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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed
U.S. Court of Appeals
Eleventh Circuit
[November 5, 2010]
John Ley
Clerk

No. 10-14534-P

TROY ANTHONY DAVIS,
Petitioner-Appellant

versus

WILLIAM TERRY,
Respondent-Appellee

Appeal from the United States District Court
for the Southern District of Georgia

BEFORE: DUBINA, Chief Judge, BARKETT and
MARCUS, Circuit Judges.

BY THE COURT:

Petitioner, Troy Anthony Davis, filed a certificate of appealability (“COA”), with this court following the district court’s denial of his request for a COA. Pursuant to 28 U.S.C. § 2253(c), a habeas petitioner may not appeal from a district court’s adverse ruling unless a circuit justice or judge issues a COA. A

court will issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S. Ct. 1595; 1603-04 (2000). To satisfy this standard, a petitioner must show that it is debatable among reasonable jurists that the district court’s assessment of the claim was wrong. *Slack*, 529 U.S. at 484, 120 S. Ct. at 1604.

Because of the unusual procedural posture of this case, we set forth the procedural history of this case in detail. In 1991, a Georgia jury convicted Davis of murder, obstruction of a law enforcement officer, two counts of aggravated assault and possession of a firearm during the commission of a felony. The trial court sentenced Davis to death for the murder conviction. The Supreme Court of Georgia affirmed Davis’s convictions and death sentence. *Davis v. State*, 426 S.E.2d 844 (Ga. 1993). The United States Supreme Court denied Davis’s petition for writ of certiorari. *Davis v. Georgia*, 510 U.S. 950, 114 S. Ct. 396 (1993). Subsequently, in 1994, Davis filed a petition for writ of habeas corpus in Georgia Superior Court, which the court denied. The Georgia Supreme Court affirmed the denial of Davis’s habeas petition, *Davis v. Turpin*, 539 S.E.2d 129 (Ga. 2000), and the United States Supreme Court denied his petition for writ of certiorari, *Davis v. Turpin*, 534 U.S. 842, 122 S. Ct. 100 (2001).

In 2001, Davis filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in federal district court. The district court denied his petition for relief, and this court affirmed. *Davis v. Terry*, 465 F.3d 1249 (11th Cir. 2006), *cert. denied*, 551 U.S. 1145 (2007). In 2008, Davis filed an application with

this court for leave to file a second or successive habeas corpus petition, and this court denied his application. *In re Davis*, 565 F.3d 810 (11th Cir. 2009). In that opinion, we specifically noted that Davis could “petition the United States Supreme Court to hear his claim under its original jurisdiction.” *Id.* at 826.

Davis followed our suggestion and filed an original habeas corpus petition in the United States Supreme Court, citing 28 U.S.C. §§ 2241, 2254(a), 1651(a), and Article III of the U.S. Constitution, as providing the basis for the Supreme Court’s jurisdiction. Upon consideration, the Supreme Court ordered that:

The petition for a writ of habeas corpus is transferred to the United States District Court for the Southern District of Georgia for hearing and determination. The District Court should receive testimony and make, findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner’s innocence.

In re Davis, ___ U.S. ___, 130 S. Ct. 1, 1 (2009).

Upon receipt of the order from the United States Supreme Court, the district court conducted an evidentiary hearing to determine whether Davis could establish his innocence of the murder conviction. In its order of August 24, 2010, the district court denied Davis relief, concluding that Davis failed to show actual innocence of his murder conviction. *In re Davis*, No. CV409-130, 2010 WL 3385081, *1, 61 (S. D. Ga. Aug. 24, 2010). The district court, in a footnote, questioned the jurisdictional effects, particularly with respect to appeal, of the Supreme Court’s transfer and suggested that appeal of its order would be directly to the Supreme Court: *Id.* at *1 n.1.

Davis, also uncertain about his avenue of appeal, filed an appeal with this court from the district court's finding because he concluded that a direct appeal to the United States Supreme Court was not explicitly authorized by Supreme Court Rule, federal statute, or Supreme Court precedent. However, in an abundance of caution, Davis also filed a direct appeal to the United States Supreme Court. As of this date, the Supreme Court, nor this court, have ruled on Davis's respective appeals.

Now Davis has filed a request for COA in this court. In its denial of Davis's request for a COA, the district court expressed its doubt that this court had jurisdiction to hear an appeal from its finding that Davis did not establish his innocence of the murder conviction. *In re Troy Anthony Davis*, No. CV409-130 (S. D. Ga. Oct. 8, 2010). The district court emphasized that the Supreme Court exercised its *original* jurisdiction when it transferred the case to the district court. The district court reasoned that it was clear that the Supreme Court was exercising its original jurisdiction because if it were operating within the confines of its appellate jurisdiction, "it would have been unable to entertain the petition because [Davis] had not obtained leave to file a second or successive petition." Dist. Court Order at 2, citing *Felker v. Turpin*, 518 U.S. 651, 661, 116 S. Ct. 2333, 2338-39 (1996).

We agree with the district court's reasoning. Davis could only bring his claim under the Supreme Court's *original* jurisdiction because he had exhausted his other avenues of relief. The district court denied his first federal habeas petition, this court affirmed on appeal, and the Supreme Court denied review. Davis was prohibited from filing a second or successive

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habeas petition absent an order from this court authorizing such a filing. 28 U.S.C. § 2244(b). We denied his request for leave to file a successive petition, and there was no further review authorized by law. 28 U.S.C. § 2244(b)(3)(E). Therefore, Davis filed a habeas petition pursuant to the Supreme Court's original jurisdiction. If this court granted Davis's request for a COA and reviewed the district court's order at this juncture, as Davis requests, we would effectively be restoring his remedies in federal court, in complete contradiction to the express intent of Congress. In effect, we would be nullifying our previous decision denying Davis leave to file a successive habeas petition. We decline to do that.

Accordingly, we dismiss the appeal and deny his request for a COA.

Appeal is DISMISSED; Request for COA is DENIED.

BARCKETT, Circuit Judge, specially concurring:

I agree that Davis's application for a certificate of appealability should be denied on the ground that his appeal from the district court's order lies in the Supreme Court, not this Court, as Davis filed an original habeas petition in the Supreme Court. I write separately only to clarify that my agreement on this point in no way detracts from my earlier opinion dissenting from this Court's denial of Davis's application to file a second or successive habeas petition. *In re Davis*, 565 F.3d 810, 827-31 (11th Cir. 2009) (Barkett, J., dissenting). In that opinion, I expressed the view that AEDPA's limitations on filing a second or successive habeas petition "cannot possibly be applied when to do so would offend the Constitution and the fundamental concept of justice that an innocent man should not be executed." *Id.* at 827.

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APPENDIX B

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

[Filed October 8, 2010]
Clerk [Illegible]
SO. DIST. OF GA.

Civil Case No. 4:09-CV-130 (WTM)

In Re TROY ANTHONY DAVIS

ORDER

Before the Court is Petitioner Troy Anthony Davis's Motion for Certificate of Appealability. (Doc. 94.) Pursuant to 28 U.S.C. § 2253(c), a habeas petitioner may not appeal an adverse decision to a federal court of appeals unless the district court issues a Certificate of Appealability. This certificate may issue only if the petitioner has made a substantial showing of the denial of a constitutional right. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). However, this Court has serious doubts as to whether the Eleventh Circuit Court of Appeals has jurisdiction to hear an appeal in this matter.

In his Notice of Appeal to the Eleventh Circuit, Petitioner argues that he is not authorized to appeal this Court's decision directly to the Supreme Court. (Doc. 93.) First, Petitioner states that an appeal directly to the Supreme Court would be improper because direct appeals may only be taken where they

are authorized by law and there is no statute authorizing direct appeals in habeas cases. (*Id.* at 2.) Second, Petitioner claims that prior cases indicate that the Supreme Court “will not exercise original jurisdiction to issue writs of habeas corpus, when—as in this case—a court of appeals has jurisdiction to review the district court’s final judgment.” (*Id.*) Finally, Petitioner contends that under 28 U.S.C. § 1291 and 28 U.S.C. § 2253 all final orders in habeas proceedings are to be appealed to the courts of appeals.

In all of these arguments, however, Petitioner ignores one important fact: the Supreme Court exercised its *original* jurisdiction when transferring the petition to this Court. It is quite clear that when the Supreme Court transferred the habeas petition to this Court for a hearing and determination, the Supreme Court was exercising judicial power found within its original jurisdiction. Indeed, were the Supreme Court operating within the confines of its appellate jurisdiction, it would have been unable to entertain the petition because Petitioner had not obtained leave to file a second or successive petition. *See Felker v. Turpin*, 518 U.S. 651, 661 (1996) (“Although [28 U.S.C.] § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.”). In short, Petitioner could only bring his claim under the Supreme Court’s original jurisdiction. Therefore, Petitioner’s reliance on Supreme Court Rule 18 and 28 U.S.C. § 2101 is misplaced because these provisions are clearly referencing the Supreme

Court's exercise of its appellate jurisdiction. This case is one that was filed directly with the Supreme Court rather than one that was originally filed with the district court and subject to direct appeal to the Supreme Court.

Furthermore, Petitioner's reliance on both *Dixon v. Thompson*, 429 U.S. 1080 (1977) and *Ex parte Abernathy*, 320 U.S. 219 (1943) is perplexing. In his Notice of Appeal, Petitioner cites these cases for the proposition that "the Supreme Court has concluded that it will not exercise original jurisdiction to issue writs of habeas corpus, when—as in this case—a court of appeals has jurisdiction to review the district court's judgment." (Doc. 93 at 2.) In this case, however, the Supreme Court stated that it was exercising its original jurisdiction when it transferred the case to this Court. *In re Davis*, 557 U.S. ___, 130 S. Ct. 1, 1 (2009) ("Simply put, the case is sufficiently 'exceptional' to warrant utilization of this Court's . . . original habeas jurisdiction." (emphasis added)). Besides the Supreme Court's express exercise of original jurisdiction, the inapplicability of *Dixon* and *Abernathy* is patently obvious. In both *Dixon* and *Abernathy*, the Supreme Court declined to entertain habeas petitions because adequate remedies were available in the lower federal courts. *Dixon*, 429 U.S. at 1080; *Abernathy*, 320 U.S. at 220. In this case, however, Petitioner exhausted all of his remedies when the Eleventh Circuit refused to grant Petitioner leave to file a second or successive habeas petition, *In re Davis*, 565 F.3d 810 (11th Cir. 2009), a decision that was unreviewable by the Supreme Court, see *Felker*, 518 U.S. at 661 (finding that 28 U.S.C. § 2244(b)(3)(E) precludes the Supreme Court from reviewing judgment on applications for leave to file a second or successive habeas petition). Therefore, the

Supreme Court exercising its original jurisdiction was the only procedural pathway that would allow Petitioner to make his innocence claim in front of a federal court.

This Court's conclusion that review of its order denying Petitioner habeas relief is to be had by the Supreme Court alone is bolstered by the plain circumstances of the petition's procedural journey to this Court. Petitioner's first federal habeas petition was denied by the district court, affirmed on appeal to the Eleventh Circuit, and denied certiorari by the Supreme Court. *Davis*, 565 F.3d at 814. At this point, Petitioner was prohibited from filing a second or successive habeas petition absent an order from the Eleventh Circuit authorizing such a filing. 28 U.S.C. § 2244(b). On April 16, 2009, the Eleventh Circuit denied Petitioner's request for leave to file such a petition. *Davis*, 565 F.3d at 827. Importantly, Congress removed the Supreme Court's appellate power to review circuit court decisions granting or denying permission to file a second or successive petition. 28 U.S.C. § 2244(b)(3)(E). Therefore, Petitioner's ability to obtain further review of his habeas claims in federal court was effectively foreclosed. However, Petitioner filed his petition in the Supreme Court, which exercised its original jurisdiction and transferred the petition to this Court for consideration. To now reason that Petitioner may appeal to the Eleventh Circuit, thereby restoring his remedies in the federal judicial system, would be contrary to the express intent of Congress. In other words, allowing Petitioner in this case to appeal to the Eleventh Circuit would make the Eleventh Circuit's decision not to grant Petitioner leave to file a second or successive petition, for all practical purposes, reviewable by the Supreme Court—a proposition the

Supreme Court has recognized as expressly forbidden by Congress in § 2244(b)(3)(E). *Felker*, 518 U.S. at 661. To accept Petitioner's argument, therefore, would require this Court to believe that the Supreme Court can implicitly act in a manner expressly forbidden by Congress. The Court is unprepared to make such a ruling.

The better view is that this Court exercised the Supreme Court's original jurisdiction when ruling on the petition. In other words, the Supreme Court did not restore this Court's original jurisdiction when it transferred the petition; rather, the Supreme Court transferred its own jurisdiction to this Court. Therefore, any review of this Court's decision should be by the Supreme Court itself, not an intermediate appellate court. It would be incredibly anachronistic for a court of appeals to have appellate jurisdiction over cases brought under the Supreme Court's original jurisdiction. Accordingly, this Court reasons that the Eleventh Circuit lacks appellate jurisdiction to review this Court's order denying Petitioner habeas relief. As a result, Petitioner's request for a Certificate of Appealability is DENIED. Any review of this Court's decision to deny Petitioner's request for habeas relief must be conducted by the Supreme Court, not the Eleventh Circuit Court of Appeals.

SO ORDERED this 8th day of October 2010.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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APPENDIX C

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

[Filed September 23, 2010]

Civil Case No. 4:09-CV-130 (WTM)

In Re TROY ANTHONY DAVIS

**NOTICE OF APPEAL TO THE COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT**

Notice is hereby given that Troy Anthony Davis, the above-named Petitioner, hereby appeals to the United States Court of Appeals for the Eleventh Circuit from the final judgment and Order entered in this matter by the United States District Court for the Southern District of Georgia, Savannah Division, denying his Petition for Writ of Habeas Corpus by judgment entered on August 24, 2010.

Mr. Davis files this Notice because a direct appeal to the Supreme Court of the United States does not appear to be explicitly authorized by Supreme Court Rule, federal statute or Supreme Court precedent. Supreme Court Rule 18 and 28 U.S.C. § 2101 provide for an appeal from the decision of a district court only as “authorized by law.” *See* Sup. Ct. R. 18 (“When a direct appeal from a decision of a United States district court is authorized by law The notice of appeal shall specify . . . statute or statutes under which the appeal is taken.”); 28 U.S.C. § 2101(b) (“Any other direct appeal to the Supreme Court which

is authorized by law, from a decision of a district court in any civil action, suit or proceeding . . .”).

A direct appeal to the Supreme Court of an order entered in a habeas corpus proceeding is not explicitly “authorized by law.” The statute governing appeals from habeas corpus proceedings authorizes appeals only to the court of appeals. 28 U.S.C. § 2253 (“In a habeas corpus proceeding . . . the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.”). Furthermore, the Supreme Court has concluded that it will not exercise original jurisdiction to issue writs of habeas corpus, when—as in this case—a court of appeals has jurisdiction to review the district court’s final judgment. *Dixon v. Thompson*, 429 U.S. 1080, 1081 (1977) (refusing to hear an original habeas petition since “an appeal from the District Court may still be had” in the court of appeals); *see also Ex parte Abernathy*, 320 U.S. 219 (1943) (the Court does not exercise its original habeas jurisdiction “where an adequate remedy may be had in a lower federal court”).

It is clear that the United States Court of Appeals for the Eleventh Circuit has jurisdiction to resolve Mr. Davis’s claims. By statute, the Court of Appeals hears appeals from “*all* final decisions” of this Court. 28 U.S.C. § 1291 (emphasis added). Moreover, the statute that governs appeals from habeas corpus proceedings, 28 U.S.C. § 2253, likewise instructs that a district court’s “final order *shall* be the subject of review, on appeal, by the court of appeals for the circuit in which the proceeding is held” (emphasis added).

Because the court of appeals has jurisdiction to hear his immediate appeal, and because direct review

by the Supreme Court is not explicitly “authorized by law,” an appeal to the Court of Appeals for the Eleventh Circuit pursuant to a Certificate of Appealability is proper. Because the appeal procedures in this case are unprecedented and this Court indicated that it believed a direct appeal to the Supreme Court may be appropriate, Mr. Davis has filed a notice of appeal, in the alternative, to Supreme Court of the United States in order to effect timely notice of such an appeal pursuant to Federal Rule of Appellate Procedure 4(a) and the Rule 11(b) of the Rules Governing Section 2254 Cases In the United States District Court.

Respectfully Submitted,

/s/ Jason Ewart
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Counsel for Petitioner

APPENDIX D

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

[Filed September 23, 2010]

Civil Case No. 4:09-CV-130 (WTM)

IN RE TROY ANTHONY DAVIS

ALTERNATIVE NOTICE OF APPEAL
TO SUPREME COURT OF THE UNITED STATES

Mr. Davis has filed an notice of appeal to the United States Court of Appeals for the Eleventh Circuit. If it is determined that appeal to that court is improper, Mr. Davis hereby provides alternative notice of appeal to the Supreme Court of the United States relating to all portions of the final judgment and Order entered in this matter by the United States District Court for the Southern District of Georgia, Savannah Division, denying his Petition for Writ of Habeas Corpus by judgment entered on August 24, 2010.

