IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

IN RE	*	**CIVIL ACTION NO.**
	*	**4:09-CV-130-WTM**
TROY ANTHONY DAVIS,	*	
	*	
Petitioner,	*	
	*	

FINAL BRIEF ON BEHALF OF RESPONDENT

COMES NOW Respondent in the above-styled action, by and through counsel, Thurbert E. Baker, Attorney General for the State of Georgia, and files this final brief as directed by this Court in its Order of June 24, 2010, by responding to the questions of the Court as follows:

> **Question 1: Whether, as a matter of constitutional law, the Eighth Amendment of the United States Constitution bars the execution of a petitioner who has had a full and fair trial without constitutional defect, but can later show his innocence?**

The Supreme Court has repeatedly declined to answer the ultimate questions of whether "freestanding innocence claims are possible" and whether "a truly persuasive demonstration of innocence made after trial" would bar a petitioner's execution under the Eighth Amendment. House v. Bell, 547 U.S. 518, 554-555 (2006). In both Herrera v. Collins, 506 U.S. 390 (1993) and House, the Court found that it did not need to answer these paramount questions as "whatever burden a free-standing innocence claim would require, this petitioner has not

satisfied it." House, 547 U.S. at 555, citing Herrera, 506 U.S. at 417. Likewise, regardless of the burden of proof ultimately established by the Supreme Court, Petitioner has not met his heavy burden of proof and thus, this Court also need not answer these questions that the Supreme Court has thus far declined to answer.

Respondent agrees, however, with the principle that executing one who is "legally and factually innocent" would be "inconsistent with the Constitution." See Herrera, 506 U.S. at 419 (O'Connor, J., concurring)(emphasis added). "Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word," (id.), and has certainly failed to show his innocence in this Court. Instead, in light of the unreliable and untrustworthy evidence that was presented at the federal evidentiary hearing regarding Petitioner's claim, this Court need not resolve the issues that the Supreme Court has declined to answer in order to fulfill the mandate of the remand order. "Whatever burden a free-standing innocence claim would require," the testimony and

the facts of this case establish that "this petitioner has not satisfied it." Herrera, 506 U.S. at 417.[1]

For all the foregoing reasons, this Court should decline to address the Eighth Amendment question in the context of Petitioner's case as remanded from the Supreme Court.

Question 2: What the appropriate burden of proof would be in the case of a petitioner alleging innocence subsequent to a full and fair trial, assuming that the Eighth Amendment of the United States Constitution does bar the execution of such an individual upon a sufficient showing of innocence?

This Court also need not decide the "appropriate burden of proof" for all future free-standing "innocence" claims in the context of this case. This Court may simply reject Petitioner's "innocence" claim by concluding that the evidence presented during the hearing before this Court, viewed in the

[1] Respondent has not previously briefed the Eighth Amendment question in the context of this case as the central question before the Supreme Court was whether Petitioner was entitled to a hearing on his innocence claim. Now that a hearing has been conducted and Petitioner has failed to demonstrate his innocence, this Court need not reach the Eighth Amendment issue. It appears that the Supreme Court intends that any resolution of that issue found to be necessary in this case will be made before the Supreme Court. In the concurring opinion to the Supreme Court's remand order, Justice Stevens made reference to "all of these unresolved legal questions," (In re Davis, 130 S. Ct. 1, 2 (2009) (J. Stevens, concurring)), and in the dissenting opinion, Justice Scalia suggested that if the Court wished to address the issue of whether federal courts can set aside a capital conviction based on an allegation of "actual innocence" then the Court "should set this case on our own docket so that we can (if necessary) resolve that question." Id. at 1 (J. Scalia, dissenting).

context of the evidence presented at trial and in the hearing before this Court, is clearly insufficient to meet any "extraordinarily high" threshold which may ultimately be adopted by the Supreme Court. See House, 547 U.S. at 555.

