court. These writs are rarely granted." *See In re Sindram*,

498 U.S. 177, 179 (1991) ("the granting of an extraordinary writ is, in itself, extraordinary"); *In re McDonald*, 489 U.S. 180, 185 (1989) ("We have emphasized that extraordinary writs are, not surprisingly, 'drastic and extraordinary remedies,' to be 'reserved for really extraordinary causes'"); *Parr v. United States*, 351 U.S. 513, 520 (1956) (extraordinary writs "may not be used to thwart the congressional policy against piecemeal appeals").

Petitioner has failed to show exceptional circumstances warranting the exercise of the Court's discretionary powers so as to justify this Court's grant of extraordinary relief to order a federal evidentiary hearing on an "actual innocence" claim which every reviewing court has found failed to constitute a "truly persuasive demonstration of actual innocence." Accordingly, this Court should deny Petitioner's petition for writ of habeas corpus.

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent prays that this Court deny this petition for a writ of habeas corpus.

Respectfully submitted,

THURBERT E. BAKER
Attorney General

MARY BETH WESTMORELAND
Deputy Attorney General

SUSAN V. BOLEYN
Senior Assistant Attorney General
Counsel of Record
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3397