As stated in his *Notice of Appeal to the Court of Appeals for the Eleventh Circuit*, direct appeal to the United States Supreme Court may not be appropriate in this case.¹ Because the appeal procedures in this

¹ Direct appeals to the Supreme Court must be “authorized by law” pursuant to Supreme Court Rule 18 and 28 U.S.C. § 2201(b). No statute explicitly authorizes a direct appeal of an order entered in a habeas corpus proceeding. Instead, the statutes applicable to habeas proceedings require that an appeal of an order entered by a district court proceed first to the court of

case are unprecedented and the district court indicated that it believed a direct appeal to the Supreme Court may be appropriate, Mr. Davis files this Alternative Notice in order to effect timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a) and the Rule 11(b) of the Rules Governing Section 2254 Cases In the United States District Court. If this appeal is “authorized by law” pursuant to 28 U. S.C. § 2101(b) and Supreme Court Rule 18, the statute that authorizes such appeal would necessarily be 28 U.S.C. §§ 2241, 2254 or 1651.

Respectfully Submitted,

/s/ Jason Ewart

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appeals. *See, e.g.*, 28 U.S.C. § 2253 (“In a habeas corpus proceeding ... the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.”).

APPENDIX E

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

[Filed August 24, 2010]
Clerk Robert Fritts
SO. DIST. OF GA.

Civil Case No. 4:09-CV-130 (WTM)

In Re TROY ANTHONY DAVIS

ORDER

Before the Court is Petitioner Troy Anthony Davis's Petition for a Writ of Habeas Corpus. (Doc. 2.) This petition was originally filed with the United States Supreme Court and has been transferred to this Court, pursuant to 28 U.S.C. § 2241(b), with instructions to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial clearly establishes petitioner's innocence."¹ *In re Davis*, 557 U.S.

¹ The jurisdictional effects of this transfer, especially with respect to appeal, are unclear. According to the Revision Notes of 28 U.S.C. § 2241:

Subsection (b) was added to give statutory sanction to orderly and appropriate procedure. A circuit judge who unnecessarily entertains applications which should be addressed to the district court, thereby disqualifies himself to hear such matters on appeal and to that extent limits his usefulness as a judge of the court of appeals. The Supreme Court and Supreme Court Justices should not be

___, 130 S. Ct. 1, 1 (2009). This Court has conducted the hearing. (See Docs. 82, 83.) For the reasons that follow, the Court concludes that while executing an innocent person would violate the United States Constitution, Mr. Davis has failed to prove his innocence. Accordingly, the petition is DENIED.

BACKGROUND

This case involves the shooting of Savannah Police Department (“SPD”) Officer Mark Allen MacPhail. In the early hours of August 19, 1989, Officer MacPhail was working a part-time security job when he came to the assistance of a homeless man, whom had been assaulted in the parking lot of a Burger King restaurant. As Officer MacPhail neared the commotion, one of the three men responsible for the assault gunned him down.

An earlier shooting at a party in the Cloverdale neighborhood of Savannah also plays a role in this case.² Here, an individual shot at a car as it was leav-

burdened with applications for writs cognizable in the district courts.

This text suggests that petitions are transferred to avoid burdening the Supreme Court. Functionally, then, this Court is operating as a magistrate for the Supreme Court, which suggests appeal of this order would be directly to the Supreme Court. However, this Court has been unable to locate any legal precedent or legislative history on point.

² By recounting the facts of the Cloverdale shooting, the Court does not mean to suggest that the validity of that conviction is tied to the validity of Mr. Davis’s conviction for the murder of Officer MacPhail. *See infra* Analysis Part III.C.iv. Rather, the Court details those facts because they are necessary to understand the events of August 19, 1989 and the subsequent investigation and trial, during which the State bootstrapped the conviction for the Cloverdale shooting to Mr. Davis’s conviction for the MacPhail murder.

ing the party, striking one of its occupants in the face. Because this case centers on eyewitness testimony, the Court presents the facts in the manner in which they were provided by those who witnessed these events.

I. THE INVESTIGATIONS

At 11:29 p.m. on August 18, 1989, the SPD received a 911 call from a resident in the Cloverdale neighborhood informing them that several shots had been fired. (Resp. Ex. 30, Disk 1 at 00:14.) The police received several more reports of gunfire, and an officer was dispatched to investigate. At 12:17 a.m. on August 19, 1989, an officer was informed that a local hospital had admitted Mr. Michael Cooper to treat a gunshot wound he received in the Cloverdale neighborhood. (*Id.* at 03:37, 09:12.) The police visited Mr. Cooper in the hospital and obtained a description of the shooter: a young, tall, African-American male wearing a white batman shirt, a black hat, and shorts. (*Id.* at 11:01.)

At 1:09 a.m. on August 19, 2010, the SPD received a 911 call from an employee at the Thunderbird Inn, located across the street from the Burger King on Oglethorpe Avenue.³ (*Id.* at 22:56.) The caller informed the police that an individual had been shot in the Burger King parking lot and that she saw two African-American males running from the scene in the direction of the Trust Company Bank building. One minute later, the SPD received another 911 call informing the police that the shooting victim was a

³ For reference, a hand drawn diagram of the Burger King parking lot and surrounding area is provided in the appendix to this order. The diagram is from the police file (Resp. Ex. 30 at 375) and is not to scale.

police officer. (*Id.* at 24:13.) At 1:16 a.m., the SPD received a second call from the Thunderbird employee, informing them that she saw two men run from the Burger King parking lot towards the Trust Company Bank building, that both were wearing shorts, and that one was wearing a tank top t-shirt. (*Id.* at 30:38.) The caller did not identify the color of the shorts or the tank top. The limited description was quickly relayed to the responding officers, who immediately began searching for similarly dressed individuals. (*Id.* at 3803.) Meanwhile, the officers at the scene secured the area and began interviewing potential witnesses. (Resp. Ex. 30 at 13-14.) The following relevant witness statements were secured during the investigations.

A. Harriett Murray's First Statement

At 2:27 a.m. on August 19, 1989, Ms. Harriett Murray provided the police with a statement concerning the MacPhail shooting. (Pet. Ex. 32-U at 1.) In the early hours of August 19, 1989, Ms. Murray was sitting in front of the Burger King restaurant with Mr. Larry Young. (*Id.*) Mr. Young went to the nearby convenience store to purchase cigarettes and beer. (*Id.*) While Mr. Young was returning from the store to the Burger King parking lot, Ms. Murray noticed that he was arguing with another individual, who was following him. (*Id.*) Ms. Murray also noticed two other individuals, approaching from the direction of the Trust Company Bank building, who were following Mr. Young. (*Id.*)

Walking away from the individuals, Mr. Young repeatedly told the group that he was not going to fight them. (*Id.*) Ms. Murray heard one individual tell Mr. Young not to walk away and threaten to shoot him. (*Id.*) The individual then started digging down

his shirt. (*Id.*) As the three individuals converged on Mr. Young, one produced a gun. (*Id.*) Unaware of the weapon, Mr. Young continued to walk away from the trio. (*Id.*) As Mr. Young approached a van parked at the Burger King drive-through window, the armed individual struck Mr. Young in the head with what Ms. Murray believed was the butt of the weapon. (*Id.* at 1-2.) Mr. Young then fled toward the drive-through window, and began beating on the van and the window, asking for someone to call the police. (*Id.* at 1.)

Next, Ms. Murray observed a police officer approaching the three individuals, who were now fleeing, telling them to “hold it.” (*Id.* at 1-2.) As the officer closed to within five feet, the individual with the firearm turned and aimed the weapon at the officer. (*Id.* at 2.) The weapon did not discharge when the individual first pulled the trigger. (*Id.*) As the officer reached for his gun, the individual shot him in the face. (*Id.*) Wounded, the officer fell to the ground, at which point the gunman fired two or three additional rounds at the officer and then continued running. (*Id.*) Ms. Murray then found Mr. Young and assisted him in tending to his head wound. (*Id.*)

Ms. Murray described the gunman as having medium-colored skin with a narrow face, high cheekbones, and a fade-away haircut. (*Id.*) She estimated him to be between twenty-four to thirty years old, four inches taller than the officer, and approximately one hundred and thirty pounds. (*Id.*) Ms. Murray recalls the gunman as wearing a white shirt and dark colored pants. (*Id.*)

B. Larry Young

At 3:10 a.m. on August 19, 1989, the police obtained a statement from Mr. Young concerning the MacPhail shooting. (Pet. Ex. 32-N at 1.) Mr. Young informed the police that, during the early hours of August 19, 1989, he was sitting in the Burger King parking lot drinking beer with his girlfriend, Ms. Murray. (*Id.* at 2.) When the couple drank their last beer, Mr. Young went to the Time-Saver⁴ convenience store to get more beer.⁵ (*Id.*) As Mr. Young was returning, an African-American male wearing a yellow t-shirt began asking him for one of the beers that Mr. Young just purchased. (*Id.* at 2, 5.) When Mr. Young informed the individual that he could not have a beer, the individual began using foul language toward Mr. Young. (*Id.* at 2.) As Mr. Young continued walking back toward the Burger King, the individual in the yellow t-shirt followed him, continuing the verbal altercation. (*Id.*) As he approached the Burger King parking lot, Mr. Young noticed a second African-American male slipping through the fence separating the convenience store parking lot from the Trust Company Bank property. (*Id.*) Soon, Mr. Young realized that he was being followed by a third individual. (*Id.*)

As Mr. Young entered the Burger King parking lot, he observed Ms. Murray and two gentlemen sitting with her quickly get up and flee the area. (*Id.*) Mr. Young now realized that he was cornered and

⁴ Different witnesses refer to this convenience store as either the Time-Saver or Penny-Saver.

⁵ The convenience store is located to the west of the Burger King, on the same side of Oglethorpe Avenue as the Burger King. (Pet. Ex. 32-N at 1.)

resumed arguing with the individual in the yellow t-shirt. (*Id.*) As Mr. Young was focused on the individual in the yellow t-shirt, he was hit in the head by a second person. (*Id.* at 2-3.) A stunned and fearful Mr. Young ran toward the Burger King drive-through window, seeking help. (*Id.* at 3.) When he was at the window, Mr. Young heard one gunshot, which caused him to duck for cover behind a van waiting at the window. (*Id.* at 8.) Eventually, he ran to the building's front entrance and entered the building. (*Id.* at 3.)

Mr. Young informed the police that the individual in the yellow t-shirt was around twenty to twenty-one years old, five feet nine inches tall, and one hundred and fifty-eight pounds. (*Id.* at 5-6.) The individual had short hair, no facial hair, and lighter brown skin. (*Id.* at 6.) When describing his clothes, Mr. Young stated that the yellow t-shirt was a tank-top and that the individual was wearing "jam" pants. (*Id.*) Mr. Young stated that he definitely recognized the individual in the yellow t-shirt. at 5.)

Mr. Young described the individual who assaulted him as about twenty-two to twenty-three years old, five feet eleven inches tall, and one hundred and seventy-two pounds. (*Id.* at 7.) Mr. Young could not remember the individual's facial features or skin color (*Id.*), but believed that he might be able to recognize him if he saw him again (*Id.* at 5). He did state that the individual was wearing a white hat and a white t-shirt with "some kind of print on it." (*Id.* at 7.) Mr. Young could not remember anything about the third individual because that person was only in the background and was not directly involved in the altercation. (*Id.*)

C. Antoine Williams

At 3:22 a.m. on August 19, 1989, the police took a statement from Mr. Antoine Williams concerning the MacPhail shooting. (Pet. Ex. 32-00 at 1.) At about 1:00 a.m. that morning, Mr. Williams was pulling into the Burger King parking lot to begin his shift at the restaurant. (*Id.*) As he was parking, he noticed three men following one individual, who was walking across Fahm Street toward the Burger King parking lot. (*Id.*) As they drew closer, Mr. Williams could tell that two of the individuals were arguing. (*Id.*) He overheard the individual being followed say that he did not want to fight anyone and that the three others should go back to where they were. (*Id.*) As the group came between his car and the drive-through window, one of the individuals ran up and slapped the man being followed in the head with a gun. (*Id.*)

When Mr. Williams looked the other way, he saw a police officer coming from behind a van waiting at the Burger King drive-through window. (*Id.*) The officer was running towards the individual with the firearm. (*Id.*) The two unarmed individuals were already running away, and the individual with the gun was trying to stick it back in his pants. (*Id.*) According to Mr. Williams, the assailant appeared to panic as the officer was approaching and he was unable to conceal the gun. (*Id.* at 1-2.) When the officer closed to within approximately fifteen feet, the assailant turned and shot the officer. (*Id.*) After falling to the ground, it appeared that the officer was trying to regain his footing when the gunman shot him three more times. (*Id.* at 2.) After firing the fourth shot, the gunman fled from the scene. (*Id.*)

Mr. Williams described the gunman as approximately twenty to twenty-three years old, six feet two inches to six feet four inches tall, and one hundred

and eighty pounds. (*Id.*) Mr. Williams believed that the gunman was wearing a blue or white t-shirt, and dark jeans. (*Id.*) He explained that the dark shade of tint on his car's windows may have affected his ability to distinguish the exact color of the gunman's t-shirt. (*Id.* at 2- 3.) Mr. Williams then described the gun used in the shooting as a rusty, brownish colored revolver. (*Id.* at 3.) Mr. Williams did state that he believed he could identify the gunman if he saw him again. (*Id.*) When asked to describe the other three individuals, Mr. Williams could not provide any details because he was focused on the gunman. (*Id.*)

D. Dorothy Ferrell's First Statement

At 4:14 a.m. on August 19, 1989, Ms. Dorothy Ferrell provided a statement to the police concerning the MacPhail shooting. (Pet. Ex. 32-Y at 1.) Ms. Ferrell informed the police that, during the early hours of August 19, 1989, she was descending the stairs at the Thunderbird Inn, located directly across Oglethorpe Avenue from the Burger King, when she saw a bloodied individual in the Burger King parking lot. (*Id.*) Next, Ms. Ferrell observed a police officer walk across the parking lot, yelling at a group of people. (*Id.*) While two of the individuals fled, one reached into his shorts, produced a firearm, and shot the officer. (*Id.*) The wounded officer fell to the ground, at which point the gunman fired three additional shots and then fled the scene. (*Id.*)

Ms. Ferrell also recalls that, at around 6:00 p.m. on August 18, 1989, the same officer directed the gunman to leave the Burger King property. (*Id.*) The gunman was wearing the same clothes during both incidents-a white t-shirt with writing, dark colored shorts, and a white hat. (*Id.* at 1-2.) She described the shooter as approximately six feet tall with a slender

build and medium-light colored skin. (*Id.* at 2.) Ms. Ferrell was pretty sure that she could identify the gunman if she saw him again. (*Id.*)

E. Anthony Lolas

At 5:20 a.m. on August 19, 1989, the police took a statement concerning the MacPhail shooting from United States Air Force Lieutenant Colonel Anthony Lolas. (Resp. Ex. 30 at 110.) Lt. Col. Lolas informed the police that at approximately 1:01 a.m. he was lying down in the back seat of a van waiting at the Burger King drive-through window when a man started banging on the vehicle, asking for the police. (*Id.*) As he was rising from the seat, Lt. Col. Lolas heard one gunshot, quickly followed by two additional shots. (*Id.*) Turning toward the direction of the gunshots, Lt. Col. Lolas saw someone in a striped jumpsuit running toward the front of the Burger King. (*Id.*) Then, Lt. Col. Lolas focused on an individual in a white t-shirt, whose arm was surrounded by smoke. (*Id.* at 110-11.) After firing the shots, the gunman fled to the northwest. (*Id.*) Lt. Col. Lolas stated that he had no doubt that the individual in the white t-shirt was the shooter. (*Id.* at 111.)

Lt. Col. Lolas never saw the shooter's face, but described him as an African-American male, approximately six feet tall, and around one hundred and seventy pounds. (*Id.*) The shooter was wearing a white t-shirt with very dark pants. (*Id.*)

F. Matthew Hughes

At 5:49 a.m. on August 19, 1989, Mr. Matthew Hughes provided the police with a statement concerning the MacPhail shooting. (*Id.* at 115.) Mr. Hughes was seated directly behind the driver's seat in a van waiting at the Burger King drive-through

when an individual came up to the driver's side window. (*Id.*) Mr. Hughes could not hear what the man was saying, but noticed a severe cut over his right eye. (*Id.*) Next, Mr. Hughes heard a pop from the direction of the parking lot. (*Id.*) He did not think much of it until the other passengers told him there was something going on in the parking lot. (*Id.*) As Mr. Hughes turned to look, he heard two more popping sounds. (*Id.*) Once he was facing the direction of the sounds, he saw an African-American male in a light colored t-shirt standing over the body of a white individual. (*Id.*) After the shooting, the African-American male ran toward the Trust Company Bank building. (*Id.* at 116-17.)