If this Court determines that the mandate of the Supreme Court requires that this Court adopt a specific burden of proof in order to review Petitioner's "innocence" claim, this Court should adopt a standard commensurate with the "extraordinarily high" threshold repeatedly envisioned by the Supreme Court. See Id.; Herrera, 506 U.S. at 517.

In House, while declining to adopt a standard for free-standing actual innocence claims, the Court did describe the important aspects of the less stringent, "gateway" innocence standard. The Court explained that the Schlup[2] gateway "innocence" standard is one which is extremely "demanding." House, 547 U.S. at 538.[3] The Court also instructed reviewing courts that under the Schlup standard, "A petitioner's burden

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[2] Schlup v. Delo, 513 U.S. 298 (1995)

[3] The Court in House stressed that a Schlup review requires that a habeas court consider "'all the evidence,'" old and new, incriminatory and exculpatory, without regard to whether it would necessarily be admitted under "'rules of admissibility that would govern at trial.'" House, 547 U.S. at 538, quoting Schlup at 327-328. The Court then directed that a Schlup review would require that "based on this total record" the habeas court would then "make 'a probablistic determination about what reasonable, properly instructed jurors would do.'" Id., citing Schlup, 513 U.S. at 329.

at the gateway stage is to demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt…." House, 547 U.S. at 538. Moreover, the Court concluded that, "The sequence of the Court's decisions in Herrera and Schlup -- first leaving unresolved the status of freestanding claims and then establishing the gateway standard -- implies at the least that Herrera requires more convincing proof of innocence than Schlup." House, 547 U.S. at 555. Therefore, it is clear that any Herrera standard which may be adopted to review free-standing innocence claims will have to be an even more "demanding" standard than the Schlup gateway standard adopted by the Court. Thus, Supreme Court precedent does dictate that any standard adopted for assessing free-standing actual innocence claims must be "extraordinarily high" (Herrera, 506 U.S. at 417) and requires more than a showing "that more likely than not, in light of the new evidence, no reasonable juror would find Petitioner guilty beyond a reasonable doubt." House, 547 at 538.

Petitioner argued at the hearing before this Court that the "no reasonable juror" standard would be the proper standard for this Court's analysis. However, Petitioner's proposed standard would allow federal courts to "become forums in which

to relitigate state trials" in violation of Barefoot v. Estelle, 463 U.S. 880, 887 (1983). Herrera, 506 U.S. at 444 (J. Blackmun, concurring). Additionally, Petitioner initially argued in his Reply Brief in Support of his habeas corpus petition that the "more likely than not standard" of Schlup was appropriate. (Doc. 27, p. 31). However, as established above, in accordance with Herrera and House the standard must be higher and more stringent than the Schlup gateway standard.

Further, even though the Supreme Court has not recognized the viability of free-standing actual innocence claims and thus, has had no need to adopt a burden of proof, the Court has set forth several factors to be considered regarding any potential burden of proof this Court may decide to utilize in reviewing Petitioner's "innocence" claim. Initially, it is clear that in these post-conviction proceedings, the burden of proof is on Petitioner and he maintains no presumption of innocence, but has a presumption of guilt due to his conviction following a jury trial. The Court in Herrera made clear that a habeas petitioner alleging that he is innocent "does not come before the Court as one who is innocent, but, on the contrary, as one who has been convicted by due process of law…." Herrera, 506 U.S. at 400.

Additionally, in this Court's review of Petitioner's "innocence" claim, under Supreme Court precedent describing the requisite evidence for establishing a gateway innocence claim, at the very least, Petitioner must establish his claim of innocence by credible, reliable, trustworthy evidence. Quoting Schlup, the Court in House noted that for a gateway claim "'to be credible,'" there must be presented "'new reliable evidence — whether it be exculpatory scientific evidence, trustworthy eyewitness accounts or critical physical evidence — that was not presented at trial.'" House v. Bell, 547 U.S. at 537, quoting Schlup, 513 U.S. 298, 324 (1995). However, in stark contrast to Petitioner's case, the State in House "conceded" that there was "some new reliable evidence." House, 547 U.S. at 537. In this case, there was no such "concession" that Petitioner has presented "new reliable evidence" or "trustworthy" evidence before this Court.

To the contrary, not only has there been no concession by Respondent, but during the hearing before this Court, Petitioner failed to present any trustworthy or reliable evidence of his innocence as contemplated by House. Petitioner presented the testimony of Jeffrey Sapp and Kevin McQueen who testified that, contrary to their trial testimony, Petitioner allegedly did not confess to them that he shot Officer

MacPhail.[4] However, as aptly noted by the Georgia Supreme Court, "even if the recantations by Sapp and McQueen were credited as true, they would show merely that Davis did not admit his guilt to these witnesses, not that Davis was actually innocent. Furthermore, the witnesses' original testimony against Davis would remain admissible against him in any retrial." Davis v. State, 283 Ga. 438, 442 (2008).

Similarly, Antoine Williams alleged in his testimony before this Court that he does not now recall what color shirt Coles or Davis was wearing on the night of the murder[5] and Darrell Collins now alleges that he did not see anybody hit Larry Young in the head. The most recent versions of the testimony of Williams and Collins, in addition to being unreliable and not trustworthy when compared to their previous sworn statements and their trial testimony, is not evidence of Petitioner's innocence.

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[4] Police officers testified in the hearing before this Court that Sapp spontaneously approached them with Petitioner's confession to the shooting and McQueen acknowledged that he initiated contacted with the lead investigator to inform him of Davis' confession to him.

[5] The Georgia Supreme Court noted that Williams testified at trial he was 60% sure Davis was the shooter and that in his 2002 affidavit, he stated he could not identify the shooter. Davis v. State, 283 Ga. at 443. The state court concluded that "there is nothing in this affidavit that indicates affirmatively that Davis was not guilty" and further found that "Williams's original testimony would be admissible against Davis at any retrial." Id.

Anthony Hargrove's testimony that Red Coles allegedly confessed to murdering Officer MacPhail is neither trustworthy nor reliable. Instead, Mr. Hargrove's testimony was nothing but rank hearsay and thus, inadmissible before this Court. Moreover, although Petitioner had the opportunity to call Red Coles to testify and thus allow the admission of this evidence, Petitioner chose not to present the testimony of Mr. Coles. Further undermining the credibility of Mr. Hargrove's already unreliable testimony is Mr. Hargrove's complete lack of respect for the judicial system or the law and his impeachment as a witness by his voluminous criminal history.[6]

The only "new evidence" of alleged innocence Petitioner presented in the hearing before this Court in an attempt to support his claim of actual innocence was provided by Benjamin Gordon who testified for the first time after 21 years that he allegedly saw Red Coles shoot Officer MacPhail. Benjamin Gordon has provided three affidavits for Petitioner and has never, until now, claimed to be able to identify the shooter. Most recently in Gordon's 2008 affidavit he did claim to see the shots fired at Officer MacPhail, but never claimed to see the shooter. However, after the Eleventh Circuit noted that

[6] The Georgia Supreme Court found that Anthony Hargrove's 2001 affidavit that Coles allegedly confessed to him while they were smoking marijuana contained evidence that the affidavit was "not trustworthy." Davis v. State, 238 Ga. at 444-445.

Gordon's 2008 affidavit was "murky" and that it did not establish Coles was the shooter, Benjamin Gordon has now conveniently claimed for the first time that he was standing somewhere in the area, and saw Coles shoot Officer MacPhail.[7] This evidence presented by Petitioner in the form of newly, carefully worded testimony given for the first time after 21 years, is clearly not the reliable and credible evidence of "innocence" contemplated by the Court in House.