Mr. Hughes described the individual in the light colored t-shirt as an African-American male with a slender to medium build, approximately five feet seven inches to five feet nine inches tall. (*Id.*) The individual wore dark shorts, a light colored baseball cap, and a light colored t-shirt, with either short or no sleeves. (*Id.*) Mr. Hughes also saw a second individual running toward the Trust Company Bank building, who was much closer to that building than the man in the light colored t-shirt. (*Id.*) This individual was skinny, dressed in all dark clothes, and appeared to be carrying a gym bag. (*Id.*)

G. Eric Riggins

At 5:57 a.m. on August 19, 1989, the police obtained a statement from Mr. Eric Riggins concerning the MacPhail shooting. (*Id.* at 118.) Mr. Riggins was seated in the second row, behind the driver's seat, in a van waiting at the Burger King drive-through window when an individual came to the driver's side window calling for someone to phone the police. (*Id.*) After a few seconds passed, Mr. Riggins heard a

single gunshot. (*Id.*) Turning toward the direction of the gunshot, Mr. Riggins observed a man falling to the ground. (*Id.*) An individual, standing five feet from the man on the ground, raised his hand and fired two more shots. (*Id.*) Mr. Riggins recalls that the gunman never completely stopped running to fire the shots and fled towards the Trust Company Bank building. (*Id.* at 118-19.)

Mr. Riggins described the shooter as a slim, African-American male, approximately five feet ten inches tall and one hundred and sixty pounds. (*Id.* at 118.) The gunman was wearing a light colored shirt, dark shorts, and a baseball cap, the color of which Mr. Riggins could not recall. (*Id.*) Beyond the shooter, Mr. Riggins saw a second, taller male running towards the Trust Company Bank building. (*Id.*)

H. Steven Hawkins

At 6:10 a.m. on August 19, 1989, Mr. Steven Hawkins provided the police with a statement concerning the MacPhail shooting. (*Id.* at 129.) Mr. Hawkins was seated in the middle of the third row of a van waiting at the Burger King drive-through window when an individual came up to the driver's side window asking for someone to call the police. (*Id.*) Soon thereafter, Mr. Hawkins heard three popping sounds from the parking lot. (*Id.*) Turning to look in the direction of the noise, Mr. Hawkins saw an African-American teenager, who was skinny, approximately six feet tall, and was wearing a white shirt with black shorts or pants, running across the parking lot. (*Id.*)

I. Steven Sanders

At 5:15 a.m. on August 19, 1989, the police obtained a statement from Mr. Stephen Sanders concerning the MacPhail shooting. (*Id.* at 112.) Mr. Sanders was

seated in a van waiting at the Burger King drive-through window when he observed one African-American male strike another African-American male in the parking lot. (*Id.*) The man who had been hit ran to the van, asking for someone to call the police while banging on the hood of the vehicle. (*Id.*) It was at this time that Mr. Sanders heard a gunshot. (*Id.*) Turning toward the noise, Mr. Sanders observed an African-American male wearing a white shirt and black shorts standing in front of an individual who was falling forward. (*Id.*) The male in the white shirt shot at the individual two more times and then start running, with a second individual in a black outfit, toward the Trust Company Bank building. (*Id.* at 112-13.) Mr. Sanders informed the police that he would not be able to recognize the two fleeing men, except by their clothing. (*Id.* at 113.)

J. Robert Grizzard

At 6:07 a.m. on August 19, 1989, Mr. Robert Grizzard provided a statement to the police concerning the MacPhail shooting. (*Id.* at 130.) Mr. Grizzard was seated in a van waiting at the Burger King drive-through window when he observed two men running from the parking lot toward the front of the building. (*Id.*) Looking in the direction from which the men fled, Mr. Grizzard saw one man hit another on the side of his face. (*Id.*) The assaulted individual then staggered to the van and asked for someone to call the police. (*Id.*) Looking back toward the parking lot, Mr. Grizzard observed a police officer with a baton moving toward the assailant. (*Id.*) As the officer closed in on the assailant, the assailant fired as many as four shots at the officer. Once the officer fell to the

ground, the shooter fled. (*Id.*) Mr. Grizzard remembered only that the shooter was wearing a hat. (*Id.* at 130-31.) Mr. Grizzard informed the police that he would not be able to identify the shooter. (*Id.* at 131.)

K. Mark Wilds

At 6:40 a.m. on August 19, 1989, the police obtained a statement from Mr. Mark Wilds concerning the Cloverdale shooting. (*Id.* at 194.) Mr. Wilds was driving away from the Cloverdale party with Messrs. Lamar Brown, Benjamin Gordon, and Joseph Blige when someone fired at their vehicle from the bushes. (*Id.*) Mr. Wilds believed that the weapon used was a thirty-eight caliber. (*Id.*) Later, at 8:45 p.m. on August 19, 1989, Mr. Wilds amended his statement to include an identification of Mr. Davis as one who attended the Cloverdale party. (*Id.* at 195.)

L. Joseph Bilge

At 7:10 a.m. on August 19, 1989, Mr. Blige provided the police with a statement concerning the Cloverdale shooting. (*Id.* at 196.) He informed the police that he was leaving the Cloverdale party in Mr. Wilds's vehicle, along with Messrs. Brown, Gordon, and Michael Cooper, when someone started shooting at them from behind some bushes. (*Id.*) There were between four and five people standing behind the bushes when the shooting began. (*Id.*) One bullet struck Mr. Cooper, whom Mr. Wilds subsequently drove to the hospital. (*Id.*)

M. Benjamin Gordon

At 7:47 a.m. on August 19, 1989, the police obtained a statement from Mr. Benjamin Gordon concerning the Cloverdale shooting. (*Id.* at 198.) Mr. Gordon informed the police that, as he was leaving

the Cloverdale party in Mr. Wilds's vehicle with Messrs. Brown, Cooper, and Blige, someone on the corner fired multiple shots at the vehicle, hitting Mr. Cooper. (*Id.*) The shooter was wearing a white batman shirt and a dark colored pair of jeans. (*Id.*) Mr. Gordon remembered seeing the gunman earlier at the party, by the pool. (*Id.*) Mr. Gordon believed that the individual was angry at Mr. Gordon and his friends because they were from another neighborhood and the girls were talking mostly to them. (*Id.* at 198-99.) Later that evening, Mr. Gordon walked to the Burger King because he heard that an officer had been shot. (*Id.* at 199.)

N. Lamar Brown

At 6:00 p.m. on August 19, 1989, Mr. Lamar Brown provided the police with a statement concerning the Cloverdale shooting. (*Id.* at 207.) According to Mr. Brown, he was leaving the Cloverdale party in Mr. Wilds's vehicle, along with Messrs. Gordon, Blige, and Cooper, when someone started shooting at them from the corner. (*Id.*) The shooter was dark skinned with short hair, between five feet nine inches and five feet ten inches tall, and around one hundred and fifty-nine pounds. (*Id.* at 208.) The gunman was wearing a batman shirt, black pants, and a black hat. (*Id.*) Mr. Brown did not remember seeing this individual at the party. (*Id.*)

Later that evening, Mr. Brown was passing time with Messrs. Wilds, Gordon, and Bilge in the Yamacraw neighborhood when he heard gunshots. (*Id.* at 209-10.) After the shooting, Mr. Brown observed two individuals running toward the Trust Company Bank building, into the Yamacraw neighborhood. (*Id.* at 209.) One was running a short distance behind the other. (*Id.* at 210.) Due to the darkness, Mr. Brown

could not see any identifying features on either individual. (*Id.*)

O. Sylvester “Red” Coles’s First Statement

At 8:52 p.m. on August 19, 1989, Mr. Sylvester “Red” Coles gave a statement to the police concerning the MacPhail shooting. (*Id.* at 143.) Mr. Coles was standing outside of Charlie Brown’s pool room with Messrs. Troy Davis and Darrell Collins when he started arguing with someone passing through the parking lot. (*Id.* at 143-44.) Mr. Coles continued to argue with the individual as he walked toward the Burger King restaurant, followed by Messrs. Davis and Collins. (*Id.*) Mr. Coles stated that, when they were near the restaurant’s drive-through window, Mr. Davis hit the individual in the head with a pistol. (*Id.*)

As the individual ran off shouting, a police officer came out of the Burger King restaurant and told Messrs. Coles and Davis to “hold it.” (*Id.*) Mr. Coles stood in the middle of the parking lot while Mr. Davis ran past him toward the Trust Company Bank building. (*Id.*) After the officer, nightstick in hand, ran past Mr. Coles toward Mr. Davis, Mr. Coles heard a gunshot. (*Id.*) Upon hearing the shot, Mr. Coles began running toward the Trust Company Bank building. (*Id.*) As he was fleeing, Mr. Coles turned around and saw the police officer falling to the ground. (*Id.* at 145.) Mr. Coles ran past the pool room to his sister’s house in Yamacraw Village. (*Id.* at 143-44.)

Mr. Coles informed the police that he had seen Mr. Davis with a firearm earlier that evening at the pool room. (*Id.* at 145.) The gun was black, with a short barrel and brown wooden handle. (*Id.*) Mr. Coles

stated that he thought Mr. Davis was wearing a short sleeve t-shirt and orange cut off shorts, but could not really remember. (*Id.* at 146.)

P. Darrell Collins's First Statement

At 11:30 p.m. on August 19, 1989, the police obtained a statement from Mr. Darrell Collins. (*Id.* at 148.) Mr. Collins informed the police that, on the evening of August 18, 1989, he went to a pool party in Cloverdale with Messrs. Eric Ellison and Davis. (*Id.*) The trio was leaving the party when Messrs. Collins and Ellison stopped to talk to girls, while Mr. Davis continued to walk toward the street corner. (*Id.*) When Mr. Davis was almost to the corner, the occupants of an approaching car were leaning out of the vehicle's windows, cussing and throwing things. (*Id.*) Mr. Davis shot at the vehicle as it passed the corner where he was standing using a short barreled, black gun with a brown handle. (*Id.* at 149.)

After the shooting, Messrs. Collins and Ellison returned to Mr. Ellison's house. (*Id.* at 148.) After spending some time at Mr. Ellison's home, the pair were on their way to purchase gas for the vehicle when they passed Mr. Davis, who was walking on the side of the road. (*Id.*) Mr. Davis joined them and they went to the Time-Saver. (*Id.*)

Once at the Time-Saver, Messrs. Collins and Ellison stood by the vehicle while Mr. Davis walked over to Charlie Brown's pool room, located adjacent to the Time-Saver, and engaged Mr. Coles in conversation. (*Id.* at 148-49.) Soon thereafter, an argument between Mr. Coles and a second individual broke out. (*Id.* at 149.) As the argument moved toward the Burger King parking lot, Mr. Coles was followed by Mr.

Davis, who was, in turn, followed by Mr. Collins. (*Id.*)

As the group entered the Burger King parking lot, Mr. Davis slapped the individual they had been following in the head. (*Id.*) Mr. Collins then noticed a police officer advancing toward the commotion. (*Id.*) Upon observing the officer, Mr. Collins turned around and started walking back toward the gas station. (*Id.*) While he was returning to the station, Mr. Collins heard a single gunshot, which caused him to start running. (*Id.*) When Mr. Collins arrived at the gas station, he rejoined Mr. Ellison, who drove Mr. Collins home. He informed the police that, on the night of the MacPhail shooting, Mr. Davis was wearing blue or black shorts, and a white t-shirt with writing on the front. (*Id.*)

Q. Jeffrey Sams's First Statement

On August 20, 1989, Mr. Jeffrey Sams provided a statement to the police concerning the Cloverdale shooting. (*Id.* at 161.) Mr. Sams informed the police that, on August 18, 1989, he was at a party in the Cloverdale neighborhood, where he saw Mr. Davis. (*Id.*) After he heard some guys arguing at the party, he decided to take his car home and walk back to the party. (*Id.*) As he was walking back, Mr. Sams was picked up by Mr. Ellison, whose vehicle was also occupied by Messrs. Davis and Collins. (*Id.*) Mr. Ellison then drove the group to the Time-Saver. (*Id.*) After visiting the store, the group went to Charlie Brown's pool room. (*Id.*) After shooting a few games of pool, Mr. Sams returned to the car, where he stayed until Messrs. Ellison and Collins returned. (*Id.*)

R. Jeffrey Sapp

At 2:30 on August 21, 1989, Mr. Jeffrey Sapp provided a statement to the police concerning the MacPhail shooting. (*Id.* at 166.) Between 2:00 and 3:00 p.m. on August 19, 1989, Mr. Davis was riding a bicycle when he stopped to talk with Mr. Sapp. (*Id.*) Mr. Davis asked Mr. Sapp if he heard about a shooting. (*Id.*) After Mr. Sapp told Mr. Davis that he heard an officer had been shot, Mr. Davis confessed that he was the shooter. (*Id.*) Mr. Davis then recounted how Mr. Coles got into a fight with another individual, whom Mr. Davis slapped in the face with a pistol. (*Id.*) The police officer then appeared from behind a van, told Mr. Davis to stop, and reached for his firearm. (*Id.*) Mr. Davis told Mr. Sapp that he shot the officer because the officer was reaching for his firearm. (*Id.*) Mr. Sapp stated that he did not believe Mr. Davis's story. (*Id.*)

S. Eric Ellison

On August 21, 1989, the police obtained a statement from Mr. Eric Ellison. (*Id.* at 156.) Mr. Ellison informed the police that, on the evening of August 18, 1989, he and Mr. Collins were driving to a party in the Cloverdale neighborhood when they passed Mr. Davis, who was walking to the same party. (*Id.*) They picked up Mr. Davis and continued to Cloverdale. (*Id.*) Once they arrived, the group parted ways. (*Id.* at 156-57.) When Mr. Ellison left the pool area at the back of the home, he observed an argument in the front yard between two groups of people, which involved some shouting and cursing. (*Id.*) A few minutes later, Mr. Ellison saw Mr. Davis leave the party in a truck, only to return within five to ten minutes. (*Id.* at 157.)

As Messrs. Ellison and Collins were in the front yard speaking with some girls, Mr. Ellison noticed an automobile driving by with an individual leaning out of a passenger's side window, yelling derogatory comments. (*Id.*) When the car neared the corner, Mr. Ellison heard between four and five gunshots. (*Id.*) The gunfire prompted Mr. Ellison to leave the party with Mr. Collins. (*Id.*) As Mr. Ellison was leaving, he saw Mr. Davis close to the corner where the shots were fired. (*Id.*) Mr. Davis asked Mr. Ellison to be taken to the Yamacraw neighborhood. (*Id.*) Having agreed, Mr. Ellison was driving the three toward Yamacraw when he passed Mr. Jeffery Sams, who was walking back to the party. (*Id.*) Mr. Sams got into the vehicle, and the four drove off toward Yamacraw. (*Id.*)

At the direction of Mr. Davis, Mr. Ellison drove to a convenience store. (*Id.* at 158.) After going into the store, the group went to the adjacent pool room to shoot pool. (*Id.*) The group separated while playing pool. Finishing his last game, Mr. Ellison was leaving the pool room when he heard three gunshots. (*Id.*) As he got into his car, where Mr. Sams was already located, Mr. Collins approached and entered the vehicle. (*Id.* at 159.) Mr. Ellison then drove home, where he remained until he had to report to work at 10:00 a.m. (*Id.*)

T. Monty Holmes

At 2:11 p.m. on August 22, 1989, Mr. Monty Holmes provided a statement to the police regarding the MacPhail shooting. (*Id.* at 169.) Mr. Holmes stated that, on the morning of August 19, 1989, Mr. Davis came to his home and confessed to shooting Officer MacPhail. (*Id.*) Mr. Davis told Mr. Holmes that he shot the officer because he thought the officer

was reaching for his firearm. (*Id.*) Mr. Holmes thought the confession was a joke. (*Id.*)

U. Craig Young

At 2:28 p.m. on August 22, 1989, the police obtained a statement from Mr. Craig Young. (*Id.* at 211.) Mr. Craig Young informed the police that Mr. Davis told him that he had gotten into an argument with Mr. Mike Wilds at the Cloverdale party. (*Id.*) Mr. Craig Young recalls Mr. Wilds's vehicle being shot at and hearing that Mr. Davis was the shooter. (*Id.*)

According to Mr. Craig Young, he was walking home with Mr. Sapp on the morning of August 19, 1989, when Mr. Sapp informed him that Mr. Davis claimed to have shot the police officer. (*Id.* at 212.) As the two separated, Mr. Craig Young observed Mr. Davis slowly riding a bicycle down the street. (*Id.*)

V. Harriett Murray's Second Statement

At 6:11 p.m. on August 24, 1989, Ms. Murray provided the police with a second statement concerning the MacPhail shooting. (Pet. Ex. 32-V at 1.) In this statement, Ms. Murray identified Mr. Davis as Officer MacPhail's murderer from a photographic lineup. (*Id.* at 1-2.) She also identified Mr. Coles as the individual in a yellow shirt who grabbed Mr. Young's arm, causing Mr. Young to turn around. (*Id.*) It was at this time that the individual in the white shirt-Mr. Davis-struck Mr. Young with the gun. (*Id.* at 1.) Ms. Murray stated that the individual in the yellow shirt was heavier than the individual in the white shirt, whom she estimated was between 135 and 155 pounds. (*Id.*)

W. Sylvester “Red” Coles’s Second Statement

At 7:55 p.m. on August 24, 1989, Mr. Coles provided a second statement to the police concerning the MacPhail shooting. (Resp. Ex. 30 at 147.) In this statement, Mr. Coles admits that he was carrying a gun on the night Officer MacPhail was shot. (*Id.*) Specifically, Mr. Coles carried a chrome, long barreled, thirty-eight caliber revolver in the waistline of his pants. (*Id.*) Mr. Coles no longer had the gun on him when he started the argument because he had given it to Mr. Sapp for safekeeping while Mr. Coles was playing pool. (*Id.*)

X. Darrell Collins’s Second Statement

At 9:03 a.m. on August 25, 1989, the police obtained a second statement from Mr. Collins. (*Id.* at 150.) In this statement, Mr. Collins tells the police that he, Messrs. Ellison, Sams, and Davis were all in the car as they drove to the Time-Saver. (*Id.*) When Mr. Ellison went inside Charlie Brown’s pool room, Mr. Coles took a firearm from his pants and placed it on the front seat of Mr. Ellison’s vehicle. (*Id.*) Not wanting the gun in the car, Mr. Collins took it and hid it in some bushes on the side of the building. (*Id.*) Mr. Collins described the gun as long barreled and chrome with a brown handle. (*Id.*) Also, he informed the police that he had seen Mr. Davis with the gun used in the Cloverdale shooting at least twice, once two weeks prior to that shooting and once after that shooting. (*Id.* at 151.)