Additionally, in Schlup, the Court found that a court reviewing the heavy, but less stringent gateway innocence claim "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." Schlup, 513 U.S. at 332. In that same vein, in Herrera, the Court directed that "Petitioner's showing of innocence" had to be "evaluated in light of the previous proceedings in this case, which have stretched over a span of 10 years." Herrera, 506 U.S. at 398. The Court specifically found that Herrera's affidavit evidence was lacking in credibility because the affidavits were presented "over eight

[7] Gordon testified that he was supposedly in a warehouse parking lot somewhere in the vicinity of the Burger King when he allegedly saw the murder, but Petitioner failed to prove that there was any way that Gordon could have seen the shooting from his supposed location as the only nearby parking lot was that of the Thunderbird Inn. In his testimony before this Court, one of the investigating officers also disputed Gordon's claim that it would have been physically possible for Gordon to see the shooting from his newly-described location.

years after trial." Herrera, 506 U.S. at 418. Notably, in the instant case, the majority of Petitioner's affidavit evidence was obtained 12 years after Petitioner's trial. Additionally, in his interrogatories, Petitioner concedes that he did not speak to a number of the affiants and subsequent federal evidentiary hearing witnesses until six to ten years after the murder. This "timing" of the affidavits certainly undermines the credibility and reliability of the testimony upon which Petitioner relies to attempt to support his innocence claim.

In finding the credibility of Herrera's evidence lacking, the Court also considered the inconsistencies in the affidavits presented by the petitioner and the fact that proof of Herrera's guilt at trial, even when considered "alongside petitioner's belated affidavits, points strongly to petitioner's guilt." Herrera, 506 U.S. at 418. In this case, the affidavits that were admitted clearly contained inconsistencies or were ambiguous, and the proof of Petitioner's guilt at trial, even considering the "new" evidence Petitioner presented to this Court, "strongly points to Petitioner's guilt." Id.

Moreover, in requesting an evidentiary hearing, Petitioner repeatedly asserted that no court would hear his evidence. However, it is significant that when granted the opportunity to attempt to support his claims with evidence, Petitioner failed

to present three of the five eyewitnesses to the murder who Petitioner has repeatedly asserted had recanted, although those witnesses were clearly available to testify. Dorothy Ferrell and Larry Young were both available to testify, but were not called by Petitioner. As noted during the proceedings, Dorothy Ferrell sat outside the courtroom for the majority of one day during the hearing, but Petitioner chose not to call her to testify as they chose to "call the most important witnesses." The unsigned affidavit of Harriet Murray should carry no weight as Petitioner failed to provide any adequate explanation for the absence of Murray's sworn testimony.[8] See Davis v. State, 283 Ga. at 443; see also In re Davis, 565 F.3d 810, 826 (11th Cir. 2009) (as to Murray's unsworn affidavit: "we are loath to consider it, and afford it precious little weight, if any."). Further, although initially noticing that he intended to call Daniel Kinsman to testify, Petitioner failed to call Mr. Kinsman and failed to show that Mr. Kinsman was unavailable to testify. The only eyewitnesses to testify were Darrell "DD" Collins, who was a friend of Petitioner and Antoine Williams, neither of whom testified to Petitioner's innocence. A sixth

[8] The alleged statement of Harriet Murray, proffered in both an unsigned and unsworn form, is referred to as an "affidavit" solely for consistency in references to this document from prior proceedings.

eyewitness, Stephen Sanders, has never recanted his testimony that he witnessed Petitioner shoot Officer MacPhail.[9]

Significantly Petitioner also failed to present eyewitness Sylvester "Red" Coles, whom Petitioner alleges committed the murder, although Red Coles still lives in the Savannah area and Petitioner failed to show Mr. Coles was unavailable to testify. In fact, Petitioner's counsel acknowledged on the record that they did not even attempt to subpoena Mr. Coles until the middle of the hearing. However, in the absence of Coles, Petitioner did try to proffer hearsay testimony of alleged confessions by Red Coles through the testimony of two witnesses.[10]

Two other witnesses Petitioner claimed would testify to allegedly hearing Coles confess were also not called as witnesses by Petitioner, although Petitioner failed to show that either witness was unavailable. In fact, as Respondent's counsel informed the Court during the hearing, one of those witnesses, Shirley Riley, was present at the courthouse during

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[9] As found by the Eleventh Circuit, Mr. Sanders "unambiguously identified Davis as the shooter, and did not back off of his identification when he was pressed on cross-examination, testifying that 'you don't forget someone that stands over and shoots someone.'" In re Davis, 565 F.3d at 825.

[10] Petitioner sought to submit the inadmissible testimony of Anthony Hargrove, a career criminal, and Quiana Glover, a friend of a friend of Coles.

the entire first day of the proceedings, but Petitioner chose not to present Ms. Riley or retender her affidavit.

Petitioner also failed to present the testimony of Gary Hargrove, although Petitioner requested and received the issuance of a Writ of Habeas Corpus Ad Testificandum to ensure Mr. Hargrove's presence at the hearing. In reviewing Gary Hargrove's affidavit in affirming the denial of Petitioner's extraordinary motion for new trial, the Georgia Supreme Court found that Mr. Hargrove's affidavit "might actually be read so as to confirm trial testimony that Davis was the shooter." Davis v. State, 283 Ga. 438, 447 (2008). The Court held:

> Witnesses at trial indicated that one man struck Larry Young, continued to run when ordered to stop by Officer MacPhail, and then shot MacPhail. In his affidavit, Gary Hargrove indicated that Coles was the one who stood still during the murder and that Davis was the one who kept running. The true import of the witness's testimony appears to be that Davis was the one who ran from the officer. Furthermore, Davis bears a heavy burden to come forward with clear evidence of his innocence, not a craftily-worded and vague account that can be represented as stating one thing when it might very well state the opposite.

Id. Although Gary Hargrove was present at the courthouse and available to testify, again, Petitioner chose not to call him as a witness, calling only those witnesses Petitioner found to be "most important."

Based on the permutations of the statements and affidavits given by the affiants throughout the various post-conviction proceedings and in light of the fact that the record is undeniably clear that the proof of Petitioner's guilt,[11] when considered in light of the weak, unreliable, and inconsistent evidence Petitioner presented to this Court, strongly points to Petitioner's guilt, Petitioner cannot meet even the lesser gateway standard of Schlup as to his innocence claim.

The "showing of innocence" in this case, just as the evidence offered in Herrera, "falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed arguendo to exist." Herrera, 506 U.S. At 418-419. Therefore, this Court can find that no credible claim of "innocence" has been demonstrated by Petitioner without determining the appropriate burden of proof to be applied to a petitioner asserting a future, hypothetical free-standing actual innocence claim.

[11] As established at the hearing in this case, within four hours of the murder, before Petitioner was ever a suspect, six people identified a person matching Petitioner's description as the shooter of Officer MacPahil (Murray, Young, Williams, Ferrell, Sanders and Lolas). Only Williams testified that he was now unsure of his description.

Question 3: Whether 28 U.S.C. § 2254(d) bars the Court from granting relief in this case even if it finds that Petitioner can demonstrate his innocence?

As it is clear that the Supreme Court has never recognized the viability of a free-standing actual innocence claim under the AEDPA and as it is also clear that Petitioner has failed to meet any threshold for establishing his "innocence,"[12] this Court need not reach the question of whether a hypothetical petitioner who establishes a free-standing actual innocence claim could be granted habeas corpus relief under 28 U.S.C. § 2254(d).