Y. Jeffrey Sams’s Second Statement

At 4:06 p.m. on August 25, 1989, Mr. Sams provided a second statement to the police concerning the MacPhail shooting. (*Id.* at 164.) Mr. Sams informed the police that, when he was sitting by

himself in Mr. Ellison's car, Mr. Coles placed a gun in the front seat of the vehicle. (*Id.*) According to Mr. Sams, Mr. Collins immediately picked up the gun and removed it from the car. (*Id.*) Mr. Sams recalled the gun as being shiny, but could not remember if it had a long or short barrel. (*Id.*)

Z. Antoine Williams's Second Statement

At 1:16 p.m. on August 30, 1989, Mr. Williams provided the police with a second statement. (Pet. Ex. 32-PP at 1.) In this statement, he identified Mr. Davis as the individual who shot the officer. (*Id.*) Mr. Williams was about sixty percent sure in his identification. (*Id.*) He had not read about the case in the newspaper, or heard about it on the radio or television. However, Mr. Williams did see a picture of Mr. Davis on a wanted poster at work, which he thought looked like the gunman. (*Id.* at 1-2.) He stated that he would not be able to identify any of the other individuals involved in the incident. (*Id.* at 2.)

Also, Mr. Williams informed the police that the individual who slapped the man was the same individual who shot the officer. (*Id.* at 1.) And, he stated that the gunman was wearing either a white or blue shirt, but that he had difficulty distinguish between these colors due to the dark tint on his car windows. (*Id.* at 2.) However, Mr. Williams stated that the tint would not have prohibited him from distinguishing yellow from either white or blue. (*Id.*)

AA. Valerie Gordon

At 10:47 a.m. on September 1, 1989, the police obtained a statement from Ms. Valerie Gordon, Mr. Coles's sister. (Resp. Ex. 30 at 175.) Ms. Gordon informed the police that, in the early morning of August 19, 1989, she was sitting on her front porch

when she heard gunshots. (*Id.*) A few minutes later, Mr. Coles ran onto the front porch and sat down in a chair. (*Id.*) He then informed his sister that he was not sure what was going on, but that there had been a shooting and he thought someone was trying to kill him. (*Id.* at 175-76.) Mr. Coles changed out of his yellow t-shirt and into a red, white, and blue striped collared shirt that Ms. Gordon retrieved for him. (*Id.* at 176.) As Ms. Gordon returned to the front door, she observed a shirtless Mr. Davis standing next to the porch, talking to Mr. Coles. (*Id.*) Mr. Coles gave Mr. Davis the yellow t-shirt he had previously been wearing, which Mr. Davis then put on. (*Id.* at 177.) Ms. Gordon informed the police that, after Mr. Davis put on the yellow t-shirt, Mr. Coles left the property and she went inside the house. (*Id.*) A few minutes later, she observed Mr. Davis take off the yellow t-shirt, lay it just inside her front door, and exit the property. (*Id.* at 177-78.)

BB. Dorothy Ferrell's Second Statement

At 10:25 a.m. on September 5, 1989, Ms. Ferrell provided the police with a second statement concerning the MacPhail shooting. (Pet. Ex. 32-Z at 1.) In this statement, Ms. Ferrell identifies Mr. Davis as the individual who shot the officer. (*Id.*) She stated that, on the night of the MacPhail shooting, Mr. Davis was wearing a white t-shirt with quarter length sleeves and writing on the front, and dark colored shorts. (*Id.* at 4.) She admitted that she had seen his picture on television once prior to her identification, but stated that her identification was based only on what she observed on August 19, 1989. (*Id.* at 1-2.) Ms. Ferrell was between eighty and ninety percent sure that Mr. Davis was the shooter. (*Id.* at 3.)

Also, Ms. Ferrell stated that, prior to her identification, she had seen a photograph of Mr. Davis on the seat of a police car. (*Id.* at 2.) Ms. Ferrell was speaking to an officer in her neighborhood about events unrelated to the MacPhail shooting when she noticed the photograph on the seat of the officer's vehicle. (*Id.*) Ms. Ferrell informed the officer that she had witnessed the shooting and that the individual in the photograph was the gunman. (*Id.*)

II. PROBABLE CAUSE HEARING

On September 8, 1989, Mr. Davis had a probable cause hearing in Chatham County Recorder's Court. (Recorder's Court Transcript at 1.) At the hearing, the State was represented by Chatham County District Attorney Spencer Lawton, and Mr. Davis was represented by Mr. Robert Falligant, Jr. (*Id.*) At the conclusion of the hearing, the court found that the State presented sufficient evidence to charge Mr. Davis and submitted the case to Chatham County Superior Court. (*Id.* at 185.) The Court now relates the relevant witness testimony.

A. Larry Young

At the hearing, Mr. Young testified that, in the early hours of August 19, 1989, he was sitting in the Burger King parking lot with Ms. Murray when he walked to the Penny-Saver convenience store to purchase more beer. (*Id.* at 6-7.) As he was returning to the Burger King, an individual approached him and asked for some beer. (*Id.* at 8.) When Mr. Young told him no, the individual got upset and started cursing at him. (*Id.*) Mr. Young continued to walk toward the Burger King and exchange expletives with the individual, who was now following him. (*Id.*) As he was walking, Mr. Young noticed another

individual slip through a fence and circle around the back of the adjacent Trust Company Bank building. (*Id.* at 9.) By the time Mr. Young reached the Burger King parking lot, he was aware of a third individual following him. (*Id.* at 9-10.)

When Mr. Young reached the parking lot, he heard one of the individuals say something, which caused the two gentlemen sitting with Ms. Murray to start running. (*Id.* at 10.) Startled, Mr. Young looked back at his pursuers and noticed that the three had closed in on him, prompting Mr. Young to quicken his pace. (*Id.*) As he neared the Burger King drive-through, Mr. Young stopped and was confronted by the individual he had been arguing with, who was dressed in a yellow t-shirt. (*Id.* at 11-12.) Mr. Young was aware that someone was further behind him on his left side, and that someone was closer behind him on his right side, wearing a white t-shirt and a light colored cap. (*Id.* at 12.)

As Mr. Young was focused on the individual in the yellow t-shirt, someone else struck him on the right side of his head. (*Id.* at 13-14.) Dazed, Mr. Young ran in between a van waiting at the drive-through and the drive-through window and asked for someone to call the police. (*Id.* at 14-15.) When Mr. Young was in between the van and the window, he heard a single gunshot. (*Id.* at 15.) Scared, Mr. Young ran to the front of the building and went inside. (*Id.* at 16-17.) Once inside, he was joined by Ms. Murray, who helped tend to his wound. (*Id.* at 17.)

On August 19, 1989, the police showed Mr. Young a photo array of individuals and asked him if he recognized anyone who was involved in his assault. (*Id.* at 18-19.) Mr. Young incorrectly identified the individual he was arguing with, but stated that he was not

sure. (*Id.* at 19.) A few days later, however, Mr. Young realized his error when he saw Mr. Coles in person at the police station. After seeing Mr. Coles, Mr. Young identified him as the man he was arguing with. (*Id.* at 19-20.)

On cross-examination, Mr. Young testified that the individual he was arguing with was an African-American male with lighter colored skin than Mr. Young and short hair. (*Id.* at 30.) The man was approximately five foot eleven inches tall and wore a yellow t-shirt and short pants. (*Id.* at 30-31.) The individual that struck him was wearing a white t-shirt with printing, black pants, and a white baseball cap. (*Id.* at 40-41, 43.) Mr. Young was unable to identify the individual who struck him from a photo array. (*Id.* at 48.)

B. Harriett Murray

At the hearing, Ms. Murray testified that she was drinking beer with Mr. Young in the Burger King parking lot in the early hours of August 19, 1989. (*Id.* at 53.) Eventually, Mr. Young went to the convenience store to purchase more beer. (*Id.* at 54.) As Mr. Young was returning, he was being followed by an individual who was arguing with him as he continued toward the Burger King parking lot. (*Id.*) Ms. Murray also noticed two additional individuals approaching from the adjacent Trust Company Bank building, one farther back than the other. (*Id.* at 55.)

As Mr. Young neared the Burger King parking lot, the three individuals were converging on him, and one told Mr. Young that he would shoot him and began digging in his pants. (*Id.*) Upon hearing the threat, the two men sitting with Ms. Murray fled. (*Id.*) When Mr. Young neared the drive-through lane,

he was cornered: the individual in the yellow shirt was on his left and the individual in the white shirt was on his right. (*Id.* at 56-57.) The third individual was standing five or six feet behind Mr. Young. (*Id.* at 57.) The individual in the yellow shirt grabbed Mr. Young's arm, causing Mr. Young to look to his left, directly at the individual in the yellow shirt. (*Id.* at 56.) When Mr. Young turned his head, the individual on Mr. Young's right hit him in the head with the handle of a gun. (*Id.* at 56, 58.) Ms. Murray described the gun as having a black barrel and brown handle. (*Id.* at 58.)

After being hit, Mr. Young ran between a van waiting at the drive-through and the drive-through window, crying for someone to call the police. (*Id.* at 59.) Shortly thereafter, a police officer came running from behind the building. (*Id.*) Upon seeing the police, the individuals in the yellow shirt and the white shirt began to flee. (*Id.* at 60.) At this point, Ms. Murray was not sure where the third individual was located. (*Id.*) The officer took out his nightstick and told the two remaining individuals to "hold it." (*Id.*) Both individuals initially slowed down, but when the officer ran past the individual in the yellow shirt and continued toward the individual in the white shirt, the individual in the yellow shirt resumed running toward the Trust Company Bank building. (*Id.* at 60-61.) As the officer approached, the individual in the white shirt stopped, waited for the officer to get within five feet, turned, aimed the gun at the officer, and pulled the trigger. (*Id.* at 61.) The gun did not fire the first time. (*Id.* at 61-62.) As the officer reached for his own firearm, the individual in the white shirt fired again, this time striking the officer in the face and causing him to fall to the ground. (*Id.*) The gunman then took two steps

forward, fired two or three additional bullets at the fallen officer and fled. (*Id.* at 62.)

Ms. Murray was shown a photo array the night of the shooting, but could not identify the gunman. (*Id.* at 64.) Several days later, the police showed her a second photo array, from which she identified Mr. Davis as the man who hit Mr. Young and shot the officer. (*Id.* at 64-65.)

On cross-examination, Ms. Murray testified that the individual who threatened to shoot Mr. Young and started digging in his pants for a gun was the individual in the white shirt. (*Id.* at 70-71.) She also stated that the individual in the yellow shirt was a little taller and heavier than Mr. Young, while the individual in the white shirt was taller and thinner than Mr. Young. (*Id.* at 73.) Also, Ms. Murray recalled that the individual in the white shirt had darker skin than both Mr. Young and the individual in the yellow shirt. (*Id.* at 72-73.)

C. Sylvester “Red” Coles

At the hearing, Mr. Coles testified that he was playing pool at Charlie Brown’s pool room in the early hours of August 19, 1989, when he began arguing with a man coming out of the Time-Saver. (*Id.* at 96.) The argument started because the man would not give Mr. Coles one of the beers he had just purchased. (*Id.*) As the argument continued, Mr. Coles pursued the man as he walked toward the Burger King parking lot. (*Id.* at 96-97.) Messrs. Davis and Collins followed the pair by cutting through the Trust Company Bank property. (*Id.* at 97.)

As Mr. Coles and the man he was arguing with neared the Burger King drive-through, the man stopped and the two began trading insults face-to-

face. (*Id.* at 98.) While they were arguing, Mr. Coles observed Mr. Davis take up a position just behind the man and to the man's right, with Mr. Collins remaining somewhere behind Mr. Davis. (*Id.* at 98-99.) As the man was looking at Mr. Coles, Mr. Davis hit the man in the head with a small, snub-nose thirty-eight with a black or brown handle. (*Id.* at 99-100.) Mr. Coles saw the handle of the gun sticking out of Mr. Davis's pants while the two were in the pool room earlier that night. (*Id.* at 100.)

After being struck by Mr. Davis, the individual ran to the drive-through window, pleading for someone to call the police. (*Id.* at 100.) Both Messrs. Coles and Davis had turned to start running-Mr. Coles toward the Trust Company Bank building and Mr. Davis closer to Oglethorpe Avenue. (*Id.*) Soon after they had started running, a police officer came around the Burger King and told them to "hold it." (*Id.* at 101.) Upon hearing the officer, Mr. Coles turned and stopped. (*Id.*) The officer ran past Mr. Coles's right side, continuing toward Mr. Davis. (*Id.*) After the officer had passed him, Mr. Coles heard a single gunshot, which caused him to turn and resume running toward the Trust Company Bank building. (*Id.* at 101-02.) As he was running, Mr. Coles heard two more gunshots. (*Id.* at 102.) Mr. Coles stated that he was wearing a yellow t-shirt and blue shorts the night of the shooting, but could not remember what Mr. Davis was wearing. (*Id.* at 103.)

On cross-examination, Mr. Coles testified that he was five feet eleven inches tall, and weighed between one hundred forty and one hundred forty-five pounds. (*Id.* at 104-05.) He also admitted to carrying a firearm in the waistline of his shorts earlier that evening, but claimed that he no longer possessed it at

the time of the argument. (*Id.* at 115.) Specifically, he gave the weapon to Mr. Sams because Mr. Coles did not want to carry it into the pool room. (*Id.* at 116-17.) The weapon, a long-barreled, chrome-plated thirty-eight, was never returned to Mr. Coles. (*Id.* at 116.)

Also on cross-examination, Mr. Coles stated that he continued running to the Yamacraw neighborhood until he reached the home of his sister, Ms. Valerie Gordon. (*Id.* at 123.) Mr. Coles had been sitting on his sister's porch for twenty to thirty minutes when a shirtless Mr. Davis approached and asked Mr. Coles for a shirt. (*Id.* at 127-28.) Mr. Coles gave Mr. Davis the yellow t-shirt that he had been wearing earlier that night-the only spare shirt Mr. Coles had on hand. (*Id.* at 128- 29.)

D. Dorothy Ferrell

At the hearing, Ms. Ferrell testified that, in the early hours of August 19, 1989, she was descending the stairwell of the Thunderbird Motel when she observed some commotion in the Burger King parking lot, which was across Oglethorpe Avenue. (*Id.* at 131.) Ms. Ferrell saw a police officer tell three African-American males, who were running from the parking lot, to stop. (*Id.*) One of the men continued to run. (*Id.*) The second turned and stopped. (*Id.*) The third man was walking backwards, away from the officer, when he fired a gun at the officer. (*Id.* at 131, 133.) When the shot was fired, the second man resumed his flight. (*Id.* at 136.) It took a moment for the officer to fall to the ground. Then, the shooter fired three or four additional bullets at the officer. (*Id.* at 137-38.)

Ms. Ferrell testified that the gunman was wearing a white t-shirt with some letters or a design on it. (*Id.* at 138.) She was unable to recall what the other two men were wearing. (*Id.* at 136-37.) Also, Ms. Ferrell testified that she identified the shooter from a photo array. (*Id.* at 139-40.)

On cross-examination, Ms. Ferrell testified that she had a good look at the face of the man in the white t-shirt. (*Id.* at 147.) Ms. Ferrell described the shooter as having a medium build, with lighter colored skin than herself. (*Id.* at 153-54.) She recalled him having a slim, narrow face with what looked like a slight moustache. (*Id.* at 148.) However, Ms. Ferrell admitted that she never saw the gunman's face straight on, only from each side. (*Id.* at 151.) Ms. Ferrell was unable to provide a description of the gun used in the shooting. (*Id.* at 150.)

Ms. Ferrell also testified that she first saw a picture of the shooter on the front seat of a police cruiser a few days after the shooting, while she was talking to an officer about an unrelated matter. (*Id.* at 154-55.) She told the officer that she recognized the man in the picture as the individual who shot the officer in the Burger King parking lot. (*Id.* at 155-56.) Approximately a week after she saw the picture in the police cruiser, Ms. Ferrell identified the same individual from an array of five photographs. (*Id.* at 156-57.) She was positive that the man she identified was the shooter, despite the fact that the photograph showed Mr. Davis straight on and she saw only the gunman's profiles on the night of the shooting. (*Id.* at 157-58.)

E. Jeffery Sapp

At the hearing, Mr. Sapp testified that, at approximately 2:00 or 3:00 p.m. on August 19, 1989, he stopped to talk with Mr. Davis, who was riding a bicycle through the neighborhood. (*Id.* at 160.) Mr. Davis asked Mr. Sapp if he heard about a shooting. (*Id.* at 161.) Mr. Sapp acknowledged that he knew about the officer being shot in the Burger King parking lot. (*Id.*) In response, Mr. Davis stated that he had shot the officer and explained what happened. (*Id.*)

Mr. Davis explained that Mr. Coles was arguing with an individual, who said something to Mr. Davis. (*Id.* at 161.) In response, Mr. Davis hit the individual in the face with a pistol, causing him to run to the drive-through window and call for the police. (*Id.*) Mr. Davis ran at first, but stopped when the officer told him to freeze. (*Id.*) Mr. Davis then shot the officer when the officer reached for his firearm. (*Id.*) Thinking that the officer got a good look at his face, Mr. Davis “finished the job.” (*Id.*) Mr. Davis also said that he shot the officer in self-defense. (*Id.* at 161-62.)

On cross-examination, Mr. Sapp testified that he stopped Mr. Davis to ask him about the shooting at the Cloverdale party. (*Id.* at 164.) Mr. Davis stated that he did not know who fired the shots at the party, then inquired if Mr. Sapp heard about another shooting. (*Id.* at 165-66.) Mr. Sapp opined that Mr. Davis confessed to him because they were close friends. (*Id.* at 167.) Mr. Sapp admitted that he did not believe the confession. (*Id.* at 169.)

F. Monty Holmes

At the hearing, Mr. Holmes testified that, on August 19, 1989, Mr. Davis visited Mr. Holmes, who had just returned to Savannah, at his home. (*Id.* at 171-72.) While they were catching up, Mr. Davis mentioned the shooting in the Burger King parking lot. (*Id.* at 173-74.) Mr. Davis explained that he had been in a quarrel when the police officer appeared. (*Id.* at 174.) When the officer reached for his gun, Mr. Davis shot him in self-defense. (*Id.* at 174-75.) Mr. Davis said that, after he shot the officer the first time, he had to “finish the job.” (*Id.* at 175.) Mr. Holmes thought Mr. Davis was joking. (*Id.*)

On cross-examination, Mr. Holmes estimated that the conversation took place at approximately noon and that Mr. Davis rode a bicycle to Mr. Holmes’s residence. (*Id.* at 177.) Mr. Holmes reiterated that he thought Mr. Davis’s confession was a joke. (*Id.* at 178.)

III. THE TRIAL

Mr. Davis was charged with the murder of Officer MacPhail, aggravated assault on Mr. Cooper, obstruction of a law officer, and possession of a gun in commission of a felony. (Trial Transcript at 8.) Mr. Davis pled not guilty and proceeded to trial. The trial occurred in Chatham County Superior Court and lasted from August 19 to 28, 1991. The state presented thirty-four⁶ witnesses in its case-in-chief. (*Id.* at 2-5.) Mr. Davis called five witnesses and testified on his own behalf. (*Id.* at 5.) After deliberating

⁶ The Court does not detail every witnesses’ testimony, restricting its account to those witnesses whose testimony is cogent to determining this petition.

for approximately two hours, the jury found Mr. Davis guilty on all counts. (*Id.* at 1608-10.) The Court now relates the relevant witness testimony.

A. Larry Young

At trial, Mr. Young testified that he was sharing a beer with Ms. Murray in the Burger King parking lot in the early hours of August 19, 1989. (*Id.* at 797-98.) When the couple finished, Mr. Young walked to the nearby Time-Saver to purchase more beer. (*Id.* at 798.) As he was returning, a man asked him for one of the newly purchased beers. (*Id.* at 799.) When Mr. Young refused, the man began cursing at Mr. Young, following him as he walked back toward the Burger King. (*Id.*) Mr. Young was continuing toward the Burger King parking lot when he noticed a second man following him, this one approaching from the Trust Company Bank property. (*Id.*) As Mr. Young was entering the Burger King parking lot, the man he was arguing with said something that caused the two gentlemen sitting next to Ms. Murray to flee. (*Id.*) Mr. Young, however, thought little of it and continued to walk toward the Burger King parking lot. (*Id.*) As Mr. Young entered the parking lot, he realized that he was now surrounded by three individuals. (*Id.* at 799-800.) The man he was arguing with was in front of him, and the other two individuals were behind him, one on his right and one on his left. (*Id.* at 800.)

Of the three men, Mr. Young focused his attention mostly on the man he had been arguing with, who now stood directly in front of him. (*Id.*) The man in front of him was wearing a yellow shirt and was somewhat slender, tall, and had light brown-skin. (*Id.* at 800-01.) He could not describe the other two

men, but remembered that the individual on his right wore a white t-shirt. (*Id.* at 801-02.)

Mr. Young did try to keep an eye on all three men. However, soon the man in the yellow shirt made a move toward him, causing Mr. Young to shift his attention solely to this individual. (*Id.* at 802.) As Mr. Young looked forward, he received a hard blow to his head. (*Id.*) Dazed, he stumbled toward the drive-through window, where a van was waiting, and asked for help. (*Id.* at 803-04.) When Mr. Young was at the drive-through window, he heard a single gunshot, causing him to hide behind the van. (*Id.* at 804.) He then ran to the building's front door. (*Id.*) Once inside, Mr. Young was rejoined by Ms. Murray, who helped tend to Mr. Young's wound. (*Id.* at 804-05.)

Mr. Young testified that the person who struck him was definitely not the man in the yellow shirt that he had been arguing with. (*Id.* at 811.) A few days after the assault, Mr. Young picked an individual out of a photo array that he believed was the man he was arguing with. (*Id.* at 805.) However, he later saw the man he was arguing with while at the police station. (*Id.* at 805-06.) Realizing his mistake, Mr. Young informed the police that his earlier identification was incorrect and that the man at the station was the man in the yellow shirt. (*Id.* at 806.) At trial, Mr. Young testified that he did not recognize Mr. Davis as the man he had been arguing with. (*Id.* at 813-14.)

On cross-examination, Mr. Young testified that the man he was arguing with might have threatened to shoot him, which caused the gentlemen with Ms. Murray to flee. (*Id.* at 825.) Mr. Young could not recall the man in the white t-shirt saying anything that night. (*Id.* at 824-25.) Also, Mr. Young

described the man in the white t-shirt as slim, and wearing dark colored shorts and a baseball cap. (*Id.* at 828.)

Regarding Mr. Young's initial misidentification in the photo array, Mr. Young testified that the photo he first picked out as the man he was arguing with depicted Mr. Davis. (*Id.* at 831-32.) However, Mr. Young reiterated that his original identification was incorrect and he had not been arguing with Mr. Davis. (*Id.* at 832-33.) While Mr. Young was not sure who exactly hit him, he was sure that it was the individual behind him on his right, and not the man he had been arguing with. (*Id.*)

B. Harriet Murray

Ms. Murray testified at the trial that she was drinking beer with Mr. Young in the Burger King parking lot in the early hours of August 19, 1989. (*Id.* at 840-41.) After the two finished their last beer, Mr. Young walked to the nearby convenience store to purchase more. (*Id.* at 842.) When Mr. Young left, Ms. Murray was joined by two gentlemen who had just disembarked from a bus. (*Id.* at 842-43.) As Mr. Young returned, Ms. Murray noticed an individual following and harassing Mr. Young. (*Id.* at 843.) As the pair drew nearer, Ms. Murray noticed two additional individuals following Mr. Young, approaching from the Trust Company Bank property. (*Id.* at 843-44.) The three men steadily closed in on Mr. Young as he neared the parking lot. (*Id.* at 844.)

As the group neared the parking lot, an individual in a yellow shirt threatened to shoot Mr. Young. (*Id.* at 845.) Ms. Murray then saw one of the individuals following Mr. Young start digging in the front of his pants. (*Id.*) These events caused the two gentlemen

with Ms. Murray to flee. (*Id.*) Worried, she went to the Burger King entrance, which was locked, to ask if someone could call the police. (*Id.* at 845-46.)

Unable to find help, Ms. Murray turned her attention back to Mr. Young, who was now being confronted by the individual in the yellow shirt. (*Id.* at 846.) As Mr. Young turned to face the individual in the yellow shirt, an individual in a white shirt, located on Mr. Young's right side, hit Mr. Young on the right side of his face with a brown-handled gun with a black barrel. (*Id.* at 846-47.) After he received the blow, Mr. Young ran in between a van waiting at the drive-through and the drive-through window, pleading for someone to call the police. (*Id.* at 848.)

While Mr. Young was at the drive-through window, a police officer entered the parking lot from behind the Burger King restaurant. (*Id.* at 848.) As the officer was approaching, the individuals in the yellow and white shirts started running. (*Id.* at 848-49.) The third individual had started running as soon as Mr. Young was hit. (*Id.*) After the police officer told the two to "hold it," the individual in the yellow shirt slowed. (*Id.* at 849.) The officer ran past the individual in the yellow shirt and continued toward the individual in the white shirt. (*Id.*) After the officer ran past him, the individual in the yellow shirt resumed running toward the back of the Trust Company Bank property. (*Id.*) As the officer chased the individual in the white shirt, nightstick in hand, the individual stopped and looked over his shoulder. (*Id.* at 850.) When the officer came within five or six feet, the individual in the white shirt turned around, gun in hand, and pulled the trigger. (*Id.*) The gun did not discharge, but only clicked, causing the officer to reach for his own firearm. (*Id.*) As the officer was

reaching, the individual in the white shirt shot him. (*Id.*) Reeling from the shot, the officer fell to the ground, at which point the individual in the white shirt took a few steps forward and shot him again. (*Id.*) After firing his last shot, the individual in the white shirt fled toward the Trust Company Bank building. (*Id.* at 851.) Ms. Murray then found Mr. Young and helped tend to his wound. (*Id.*)

Ms. Murray described the individual in the yellow shirt, who had been arguing with Mr. Young, as stocky and slightly taller than Mr. Young with light colored skin. (*Id.* at 846.) The first time Ms. Murray was shown a photo spread, she did not recognize any of the individuals pictured. (*Id.* at 861-62.) Later, Ms. Murray was shown a second photo spread, from which she identified Mr. Davis as the man who both hit Mr. Young and shot the officer. (*Id.* at 862-65.) Ms. Murray testified that she recognized Mr. Davis's photograph because of his narrow face. (*Id.* at 865.)

On cross-examination, Ms. Murray admitted that she was a little near-sighted and had trouble seeing long distances without her glasses, which she was not sure if she was wearing that night. (*Id.* at 870.) Also, Ms. Murray was questioned regarding discrepancies between her trial testimony, police statement, and Recorder's Court testimony regarding which individual threatened to shoot Mr. Young and was digging in his shorts. (*Id.* at 871-79.) Further, Ms. Murray described the man in the yellow shirt as having a chubby face, and taller, stockier, and lighter in skin color than Mr. Young. (*Id.* at 883.) She recalled that the man in the white shirt was tall and slender with dark colored skin, a narrow face, and a fade-away hair cut. (*Id.* at 883-84.) Comparing the individuals in the yellow and white shirts, Ms.

Murray testified that the individual in the yellow shirt was shorter, heavier, and lighter in skin color than the individual in the white shirt. (*Id.* at 885.) Also, Ms. Murray admitted that when she first picked out Mr. Davis's picture from the photo spread, she told the police only that he was one of the three men at the shooting, not that he was the gunman. (*Id.* at 888-89.)

C. Sylvester "Red" Coles

Mr. Coles testified at the trial that, in the early hours of August 19, 1989, he was outside of Charlie Brown's pool room when he asked a man passing by for a beer. (*Id.* at 900.) Mr. Coles began arguing with the individual when he was refused, following him along Oglethorpe Avenue toward the Burger King parking lot. (*Id.* at 902-04.) Messrs. Davis and Collins were trailing the two, coming around the back of the Trust Company Bank building. (*Id.*) The three young men converged on the individual with the beer in the Burger King parking lot, Mr. Coles in front of him, Mr. Davis behind the individual to his right, and Mr. Collins in the background. (*Id.* at 908-09.) As the individual was looking at Mr. Coles, Mr. Davis hit the man on the right side of the head with a black, short-barreled, thirty-eight with a brown handle. (*Id.* at 908, 912-13.) He recalled seeing Mr. Davis with a gun in the waistline of his pants earlier when they were at the pool room. (*Id.* at 913.)

After the assault the group scattered: the man who was struck ran to the drive-through window, Mr. Coles ran toward the back of the Trust Company Bank building, and Mr. Davis ran along Oglethorpe Avenue toward the front of the Trust Company Bank property. (*Id.* at 909.) As they started to run, a police officer appeared from behind the Burger King

and ordered everyone to “hold it.” (*Id.* at 910.) Mr. Coles stopped and turned, and the officer ran past him toward Oglethorpe Avenue. (*Id.* at 910.) As the officer past him, Mr. Coles heard a single gunshot. (*Id.* at 910-11.) After hearing the first gunshot, he turned and resumed running, at which point he heard two more gunshots. (*Id.* at 911.) Mr. Coles continued running until he reached his sister’s house in the Yamacraw neighborhood. (*Id.* at 912.)

When Mr. Coles arrived at his sister’s house, he changed out of his yellow t-shirt. (*Id.* at 914.) Approximately twenty to thirty minutes after Mr. Coles arrived, Mr. Davis appeared at the house. Mr. Davis was not wearing a shirt when he arrived and asked for one to wear. (*Id.*) Mr. Coles gave Mr. Davis the only other shirt he had at the house-the yellow t-shirt he had been wearing earlier. (*Id.*) As Mr. Coles was leaving, Mr. Davis put on the yellow t-shirt. (*Id.* at 915.)

On cross-examination, Mr. Coles admitted that he was carrying a long barreled, thirty-eight caliber revolver on the night of the shooting. (*Id.* at 927.) During his re-direct examination, Mr. Coles described the firearm as chrome plated, making it silver in color. (*Id.* at 952.) During cross-examination, Mr. Coles also testified that he had been carrying the revolver in the waist of his pants, but would often leave it in some bushes on the side of the building when he went inside the pool room. (*Id.* at 927-28.) On the night of the shooting, Mr. Coles gave the gun to Mr. Sams for safekeeping, approximately thirty minutes after Mr. Sams arrived at the pool room. (*Id.* at 930-31.) Mr. Coles never recovered the weapon. (*Id.* at 931.)

Also on cross-examination, Mr. Coles testified that he arrived at the pool room at approximately 8:00 p.m. and was not in Cloverdale the evening of the shooting. (*Id.* at 922-24, 926.) He further testified that he neither threatened to shoot anyone nor heard Mr. Davis speak to the man with the beer. (*Id.* at 936-37.) Mr. Coles admitted that he did not see Mr. Davis shoot the officer and did not remember what Mr. Davis was wearing on the night of the shooting. (*Id.* at 930, 942.) Mr. Coles stated that he was five feet eleven inches tall and weighed between one hundred forty-five and one hundred fifty pounds. (*Id.* at 920.) He explained that he often kept clothes at his sister's house because he liked to change after playing basketball in that neighborhood. (*Id.* at 924-25.) Mr. Coles admitted that, after leaving his sister's house, he walked back by the Burger King parking lot, then returned to her house. (*Id.* at 947-48.)