Petitioner initially filed his petition with the United States Supreme Court asking the Court to invoke its jurisdiction under 28 U.S.C. § 2241 and Supreme Court Rule 20.4. In Medberry v. Crosby, 351 F.3d 1049 (11th Cir. 2003), the Eleventh Circuit addressed the interaction of § 2241 and § 2254, noting "the writ of habeas corpus is a single post-conviction remedy principally governed by two different statutes." Id. at 1059. The court concluded that § 2254 was essentially a narrowing of a certain category of habeas corpus cases. "Section 2254(a) is more in the nature of a limitation on authority than a grant of authority." Id. That section "presumes that federal courts already have the authority to

[12] See Herrera, 506 U.S. at 417 ("The showing made by petitioner in this case falls far short of any such threshold.").

issue the writ of habeas corpus to a state prisoner, and it applies restrictions on granting the Great Writ to certain prisoners -- i.e., those who are 'in custody pursuant to the judgment of a State court.'" Id. The court then went on to agree with the Third Circuit's conclusion that a petition filed by a petitioner challenging his state court conviction would be subject to the limitations of § 2254. "'[B]oth §§ 2241 and 2254 authorize [petitioner's] challenge to the legality of his continued state custody, but ... allowing him to file his 'petition in federal court pursuant to § 2241 without reliance on Section 2254 would ... thwart Congressional intent.'" Id., quoting Coady v. Vaughn, 251 F.2d 480, 484-5 (3d Cir. 2001). To conclude otherwise would make § 2254 "a great irrelevancy because a state prisoner could simply opt out of its operation by choosing a different label for his petition." Medberry at 1061. Thus, insofar as the current proceedings fall within the parameters of an original matter under § 2241, the limitations of § 2254 are applicable to Petitioner's free-standing actual innocence claim. See Felker v. Turpin, 518 U.S. 651 (1996); Francis v. Henderson, 425 U.S. 536, 538 (1976) ("There can be no question of a federal district court's power to entertain an application for a writ of habeas corpus in a case such as this. 28 U.S.C. §§ 2241, 2254."); see also Grace v. Hopper, 566 F.2d

507, 508 (5th Cir. 1978) ("This is a habeas case brought pursuant to 28 U.S.C. §§ 2241, 2254 ….").

28 U.S.C. § 2254(d) as amended by the AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Unless a petitioner can establish one of these two prongs, he fails to state a claim upon which habeas relief can be granted.

The Georgia Supreme Court denied Petitioner's claim of actual innocence in denying his extraordinary motion for new trial on the "merits." Thus, under (d)(1), Petitioner would have to show that the determination of the Georgia Supreme Court was "contrary to, or an unreasonable application of," United States Supreme Court precedent. As the United States Supreme Court has never found that a petitioner is entitled to habeas relief on a free-standing actual innocence claim, there is no clearly established Supreme Court precedent. Thus,

(d)(1) is inapplicable to Petitioner's claim.[13] This provision of the AEDPA has not been held unconstitutional by the Supreme Court and therefore its provisions must be complied with in order to obtain the granting of federal habeas corpus relief. The Georgia Supreme Court's finding in denying Petitioner's extraordinary motion for new trial was not "contrary to, or an unreasonable application of," United States Supreme Court precedent. A state court cannot possibly have contravened, or even unreasonably applied, clearly established Supreme Court precedent by rejecting a type of claim that the Supreme Court has not once held to be available.

Under (d)(2) of this statute, Petitioner is also not entitled to relief. Petitioner's actual innocence claim is not reviewable under (d)(2) as there can be no unreasonable determination of the facts of an issue that has never been held to be cognizable under § 2254.

Of note, however, in Felker, the Court rejected Petitioner's original petition under Rule 20.4(a) finding that Felker's claims did not satisfy "the relevant portions of the

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[13] Petitioner has not expressly challenged the constitutionality of this code section, but merely has asserted that he can obtain relief either under this statute or pursuant to the filing of an original writ. Any concerns expressed by the Justices about the constitutionality of § 2254(d) as to free-standing actual innocence claims are more appropriately resolved by that Court.