The afternoon after the shooting, Mr. Coles's brother and uncle took him to an attorney, for whom Mr. Coles had occasionally worked. (*Id.* at 948-49.) After listening to Mr. Coles, the attorney promptly took Mr. Coles to the police station to provide a voluntary statement. (*Id.* at 949.)

D. Antoine Williams

Mr. Williams testified at the trial that, in the early hours of August 19, 1989, he was arriving for his 1:00 a.m. shift at the Burger King. (*Id.* at 955-56.) As Mr. Williams was pulling into the parking lot, he noticed three men following one individual, who was telling them he did not want to fight. (*Id.* at 957-58.) Mr. Williams parked his car facing the drive-through window, where a van was waiting for its order. (*Id.* at 961.) While the group was between Mr. Williams

and the drive-through window, one of the three men ran in front of the lone individual and struck him with a gun. (*Id.* at 960-61.)

Immediately after the assault, a police officer came from behind the Burger King building, running toward the men and telling them to stop. (*Id.* at 961-62.) The two men not responsible for the assault took off running, but the third was trying to hide the weapon in his waistline. (*Id.* at 962.) As the officer came closer and the individual could not hide the gun, the individual shot the officer. (*Id.*) According to Mr. Williams, the shooting occurred a couple of feet behind him. (*Id.*) After the shooting, Mr. Williams went inside the Burger King and told his manager to call the police. (*Id.* at 962-63.)

On August 29, 1989, Mr. Williams was shown a photo spread and asked if he could recognize Officer MacPhail's murderer. (*Id.* at 963.) Mr. Williams identified Mr. Davis as the man who both hit the individual with the gun and shot the officer. (*Id.* at 963-64.) Mr. Williams also testified that Mr. Davis was wearing either a white or yellow shirt, contrary to an earlier statement given to the police. (*Id.* at 958.) Mr. Williams explained that he could not distinguish these colors due to the dark tint on his car's windows. (*Id.* at 959-60.) However, when Mr. Williams was shown his prior statement, in which he stated that the gunman was wearing either a white or blue shirt, he reaffirmed his prior statement, explaining that he could remember those details better immediately following the shooting. (*Id.*)

On cross-examination, Mr. Williams stated that the individual who was assaulted was struck on the left side of his head and that Officer MacPhail's murderer was not wearing a hat. (*Id.* at 967-68.) With respect

to the photo spread, Mr. Williams admitted to seeing a wanted poster of Mr. Davis at work prior to being shown the photos and that he was only sixty percent sure that his identification was accurate. (*Id.* at 970-71.)

E. Steven Sanders

Mr. Sanders testified at the trial that, in the early hours of August 19, 1989, he was a passenger in a van at the Burger King drive-through window. (*Id.* at 976-77.) While the occupants of the van were placing their orders, Mr. Sanders observed two African-American men walking toward the Burger King building, trailed by two other African-American men. (*Id.* at 977-78.) As they walked in front of the van, one of the trailing men caught up, pushed one of the leading individuals, and then struck him on the right side of his head with an object. (*Id.* at 978, 981.) After he was hit, the victim started banging on the hood of the van, asking for help and for someone to call the police. (*Id.*)

Turning his attention to the assailant, Mr. Sanders observed him start to run through the Burger King parking lot. (*Id.* at 979.) He then witnessed the attacker shoot a police officer, which was the first time Mr. Sanders noticed the officer. (*Id.*) To Mr. Sanders, it appeared that the police officer was already standing in the parking lot, the gunman shooting him as the gunman ran past the officer. (*Id.* at 979-80.) The officer fell to the ground, at which point the gunman fired several more bullets. (*Id.*) When he was finished, the shooter fled toward the back of the Trust Company Bank building. (*Id.* at 980.) Mr. Sanders testified that the gunman was wearing a white t-shirt, dark shorts, and a white hat,

and identified Mr. Davis as the individual responsible for both the assault and the murder. (*Id.* at 983.)

On cross-examination, Mr. Sanders admitted that he initially told the police he would not be able to identify the gunman, except by what he was wearing. (*Id.* at 984.) He further conceded that he saw a picture of Mr. Davis in the paper the day before he testified. (*Id.* at 983-84.) Mr. Sanders could identify neither the individual that was struck in the head nor the object used to strike him. (*Id.* at 986.) Also, Mr. Sanders testified that, after the shooting, he observed a second man, dressed in a black shirt and black pants, run in the same direction as the shooter. (*Id.* at 988.) This second individual appeared to be trailing the shooter, but not running with him. (*Id.*)

F. Robert Grizzard

Mr. Grizzard, a staff sergeant in the United States Air Force, testified at the trial that he was at the Burger King drive-through window in the early hours of August 19, 1989 in a van, which he was driving. (*Id.* at 996-97.) While there, Mr. Grizzard noticed one individual chasing a second across the parking lot toward the Burger King. (*Id.* at 998.) When the man in front tripped and fell, the pursuer veered off and headed away from the building. (*Id.* at 998.)

While he was still at the window, Mr. Grizzard again saw the man who had been chasing the individual. (*Id.*) This time, Mr. Grizzard saw him strike another man in the head. (*Id.*) The individual who had been struck staggered toward the van's driver's side window, asking for someone to call the police. (*Id.*) Next, Mr. Grizzard observed a police officer running toward the assailant. (*Id.*) As the officer approached, the individual aimed a weapon at the

officer and fired one shot. Struck by the bullet, the officer fell to the ground, at which point the gunman fired at least one more shot at the officer. (*Id.*) When he finished shooting, the gunman fled. (*Id.* at 998-99.) Mr. Grizzard described the weapon as dark in color with a short barrel. (*Id.* at 1009.)

Mr. Grizzard testified that the gunman was wearing a dark baseball hat and a light colored shirt, the exact color of which he could not recall. (*Id.* at 999.) However, Mr. Grizzard was sure that the same individual who struck the man on the head shot the officer. (*Id.*) Mr. Grizzard was unable to identify Mr. Davis as the shooter. (*Id.* at 1002.)

On cross-examination, Mr. Grizzard reiterated that he did not see what the assailant used to strike the individual. (*Id.* at 1007-08.) Also, Mr. Grizzard again stated that he would not be able to identify the gunman. (*Id.*)

G. Dorothy Ferrell

Ms. Ferrell testified at the trial that, on the night of August 18, 1989, she was a guest at the Thunderbird Motel, located across Oglethorpe Avenue from the Burger King. (*Id.* at 1011-12.) Around 1:00 a.m. on August 19, 1989, she was descending a stairwell at the motel when she heard screaming from the Burger King parking lot. (*Id.* at 1012-13.) She ran to the sidewalk to get a better view. (*Id.* at 1013.)

From the sidewalk, she saw three men in the Burger King parking lot. (*Id.*) As one of the men started running toward the Trust Company Bank property, a police officer entered the parking lot and told the men to stop. (*Id.* at 1013-14.) As the officer approached, one of the men, who was wearing a light yellow t-shirt, started moving backwards. (*Id.* at

1014-15.) Then the third man, who was wearing a white t-shirt and dark shorts, shot the officer. (*Id.* at 1015.) After the officer fell to the ground, the gunman stepped forward, stood over the officer, and fired more bullets at him. (*Id.* at 1016.) Finished, the gunman ran toward the Trust Company Bank. (*Id.* at 1016.) At trial, Ms. Ferrell identified Mr. Davis as the individual who shot the officer. (*Id.* at 1021.)

Ms. Ferrell also testified that, two days after the shooting, she recognized a photograph of Mr. Davis and identified him as the gunman. (*Id.* at 1021-23.) According to Ms. Ferrell, she was speaking with a police officer about matters unrelated to the MacPhail shooting when she noticed a photograph of Mr. Davis on the front passenger seat of the officer's cruiser. (*Id.* at 1022.) She informed the officer that she recognized the man in the photograph as Officer MacPhail's murderer. (*Id.* at 1023.) Ms. Ferrell had not seen any pictures of Mr. Davis prior to that identification. (*Id.*) A few days later, Ms. Ferrell was shown a photo spread and asked if she recognized the gunman. (*Id.* at 1024.) Ms. Ferrell again identified Mr. Davis. (*Id.* at 1024-25.) Ms. Ferrell testified that she was pretty confident in the accuracy of her identification. (*Id.* at 1027.)

On cross-examination, Ms. Ferrell testified that the individual in the yellow t-shirt was looking straight at the gunman when he fired the first shot. (*Id.* at 1041.) Ms. Ferrell stated that the gunman passed in front of the Trust Company Bank building while fleeing. (*Id.* at 1041-42.) She was then impeached with her police statement, in which she claimed that the gunman ran behind the Trust Company Bank building. (*Id.* at 1045-46.) Ms. Ferrell was also questioned on variations between her police statement

and trial testimony regarding when the individuals in the yellow and white t-shirts started running. (*Id.* at 1044-46.) Finally, Ms. Ferrell admitted that the portion of her police statement recounting how Officer MacPhail had run the shooter off the Burger King property earlier in the day was incorrect. (*Id.* at 1046-48.) She explained that she had not seen Officer MacPhail run the shooter off the property, only some individuals dressed like the shooter. (*Id.* at 1048.) Ms. Ferrell opined that the inconsistency was due to a misunderstanding by the officer taking her statement. (*Id.* at 1048-50.)

Also on cross-examination, Ms. Ferrell was challenged regarding her prior descriptions of the shooter. (*Id.* at 1050-52.) In her police statement, Ms. Ferrell recalled that the shooter was six feet tall with a narrow face and slender build, while she described the shooter as slightly taller than her height-five feet-and with a medium build when she testified in Recorder's Court. (*Id.* at 1050-51.) In Recorder's Court, Ms. Ferrell testified that the shooter had lighter colored skin than her. (*Id.*) However, Ms. Ferrell admitted that she and Mr. Davis had about the same skin color, while Mr. Coles's skin color was much lighter than hers. (*Id.*) Ms. Ferrell did state that she would not describe Mr. Coles's skin color as light, but rather as "red." (*Id.*) Also, Ms. Ferrell admitted that, despite testifying in Recorder's Court that the shooter had a narrow face, she never saw the shooter face-on, seeing only his left and right profiles. (*Id.* at 1052-53.) Finally, Ms. Ferrell testified that she saw Mr. Davis on television

prior to her identification of his photograph.⁷ (*Id.* at 1053-54.)

On redirect-examination, Ms. Ferrell explained a few of the inconsistencies between her various statements. Ms. Ferrell clarified that, in Recorder's Court, she stated the shooter was a little taller than Mr. Davis's attorney, not a little taller than herself. (*Id.* at 1064-65.) Also, Ms. Ferrell explained that she did not see only left and right profiles of the gunman's face. While she never observed his face straight on, Ms. Ferrell saw enough of the shooter's face at various angles to recognize that he had a narrow face. (*Id.* at 1066-67.)

H. Darrell Collins

Mr. Collins testified at the trial that he attended a party in the Cloverdale neighborhood with Messrs. Davis and Ellison on the night of August 18, 1989. (*Id.* at 1115.) When the three arrived at the party, they went to the backyard, where Mr. Collins swam in the pool while Messrs. Ellison and Davis talked with some of the guests. (*Id.* at 1116-17.) They stayed for approximately an hour and a half. (*Id.* at 1118.) As the group was walking through the front yard to Mr. Ellison's car, with Mr. Davis in front, a car drove by the house with individuals hanging out of the windows, cursing and throwing items. (*Id.* at 1118-19.) As the car rounded the corner at the end of the block, Mr. Collins heard gunshots. (*Id.* at 1120.)

Contrary to his earlier statements, Mr. Collins testified at trial that he did not see who shot at the

⁷ Ms. Ferrell also admitted during cross-examination that she had a number of prior criminal convictions for shoplifting and trespass. (*Id.* at 1060-61.)

oar. (*Id.*) The State challenged Mr. Collins with the contents of his August 19, 1989 police statement, which both placed Mr. Davis at the end of the block where the car turned and identified him as the shooter. (*Id.* at 1120-21.) At trial, Mr. Collins alleged that the police pressured him into identifying Mr. Davis as the Cloverdale shooter by threatening to charge him as an accessory to murder and give him a ten to twelve year prison sentence. (*Id.* at 1120-21, 1135-37.) Explaining his photo identification of Mr. Davis as the Cloverdale shooter, Mr. Collins testified that he identified Mr. Davis because the police asked if Mr. Collins knew any of the individuals in the photographs. (*Id.* at 1130.)

After the Cloverdale shooting, Mr. Ellison drove Mr. Collins to Mr. Ellison's home. (*Id.* at 1121.) Later, Mr. Ellison, accompanied by Messrs. Collins and Sams, were driving to purchase gasoline when they came upon Mr. Davis, who asked for a ride. (*Id.* at 1122.) Now accompanied by Mr. Davis, Mr. Ellison drove to the gas station, which was adjacent to Charlie Brown's pool room. (*Id.*) After Mr. Ellison purchased gasoline, he and Mr. Collins went inside the pool room. (*Id.* at 1123.) Mr. Collins could not recall if Mr. Davis went inside the pool room. (*Id.*)

Later, Mr. Collins observed Mr. Coles get into an argument with a gentleman in front of the pool room. (*Id.*) The two continued to argue as they walked in front of the Trust Company Bank building, toward the Burger King parking lot. (*Id.* at 1224, 1131.) Messrs. Collins and Davis followed the pair, also walking in front of the Trust Company Bank building. (*Id.* at 1131.) By the time they reached the parking lot, Mr. Collins was behind the three other individuals. (*Id.* at 1132.) As they approached the

Burger King restaurant, Mr. Davis slapped the individual that Mr. Coles was arguing with on the right side of the face. (*Id.* at 1124-25.) Mr. Collins did not see anything in Mr. Davis's hand when he dealt the blow. (*Id.*)

After Mr. Davis slapped the individual, Mr. Collins noticed a police officer standing behind the Burger King building. (*Id.* at 1125.) As Mr. Collins was turning to exit the parking lot, he saw the officer making motions toward where Mr. Davis assaulted the individual. (*Id.*) Mr. Collins heard some gunshots as he was walking away, which caused him to start running. (*Id.* at 1125-26.) He ran back to the pool room, got in Mr. Ellison's car with Messrs. Ellison and Sams, and left the area. (*Id.* at 1126.) Mr. Collins stated that, on the night of the shootings, Mr. Davis was wearing blue or black shorts and a white t-shirt with writing on it. (*Id.* at 1128.)

Mr. Collins testified that he did not see Mr. Davis with a firearm on the night of the shooting. (*Id.* at 1126-27.) Again, the State challenged Mr. Collins with his initial police statement where he described the gun Mr. Davis used at the Cloverdale shooting as short-barreled and black with a brown handle. (*Id.* at 1127.) Mr. Collins was also challenged with his August 25, 1989 police statement, in which he informed the police that he saw Mr. Davis with the weapon Mr. Davis used in Cloverdale both prior to and after that shooting. (*Id.* at 1134-35.) Yet, Mr. Collins contended that the police told him what to put in his statement and that his present testimony reflected the truth. (*Id.*) However, Mr. Collins did testify that, prior to the Cloverdale shooting, he saw Mr. Davis with a gun fitting the description that Mr.

Collins provided in his police statement. (*Id.* at 1128.)

Mr. Collins also claimed to have seen Mr. Coles with a chrome, long-barreled thirty-eight on the night of the shootings. (*Id.* at 1128-29.) He testified that, when they were at the pool room, Mr. Coles placed his weapon on the seat of Mr. Ellison's car. (*Id.* at 1129.) Prior to the MacPhail shooting, Mr. Collins took the firearm and placed it on the ground at the end of the pool room building because he did not want it in the vehicle. (*Id.*)

On cross-examination, Mr. Collins testified that he did not see Mr. Davis argue with anyone at the Cloverdale party, shoot at the vehicle, or even possess a firearm that evening. (*Id.* at 1139-43.) However, Mr. Collins admitted that he would not have been able to see a gun even if Mr. Davis was carrying one. (*Id.* at 1140.) Also, Mr. Collins testified that Mr. Coles knew that Mr. Collins placed his weapon next to the building. (*Id.* at 1148-49.)

Mr. Collins then reiterated that he and Mr. Davis passed in front of the Trust Company Bank building as they walked toward the Burger King parking lot. (*Id.* at 1151-52.) Mr. Collins could not recall Mr. Coles threatening to shoot anyone. (*Id.* at 1153.) He also claimed that he did not see anything that happened after Mr. Davis slapped the individual because he had turned to walk back to the pool room. (*Id.* at 1155-56.) Mr. Collins did not recall Mr. Davis wearing a hat on the evening of the shootings. (*Id.* at 1158.)

Mr. Collins also reiterated that he was pressured to name Mr. Davis as the Cloverdale shooter. (*Id.* at 1142-43.) He stated that he was taken to the police

station, told that he was a suspect, provided no opportunity to call an attorney, threatened with jail time, and questioned prior to his parents arrival. (*Id.* at 1143-45.) Mr. Collins was sixteen at the time and claimed that he told the police what they wanted to hear because he was scared and did not want to go to prison. (*Id.* at 1144-45.)