Act" nor had "extraordinary circumstances" been established. Id. at 665. Therefore, it is clearly within the province of the Supreme Court to interpret and apply § 2254(d) and original writ provisions and determine whether some form of relief may be granted to a petitioner who could meet his heavy burden of establishing his free-standing claim of actual innocence.[14] As set forth in Question 1, there may be some future petitioner who has met the extraordinarily high burden of establishing his actual innocence which would require the reviewing court to review the limitations of § 2254(d) with regard to free-standing actual innocence claims. This case falls far short of requiring such an analysis.

Thus, under the current statute and without further guidance or contrary interpretation from the Supreme Court authorizing the litigation of free-standing actual innocence claims, § 2254(d) does not provide an avenue for relief.[15]

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[14] The Supreme Court has already granted Petitioner a form of federal habeas corpus "relief" pursuant to § 2241, as he was granted a federal evidentiary hearing as to his "innocence" claim. In re Davis, 130 S. Ct. 1 (2009).

[15] The Eleventh Circuit properly found no basis for granting Petitioner an evidentiary hearing or permission to file a second federal petition to raise a free-standing actual innocence claim that could have been raised in his original petition when Petitioner admittedly had the "lions share" of the evidence he now relies on in the instant proceedings. See Davis v. Turpin, 565 F.3d 810, 820 (11th Cir. 2009).

Question 4: What level of deference, if any, should the Court apply to state court factual determinations when the federal court holds an evidentiary hearing but the state court did not?

Even though the trial court did not hold a hearing on Petitioner's extraordinary motion for new trial in which Petitioner raised his "innocence claim," it is clear that the Georgia Supreme Court reviewed the substance of Petitioner's affidavits on appeal from the denial of the extraordinary motion. The Georgia Supreme Court reviewed Petitioner's offered affidavits "on the merits," rather than resting its decision solely on state law grounds governing extraordinary motions for new trial.[16] Therefore, the state court's decision is entitled to deference. 28 U.S.C. § 2254. See also House v. Bell, 547 U.S. at 539.[17]

Deference to the Georgia Supreme Court's decision is also warranted because Petitioner continued to rely on affidavit evidence as alleged support for his claim during the

[16] See Davis v. State, 283 Ga. at 447 (in which the Georgia Supreme Court noted that it was looking "beyond bare legal principles that might otherwise be controlling to the core question of whether a jury presented with Davis's allegedly-new testimony would probably find him not guilty or give him a sentence other than death").

[17] While not a judicial decision, the State Board of Pardons and Paroles' denial of clemency is noteworthy, (see Res. Ex. 33), particularly in light of Herrera's emphasis on the importance of clemency proceedings as an avenue for reviewing post-conviction "innocence" claims. See Herrera, 506 U.S. at 417.

evidentiary hearing before this Court. Therefore, the Georgia Supreme Court's review of those affidavits upon which Petitioner continues to rely and which this Court finds to be admissible evidence in this proceeding is comparable to this Court's review of those same affidavits and should be given deference under § 2254 in considering both the trial evidence and the "new" evidence now offered as to his "innocence" claim.

It is also apparent that in placing Petitioner's "innocence" claim in the proper context, every state and federal reviewing court has closely examined the prior post-conviction proceedings involving Petitioner's claim in examining whether Petitioner timely raised this claim and whether evidence could have been presented earlier in support of this claim.[18] Therefore, whether Petitioner raised his "innocence" claim and presented specific evidence in support of this claim is an important consideration for this Court in fulfilling the mandate of the Supreme Court, whether it is considered a matter of "deference" or whether it is simply a factor for this Court's consideration in making its required factual findings.

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[18] The Eleventh Circuit also reached the same conclusion as did the state courts finding that "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." Davis v. Turpin, 565 F.3d at 825-826.

Thus, for the foregoing reasons, deference should be accorded to the Georgia Supreme Court's decision affirming the denial of Petitioner's extraordinary motion for new trial and specifically to the factual findings by that court relating to the affidavits considered by this Court.

Question 5: What level of deference, if any, the Court should apply to the state court's specific findings with respect to any witnesses whose testimony is before both this Court and the state court in affidavit form only?

Initially, Respondent asserts that this Court should disregard evidence which Petitioner introduced in "affidavit form only" as to those witnesses who were clearly available to testify during the hearing, but were not called to testify by Petitioner. As noted by the Supreme Court, "innocence" claims based on affidavits are "disfavored." Herrera, 506 U.S. at 417.

> Affidavits like these are not uncommon, especially in capital cases. They are an unfortunate although understandable occurrence. It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him. Experience has shown, however, that such affidavits are to be treated with a fair degree of skepticism.

Herrera, 506 U.S. at 423 (J. O'Connor, concurring).

Throughout his post-conviction proceedings, Petitioner has continuously asked for a hearing in which to allow his "new" evidence to be reviewed. It is significant that even though Petitioner was given an open-ended opportunity to present any

"new" evidence in the hearing in this Court, Petitioner primarily chose to recycle "old" evidence and call witnesses who had nothing substantial to offer which was "new." Petitioner inexplicably chose to continue to rely mainly on affidavits filled with hearsay evidence, even when some of the affiants were not only "available" to testify, but had been subpoenaed and in some instances were actually present in the federal courthouse, but were not called to the stand to testify. As noted by Justice Blackmun in his dissent in Herrera, "if the petition warrants a hearing, it may require the federal courts to hear the testimony of 'those who made the statements in the affidavits which petitioner has presented.'" Herrera, 506 U.S. at 444. Therefore, as to the affidavits of those individuals that were available to testify and Petitioner failed to call, this Court should give no weight to any such affidavit evidence but certainly should give deference to any fact-findings by the state court.

Further, this Court should give no weight or credibility to the prior affidavit of any witness whom Petitioner failed to call during the hearing in this Court without proof of the

witness's unavailability.[19] In that regard, Petitioner failed to establish that any witness who had previously given an affidavit was unavailable to testify with the exceptions of Harriet Murray and Joseph Blige, who were deceased at the time of the hearing.[20]

If this Court chooses to consider the testimony that was submitted solely by affidavit, as set forth above with regards to Question 4, this Court should give deference to the Georgia Supreme Court's findings under § 2254.

However, as to those affidavits that were admitted of individuals who testified before this Court, while the findings of the state court should certainly be reviewed and considered by this Court, this Court should assess the credibility of those witnesses by conducting a de novo review of the new

[19] Respondent presented voluntary, sworn statements to impeach those witnesses who did testify at the hearing and offered additional voluntary, sworn statements of witnesses to show the course of conduct of the police officers in investigating the murder of Officer MacPhail. Additionally, insofar as the Court considers the affidavits of witnesses that did not testify, but are in the record from prior proceedings, the voluntary, sworn statements should be considered accordingly.

[20] Harriet Murray's affidavit should be not be given any weight as it is unsworn and unsigned, thus failing to meet the threshold of testimonial evidence being sworn to ensure a hold on the conscience of the witness.

"live" testimony in the context of reviewing all of the evidence.[21]

[21] In Herrera the Court stated that the affidavits offered in that case in support of an innocence claim "must be considered in the light of the proof of petitioner's guilt at trial" which included, *inter alia*, two eyewitness identifications and "numerous pieces of circumstantial evidence." Herrera, 506 U.S. at 419.

Conclusion

WHEREFORE, for all the above and foregoing reasons, Respondent respectfully requests that this Court conclude that under any reasonable standard of proof Petitioner has failed to establish his actual "innocence" and that no further relief is warranted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed this brief with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorney of record:

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This 7th day of July, 2010.

_s/Beth Burton ___________________
BETH BURTON
Senior Assistant Attorney General