I. Valerie Coles Gordon

Ms. Gordon testified at the trial that, in the early hours of August 19, 1989, she was sitting on the porch of her Yamacraw neighborhood home when she heard some gunshots. (*Id.* at 1160-61.) Approximately fifteen to twenty minutes later, Ms. Gordon's brother, Mr. Coles, ran onto the porch. (*Id.* at 1161.) Mr. Coles immediately slumped over, gasping for breath, causing Ms. Gordon to think that he was hurt. (*Id.* at 1161-62.) Satisfied that he was uninjured, Ms. Gordon went into the house and laid out three shirts for Mr. Coles to change into. (*Id.* at 1162.) Ms. Gordon recalls Mr. Coles changing out of the yellow shirt he had been wearing into a blue, red, and white collared shirt. (*Id.* at 1162-63.) After changing shirts, Mr. Coles left the yellow shirt on the banister. (*Id.* at 1163-64.)

A few minutes later, Mr. Davis came up to the porch, wearing dark shorts and no shirt. (*Id.* at 1164-65.) Mr. Coles stepped outside to speak with Mr. Davis, eventually handing him the yellow shirt that Mr. Coles had previously been wearing. (*Id.*) After handing the yellow shirt to Mr. Davis, Mr. Coles left. (*Id.* at 1165.) According to Ms. Gordon, Mr. Davis put the shirt on, but quickly took it off and left it by her front door. (*Id.*) She washed the shirt the next day, later giving it to the police. (*Id.* at 1165-66.)

On cross-examination, Ms. Gordon admitted that, after arriving on the porch, Mr. Coles stated that he thought someone was trying to kill him. (*Id.* at 1168.) Ms. Gordon also stated that, prior to Mr. Davis arriving, Mr. Blige came by the house. (*Id.* at 1171.) Mr. Blige appeared to argue with Mr. Coles, who told him to leave. (*Id.* at 1171-72.) Ms. Gordon never saw Mr. Davis with a firearm. (*Id.* at 1174.)

J. Michael Cooper

Mr. Cooper testified that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (*Id.* at 1179.) Mr. Wilds drove Mr. Cooper to the party, along with Messrs. Blige, Brown, and Gordon. (*Id.* at 1179-80.) The group arrived at approximately 10:30 p.m. and went to the backyard to hang out by the pool. (*Id.* at 1181.) While at the party, Mr. Wilds argued with some gentlemen, who were across the street from the party, because the two groups were from rival neighborhoods. (*Id.* at 1182.) Mr. Cooper remembers seeing Mr. Davis in the area of the group arguing with Mr. Wilds. (*Id.* at 1182-83.)

Mr. Cooper returned to the pool area, but his group decided to leave and change their clothes because they had been splashed with water. (*Id.* at 1183.) They told some of the girls that they would be back and walked to Mr. Wilds car. (*Id.* at 1185.) As they were leaving, Mr. Cooper was in the front passenger seat, hanging out of the window speaking loudly to some girls. (*Id.* at 1185-86.) As they took a right turn, Mr. Cooper, now fully inside the vehicle, heard several gunshots. (*Id.* at 1186-87.) One struck Mr. Cooper in the right side of his jaw. (*Id.* at 1187.) Panicked, Mr. Wilds drove Mr. Cooper to the hospital. (*Id.*)

On cross-examination, Mr. Cooper admitted that he was intoxicated when he arrived at the party. (*Id.* at 1190.) He could remember neither how many men Mr. Wilds was arguing with nor whether Mr. Davis was actually a part of that group. (*Id.* at 1191.) However, Mr. Cooper was sure that Mr. Davis was in the vicinity of the argument. (*Id.* at 1191-92.) Mr. Cooper testified that he had never met Mr. Davis, and could not think of a reason why Mr. Davis would shoot at him. (*Id.* at 1192.)

K. Benjamin Gordon

Mr. Gordon testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (*Id.* at 1194.) Mr. Wilds drove Mr. Gordon to the party, along with Messrs. Blige, Brown and Cooper. (*Id.* at 1195.) After parking down the street from the party, the group walked through the front yard to the pool in the backyard. (*Id.* at 1196.) There was not a group of individuals standing near the front of the house when they arrived and nobody spoke to them as they made their way to the backyard. (*Id.* at 1196.) However, the State confronted Mr. Gordon with his August 19, 1989 police statement, in which he recounted a group of young men asking Mr. Gordon's group if they were from the Yamacraw neighborhood. (*Id.* at 1196-97.) At trial, Mr. Gordon stated that he could not remember if that happened. (*Id.* at 1197.)

Once at the party, the group socialized by the pool for some time, speaking with girls before leaving the party because they were bored. (*Id.* at 1197.) As they were leaving, Mr. Gordon was sitting in the middle of the back seat next to Mr. Blige, who was hanging out of the window. (*Id.* at 1197-98.) As they were rounding the corner at the end of the block,

someone fired a weapon at the vehicle, one bullet striking Mr. Cooper. (*Id.* at 1198-99.)

At trial, Mr. Gordon denied seeing the individual who shot at the vehicle. (*Id.* at 1199-1200.) He was again confronted with his August 19, 1989 police statement, in which he described the shooter as wearing a white, batman t-shirt and dark color jeans. (*Id.* at 1199-1201.) He had also stated that, earlier at the party, he saw the shooter by the pool. (*Id.* at 1201) At trial, Mr. Gordon testified that he only told the police that he heard someone in a white, batman t-shirt with dark jeans had been the shooter, not that he actually saw someone wearing those clothes shoot at the car. (*Id.* at 1200.) Mr. Gordon explained that he did not remember telling the police the information in his statement, which he signed without reviewing. (*Id.* at 1201-02.)

On cross-examination, Mr. Gordon testified that he was a frightened sixteen-year old when he provided the August 19, 1989 police statement. (*Id.* at 1202-03.) He explained that he was questioned by the police without having either his parents or a lawyer present. (*Id.* at 1202.) Mr. Gordon reiterated that he did not see who shot at the vehicle. (*Id.* at 1203.)

L. Craig Young

Mr. Craig Young testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989, where he saw Mr. Davis. (*Id.* at 1207-08.) However, he neither saw Mr. Davis argue nor threaten anyone at the party. (*Id.* at 1209.) Likewise, Mr. Davis never confessed these actions to him. (*Id.* at 1209.) While Mr. Craig Young did testify that he heard the gunshots, he did not see the shooter. (*Id.*)

The State confronted Mr. Craig Young with his previous police statement. (*Id.* at 1211.) In the statement, he informed the police that Mr. Davis told him at the party that Mr. Davis had gotten into an argument with an individual named “Mike-Mike,” but “Mike-Mike” did not give Mr. Davis a reason to start anything. (*Id.* at 1212-13.) According to the police statement, Mr. Davis joked that he should have “burned one of y’all.” (*Id.* at 1213.) Also, Mr. Craig Young told the police that he observed Mr. Davis cursing at a group of girls who would not talk to Mr. Davis. (*Id.* at 1213.)

With respect to the police statement, Mr. Craig Young contended that he only repeated what the police told him to say. (*Id.* at 1212.) He stated that they were yelling at him and coaching him on what to put in his statement. (*Id.*) Also, Mr. Craig Young stated that he and Mr. Davis had been fighting prior to the questioning and thought the statement was a good way to get back at Mr. Davis. (*Id.* at 1211.) But now that Mr. Craig Young was on the stand, he was not going to lie about what he saw that night. (*Id.*)

M. Eric Ellison

Mr. Ellison testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (*Id.* at 1215.) Mr. Ellison drove Messrs. Collins and Davis to the party. (*Id.*) Mr. Davis was wearing a white t-shirt with writing on it and dark colored shorts. (*Id.* at 1216-17.) After they arrived at the party, the three men went straight to the pool in the backyard. (*Id.* at 1217.) While Mr. Collins swam, Messrs. Ellison and Davis socialized by the pool. (*Id.*) Mr. Davis left the pool area after eating some food. (*Id.* at 1217-18.) Messrs. Ellison and Collins decided to leave the party after staying

for approximately an hour to an hour and a half. (*Id.* at 1218.)

As they were walking through the front yard, Mr. Ellison observed an argument between two groups on opposite sides of the street. (*Id.*) He noticed Mr. Davis standing in the walkway leading to the home where the party was being held. (*Id.*) As Mr. Ellison was standing in the driveway, he heard shots down the street. (*Id.* at 1218-19.) Mr. Ellison did not know from where, or at what, the shots were fired. (*Id.* at 1219.) However, he recalled a vehicle heading in the direction of the gunshots with an individual hanging out of its window. (*Id.* at 1219-20.)

As Mr. Ellison was walking back to his car, which was parked in the area the shots were fired from, Mr. Davis asked him for a ride back to the Yamacraw neighborhood. (*Id.* at 1220-21.) At trial, Mr. Ellison could not remember if Mr. Davis approached him from the direction of the gunshots. (*Id.* at 1221.) However, Mr. Ellison confirmed the truth of his police statement, which stated that Mr. Davis approached from the direction the shots were fired. (*Id.* at 1221-22.) After waiting for things to settle down, Mr. Ellison drove Messrs. Collins and Davis first to Mr. Ellison's house, where they picked up Mr. Sams, and then to Charlie Brown's pool room. (*Id.* 1221-23.)

After parking the car, the four men went inside the pool room. (*Id.* at 1223.) After playing several games of pool, Mr. Ellison was leaving the pool room when he heard gunshots. (*Id.* at 1223.) Mr. Ellison started to walk back to his car, where Mr. Sams was already in the backseat. (*Id.*) As Mr. Ellison neared his car, Mr. Collins arrived. (*Id.* at 1223-24.) Mr. Ellison told Mr. Collins to get in the car, and the three went to

Mr. Ellison's home. (*Id.*) Mr. Ellison did not know what became of Mr. Davis after they arrived at the pool room. (*Id.* at 1224.)

On cross-examination, Mr. Ellison testified that he did not know who fired the shots at the Cloverdale party. (*Id.* at 1225.) Also, he did not see Mr. Davis carrying a firearm that night. (*Id.*)

N. Kevin McQueen

Mr. McQueen testified at trial that Mr. Davis confessed to shooting Officer MacPhail. (*Id.* at 1231-32.) The alleged confession occurred while the two were waiting to play basketball in the Chatham County Jail. (*Id.* at 1230.) According to Mr. McQueen, Mr. Davis asked Mr. McQueen if he knew why Mr. Davis was in jail. (*Id.*) Mr. McQueen responded that everyone knew why Mr. Davis was in jail. (*Id.*) Mr. Davis explained that he got into an argument at a party in Cloverdale, which resulted in an exchange of gunfire. (*Id.* at 1230-31.) After he left the party, Mr. Davis went to his girlfriend's house, located in the Yamacraw neighborhood. (*Id.* at 1231.) Later, Mr. Davis left his girlfriend's house and walked to the Burger King to eat breakfast. (*Id.*) While Mr. Davis and a friend were on their way into the restaurant, Mr. Davis noticed someone who owed him drug money. (*Id.*) As he started arguing with the debtor, a police officer approached. (*Id.*) Afraid that the officer would connect him with the earlier Cloverdale shooting, Mr. Davis shot the officer first in the face and again as the wounded officer was trying to get up. (*Id.* at 1231-32.)

On cross-examination, Mr. McQueen admitted that he had seen a story about the shooting on the news and heard about it from other inmates. (*Id.* at 1239.)

Mr. McQueen was not sure what weapon Mr. Davis used to shoot the officer, but recalled that Mr. Davis's friend had a rifle in the trunk of his car. (*Id.* at 1240.) Mr. McQueen denied having any arguments with Mr. Davis prior to either of them being placed in jail. (*Id.* at 1241.) Also, Mr. McQueen denied hoping to gain any advantage by testifying on behalf of the State, claiming that he had already been sentenced for his crimes. (*Id.* at 1242-43.)

O. Jeffery Sapp

Mr. Sapp testified at trial that, on the afternoon of August 19, 1989, he was walking through the Cloverdale neighborhood when he approached Mr. Davis, who was riding a bicycle. (*Id.* at 1249-50.) Mr. Sapp stopped Mr. Davis and asked him about the shooting at the Cloverdale party. (*Id.* at 1250.) Mr. Davis denied any knowledge of that shooting but began to discuss the MacPhail shooting. (*Id.*) Mr. Davis said that Mr. Coles was arguing with an individual, who said something to Mr. Davis that prompted him to hit the individual with a pistol. (*Id.* at 1250-51.) After Mr. Davis struck the man, a police officer ran toward him and told him to freeze. (*Id.* at 1251.) When the officer reached for his firearm, Mr. Davis shot him in self-defense. (*Id.* at 1251-52.)

Mr. Sapp also testified that he fabricated a portion of his police statement and Recorder's Court testimony. (*Id.* at 1253-55.) Specifically, Mr. Sapp stated that, contrary to his prior statements, Mr. Davis never told him that he had to go back and finish the job because the officer got a good look at Mr. Davis's face. (*Id.*)

On cross-examination, Mr. Sapp testified that his conversation with Mr. Davis took place at approx-

imately 2:00 to 3:00 p.m. (*Id.* at 1258.) Mr. Sapp recalled that he did not believe Mr. Davis when he confessed to shooting the officer. (*Id.* at 1260.) Also, Mr. Sapp explained that his false statements were made for revenge due to a recent feud between he and Mr. Davis. (*Id.* at 1261-62.)

P. Joseph Washington⁸

Mr. Washington, who was incarcerated for armed robbery at the time of trial, testified that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (*Id.* at 1339-40.) Mr. Washington was unsure what time he arrived at the party. (*Id.* at 1340.) Mr. Washington recalled seeing Mr. Davis at the Cloverdale party, but not Mr. Coles. (*Id.* at 1343.) At some point, Mr. Washington left the party to meet a friend named “Wally” in the Yamacraw neighborhood, with whom he planned to return to the party. (*Id.* at 1340-41.)

Some girls from the party drove Mr. Washington to Yamacraw, dropping him off on the corner of the Burger King property. (*Id.* at 1341-42.) There, he observed three people arguing while he was waiting for Wally. (*Id.* at 1342.) Mr. Washington recognized one of the individuals as Mr. Coles. (*Id.* at 1342-43.) As the argument continued, Mr. Washington saw Mr. Coles hit one of the individuals. (*Id.* at 1343.) After the assault, a police officer approached the group. (*Id.*) While Mr. Coles was backing up, he fired a gun at the officer. (*Id.*) After the shooting, Mr. Washington returned to the party. (*Id.* at 1344.) Mr. Washington explained that he did not mention observing the incident in the Burger King parking lot

⁸ The following witnesses are the relevant witnesses from Mr. Davis’s defense at trial.

in his police statement concerning the Cloverdale shooting because he did not want to get involved. (*Id.*) In addition, Mr. Washington testified that Mr. Coles has a lighter complexion than Mr. Davis. (*Id.* at 1345.)

On cross-examination, Mr. Washington contended that he was at the Cloverdale party for both the earlier shooting involving Mr. Cooper and a later shooting involving Sherman Coleman.⁹ (*Id.* at 1345-46.) Also, Mr. Washington testified that he did not remember what time he left the Cloverdale party, how long he waited in the Burger King parking lot, or how long he stayed at the party when he returned. (*Id.* at 1345-48.) Finally, he could not remember Wally's last name. (*Id.* at 1347.)

Q. Tayna Johnson

Ms. Johnson testified at trial that she was at home when she heard gunshots in the early hours of August 19, 1989. (*Id.* at 1358.) Looking outside, she noticed police lights. (*Id.*) When she felt it was safe, she walked toward the police lights with her friend, Gail Dunham. (*Id.* at 1358-59.) As she was walking toward the Burger King, Ms. Johnson was approached

⁹ A second shooting occurred at the Cloverdale party at approximately 1:04 a.m. on August 19, 1989. (Resp. Ex. 30 at 642.) In this shooting, Lamar Brown shot at the party from the window of Mr. Wilds's car as it was passing the party, striking Sherman Coleman in the leg. (*Id.*) Important to Mr. Washington's credibility is the fact that he claims to be present at both the MacPhail shooting, which occurred at approximately 1:09 a.m., *see supra* Background Part I, and the Coleman shooting, which occurred at approximately 1:04 a.m. Worse still, is Mr. Washington's testimony that he observed the Coleman shooting after he returned from observing the MacPhail shooting. (Trial Transcript at 1348.)

by Mr. Coles and an individual named Terry. (*Id.* at 1359.) Mr. Coles asked if they could walk with the two down the street. (*Id.* at 1359.) Ms. Johnson agreed, and the group headed toward the Burger King and the police lights. (*Id.*)

As they approached the Burger King, Mr. Coles did not want to walk into the parking lot. (*Id.* at 1359-60.) After visiting the Burger King, Ms. Johnson and Mr. Coles walked back to Ms. Johnson's mother's home. (*Id.* at 1360.) While they were at the house, Mr. Coles asked Ms. Johnson to return to the Burger King and look for police. (*Id.*) Ms. Johnson returned to the Burger King, spoke with the police, and reported back to Mr. Coles. (*Id.*)

Ms. Johnson recalls that Mr. Coles was acting very nervous, especially after she informed him that the police were investigating the Burger King shooting. (*Id.* at 1361.) Also, Ms. Johnson stated that Mr. Coles was wearing a white shirt that evening. (*Id.* at 1362.) Ms. Johnson also attended the Cloverdale party, where she saw Mr. Coles and Mr. Davis. (*Id.* at 1364.) She testified that she did not see Mr. Davis argue with anyone while he was at the party. (*Id.* at 1365.)

On cross-examination, Ms. Johnson admitted that Mr. Coles appeared not to know what happened at the Burger King when he asked her to go and look around. (*Id.* at 1366.) Also, Ms. Johnson stated that she only saw Mr. Davis on a few occasions while he was at the party, but that she would have heard if he had gotten into an argument. (*Id.* at 1368-69.)

R. Jeffery Sams

Mr. Sams testified at trial that he attended a party in the Cloverdale neighborhood on the evening of

August 18, 1989. (*Id.* at 1373.) Mr. Sams stayed at the party for fifteen to twenty minutes, then left to take his car home. (*Id.* at 1373-74.) He saw Mr. Davis at the party. (*Id.* at 1374.)

After driving his car home, Mr. Sams was walking back to the party when he came upon a vehicle driven by Mr. Ellison. (*Id.*) Messrs. Collins and Davis were also in the automobile. (*Id.* at 1374-75.) Mr. Sams joined the group, which then went to Charlie Brown's pool room. (*Id.* at 1375.) Mr. Sams went inside the pool room for five or ten minutes, then returned to the vehicle to listen to music. (*Id.* at 1376.) He remembers seeing both Mr. Davis and Mr. Coles inside the pool room. (*Id.* at 1376.)

While he was sitting in Mr. Ellison's car, Mr. Coles placed a firearm on the front seat. (*Id.* at 1377.) Almost immediately, Mr. Collins took the weapon and walked toward the side of the pool room. (*Id.* at 1378.) Soon after, Mr. Sams fell asleep, not waking until after Mr. Ellison drove away from the pool room. (*Id.* at 1379.) Mr. Sams did not recall seeing Mr. Davis with a gun that night. (*Id.* at 1379-81.)

On cross-examination, Mr. Sams described the firearm Mr. Coles placed on the front seat as real shiny. (*Id.* at 1382.) Mr. Sams reiterated that he had never seen Mr. Davis with a firearm. (*Id.* at 1384.) Finally, Mr. Sams admitted that it was possible for Mr. Davis to have a weapon in the waistline of his pants without it being noticed. (*Id.*)

S. Virginia Davis

Virginia Davis, Mr. Davis's mother, testified at trial that Mr. Davis went to a party in Cloverdale on the evening of August 18, 1989. (*Id.* at 1386-87.) He left for the party with Messrs. Ellison, Collins, and

Sams. (*Id.* at 1387.) Ms. Davis also testified that when she woke Mr. Davis for breakfast on the morning of August 19, 1989, he was not acting nervous or in any way out of the ordinary. (*Id.* at 1388-89.) After breakfast, Mr. Davis stayed at home all day. (*Id.* at 1389.) Ms. Davis never saw Mr. Davis talking to Mr. Sapp that afternoon. (*Id.*)

On cross-examination, Ms. Davis stated that Mr. Davis never left her sight from 10:00 a.m. to 4:00 p.m. on August 19, 1989. (*Id.* at 1395-96.) She also testified that she would have known if Mr. Davis left the property. (*Id.* at 1399.) Finally, Ms. Davis recalled that Mr. Davis was wearing blue shorts and a multi-colored shirt when he left for the Cloverdale party. (*Id.* at 1411-12.)

T. Troy Davis

At trial, Mr. Davis took the stand in his own defense. (*Id.* at 1415.) He testified that he arrived at the Cloverdale party between 10:00 and 10:15 p.m. wearing a pink and purple polo shirt. (*Id.* at 1416, 1418.) After socializing in the backyard for approximately twenty-five to thirty minutes, Mr. Davis decided to leave the party. (*Id.* at 1417.) As he was walking, Mr. Davis observed a car speeding down the street. (*Id.*) The vehicle was rounding the corner at the end of the block when he heard a gunshot. (*Id.* at 1417-18.) He did not see who fired the gun. (*Id.* at 1418.)

When Mr. Davis returned home, he changed shirts because his shirt had gotten wet at the party. (*Id.* at 1418.) Mr. Davis never stated what color shirt he was wearing after he changed clothes. Mr. Davis then went for a ride with Messrs. Collins and Ellison. (*Id.*) While they were driving, they picked up Mr. Sams,

whom they passed walking on the side of the road. (*Id.* at 1418-19.) The group first drove back by the Cloverdale party, then decided to shoot pool at Charlie Brown's pool room. (*Id.* at 1419.)

Mr. Davis was waiting to play a game of pool when Mr. Collins told him that Mr. Coles was outside arguing with someone. (*Id.* at 1420.) After going outside, Mr. Davis decided to follow the arguing pair. (*Id.* at 1421.) As he neared Mr. Coles, Mr. Davis figured out that Mr. Coles wanted the man to give him some of his beer. (*Id.*) Mr. Davis told Mr. Coles to just leave the man alone, but Mr. Coles told him to "shut the hell up." (*Id.* at 1421-22.) Joined by Mr. Collins, Mr. Davis continued following Mr. Coles to see what would happen. (*Id.* at 1422.)

Mr. Davis, along with Mr. Collins, cut through the back of the Trust Company Bank property on their way to the Burger King parking lot. (*Id.* at 1422.) As Mr. Coles was about to cross Fahm Street toward the Burger King parking lot, Mr. Davis overheard Mr. Coles threaten to take the life of the man with whom Mr. Coles was arguing. (*Id.* at 1422-23.) Mr. Davis caught up with Mr. Coles and the individual in the middle of the Burger King parking lot. (*Id.* at 1423.) According to Mr. Davis, he again pleaded with Mr. Coles to leave the man alone, but was told to shut up. (*Id.*)

Mr. Davis testified that the individual turned to Mr. Davis and told him to tell Mr. Coles to back off. (*Id.*) While the individual was focused on Mr. Davis, Mr. Coles slapped him in the head. (*Id.*) Mr. Davis stated that, after Mr. Coles slapped the individual, Mr. Davis shook his head and started walking away. (*Id.*) As he was walking, Mr. Davis observed Mr. Collins running, prompting Mr. Davis to start jogging

away from the Burger King. (*Id.*) Looking over his shoulder, Mr. Davis saw a police officer entering the Burger King parking lot. (*Id.*) When Mr. Davis was crossing back over Fahm Street, toward the Trust Company Bank property, he heard a single gunshot, which caused him to run even faster. (*Id.* at 1424.) Mr. Davis was running past Charlie Brown's when he heard a few more gunshots. (*Id.*) As Mr. Davis was entering the Yamacraw neighborhood, Mr. Coles ran past him. (*Id.*) Thinking Mr. Coles had been shot, Mr. Davis asked him if he was alright, but Mr. Coles continued running and did not respond. (*Id.*) Mr. Davis then walked home to the Cloverdale neighborhood, arriving sometime before 2:00 a.m. (*Id.* at 1425.) Mr. Davis testified that he never looked back to see who was firing the weapon. (*Id.* at 1424.)

According to Mr. Davis, he slept until his mother woke him the next morning. (*Id.* at 1426.) After he awoke, Mr. Davis showered, ate breakfast, and started performing his weekend chores. (*Id.* at 1426-27.) Mr. Davis testified that he only saw his neighbor, Ms. Shelley Sams, that afternoon. (*Id.* at 1427.) He denied both speaking to Mr. Sapp or riding a bicycle in the neighborhood. (*Id.* at 1431.)

Mr. Davis testified that, at the time of the shooting, he weighed approximately one-hundred and seventy-five pounds. (*Id.* at 1433.) He denied ever having a fade-away haircut. (*Id.*) Comparing himself to Mr. Coles, Mr. Davis stated that he was the same height, a little bigger, and had a darker complexion. (*Id.* at 1434.) While he recognized Mr. McQueen from jail, Mr. Davis denied ever playing basketball or speaking with Mr. McQueen. (*Id.*)

On cross-examination, Mr. Davis testified that, at the Cloverdale party, he never noticed a group of individuals from Yamacraw talking to girls. (*Id.* at 1437-39.) He stated that he recognized only five or six people at the party. (*Id.* at 1439.) Mr. Davis denied shooting at Mr. Wilds's vehicle. (*Id.* at 1440.) Regarding the events in the Burger King parking lot, Mr. Davis stated that he approached the Burger King parking lot from behind the Trust Company Bank building because he thought it was faster, not because he wanted to approach the man Mr. Coles was arguing with without being seen. (*Id.* at 1446-48.) Also, Mr. Davis reiterated that it was Mr. Coles who slapped Mr. Young. (*Id.* at 1451.) He denied shooting the police officer, seeing Mr. Coles at his sister's house later that evening, or speaking to Mr. McQueen while imprisoned in the Chatham County Jail. (*Id.* at 1453, 1456, 1458-59.)

IV. SUBSEQUENT PROCEEDINGS

A. Motion for New Trial

After he was convicted, Mr. Davis filed a Motion for New Trial. (Doc. 14, Ex. 28.) On February 18, 1992, a hearing on the motion was held in Chatham County Superior Court. (*Id.*) On March 16, 1992, the court denied Mr. Davis's motion. (Doc. 21 at 15.)

B. Direct Appeal

Mr. Davis appealed his conviction directly to the Georgia Supreme Court. *Davis v. State*, 263 Ga. 5, 426 S.E.2d 844 (1993). After oral argument, the Georgia Supreme Court unanimously affirmed Mr. Davis's convictions and capital sentence. *Id.* On November 1, 1993, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. (Doc. 15, Attach. 12.)

C. State Habeas Proceedings

On March 15, 1994, Mr. Davis filed a petition for a writ of habeas corpus in the Georgia Superior Court. (Doc. 15, Attach. 15.) An evidentiary hearing was held on December 16, 1996. (Doc. 16, Attachs. 3-10.) During the hearing, Mr. Davis submitted six affidavits purporting to establish his innocence.¹⁰ (*Id.*, Attach. 3 at 3.) On September 5, 1997, the court denied the petition after reviewing the entire record, including the innocence affidavits. (Doc. 17, Attach. 6.)

Mr. Davis appealed the denial of his habeas petition to the Georgia Supreme Court. *Davis v. Turpin*, 273 Ga. 244, 539 S.E.2d 129 (2000). In his application for certificate of probable cause to appeal, Mr. Davis argued that the failure to present additional evidence of innocence was ineffective assistance of counsel and that the new evidence undermined confidence in the guilty verdict. (Doc. 17, Attach. 8 at 88-96.) However, the Georgia Supreme Court declined to hear this question on appeal. (*See Id.*, Attach. 11.) Ultimately, the court affirmed the denial of Mr. Davis's state habeas petition. *Davis*, 273 Ga. at 249, 539 S.E.2d at 134. On October 1, 2001, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. (Doc. 17, Attach. 25.)

¹⁰ The six affidavits were from Joseph Washington, Tonya Johnson, Kevin McQueen, Joseph Blige, April Hester, and Lamar Brown. (Doc. 21, App'x 1.) Mr. Davis submitted twenty-seven additional affidavits relating to his other claims, such as ineffective assistance of counsel and the unconstitutionality of the death penalty. (Doc 16, Attachs. 5-10.)

D. Federal Habeas Proceedings

On December 14, 2001, Mr. Davis filed a petition for writ of habeas corpus in federal district court. (*Id.*, Attach. 26.) In support of his petition, Mr. Davis submitted between sixteen and nineteen new innocence affidavits,¹¹ along with the six innocence affidavits he submitted as part of his state habeas petition. (Compare Doc. 3, Ex. 1, with Doc. 21, Ex. 1.) On March 10, 2003, the district court denied Mr. Davis's request for an evidentiary hearing, which asked the court to receive live testimony from the affiants. (Doc. 17, Attach. 47.) Ultimately, the district court denied Mr. Davis's petition on May 13, 2004. (Doc. 18, Attach. 5.) In denying the petition, the district court did not directly address Mr. Davis's claims of innocence, instead finding Mr. Davis's claims of constitutional error without merit.¹² (*Id.* at 65.)

¹¹ It is not clear how each new affidavit is best characterized. However, the additional substantive affidavits were given by: Monty Holmes, Dorothy Ferrell, Harriett Murray, Larry Young, Antoine Williams, Anthony Hargrove, Shirley Riley, Darold Taylor, Gary Hargrove, Abdus-Salam Karim, Anita Dunham Saddler, Jeffrey Sapp, Michael Cooper, Benjamin Gordon, April Hester Hutchinson, Peggie Grant, Darrell Collins, James Riley, and Daniel Kinsman. (Doc. 3 Ex. 1; Doc. 21, Ex. 1.)

¹² In addressing any claim of actual innocence raised by Mr. Davis, the district court concluded that

[A] federal court looks, under the miscarriage of justice exception, to colorable claims of actual innocence for "permission" to address questions of constitutional impropriety asserted in procedurally defaulted claims. If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented. Ultimately, the state habeas court's analysis serves as assurance that no constitutional defi-

On September 26, 2006, the Eleventh Circuit Court of Appeals affirmed the district court's decision. *Davis v. Terry*, 465 F.3d 1249 (11th Cir. 2006). The Eleventh Circuit did not recognize Mr. Davis's claim as a substantive one based on actual innocence. *Id.* at 1251. Rather, that court identified Mr. Davis as "argu[ing] 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." *Id.* The Eleventh Circuit concluded that the question of Mr. Davis's innocence was immaterial to its inquiry because he conceded that the district court considered his claims of constitutional error even though they had been procedurally defaulted. *Id.* at 1252-53. Therefore, the Eleventh Circuit only addressed the issue of whether Mr. Davis's claims of constitutional error failed as a matter of law, not whether he established a substantive claim of actual innocence. *Id.* at 1253. On June 25, 2007, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. *Davis v. Terry*, 551 U.S. 1145 (2007).

E. Extraordinary Motion for New Trial

On July 9, 2007, Mr. Davis failed an extraordinary motion for new trial in Chatham County Superior Court. (Doc. 19 Attachs. 4-5.) In the motion, Mr. Davis directly argued that he was innocent and that new evidence showed Mr. Coles murdered Officer MacPhail. (*Id.*, Attach. 4 at 1-2.) In support of his claim, Mr. Davis presented twenty-six innocence affidavits, the bulk of which were the same affidavits

ciencies exist in this case so as to merit habeas corpus relief.

(Doc. 18, Attach. 5 at 65.) (citations omitted)).

Mr. Davis presented in his state and federal habeas petitions. (*Id.*, Table of Appendices at 41-42.) On July 13, 2007, the court denied Mr. Davis's motion, concluding that, under Georgia law, the affidavits submitted by Mr. Davis failed to meet the burden required for a new trial.¹³ (*Id.*, Attach. 16 at 3-6.)

On August 3, 2007, the Georgia Supreme Court granted Mr. Davis's application for a discretionary appeal. *Davis v. State*, 282 Ga. 368, 651 S.E.2d 10 (2007). After reviewing the innocence affidavits, a divided court affirmed the denial of Mr. Davis's motion, finding the strength of the innocence affidavits insufficient to overturn the jury's verdict. *Davis v. State*, 283 Ga. 438, 447, 660 S.E.2d 354, 362-63 (2008). The three justices in the minority reasoned that, the trial court should at least "conduct a hearing, to weigh the credibility of Davis's new evidence, and to exercise its discretion in determining if the new evidence would create the probability of a different outcome if a new trial were held." *Id.* at 450, 660 S.E.2d at 365 (Sears, J., dissenting). On October 14, 2008, the Supreme Court of the United States denied

¹³ The state court applied the following six part standard for determining whether the affidavits submitted by Mr. Davis warranted a new trial:

"(1) [T]hat the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness."

(Doc. 19, Attach. 16 at 2 (*quoting Drake v. State*, 248 Ga. 891, 894, 287 S.E.2d 180, 182 (1992)).)

Mr. Davis's petition for writ of certiorari. (Doc. 20, Attach. 16.)

F. Georgia State Board of Pardons and Paroles

Following the denial of his extraordinary motion for new trial, Mr. Davis submitted an application for executive clemency with the Georgia State Board of Pardons and Paroles. (Doc. 20, Attach. 7 at 1.) In reviewing Mr. Davis's case, the Board allowed Mr. Davis's attorneys "to present every witness they desired to support their allegation that there is doubt as to Davis' guilt." (*Id.*, Attach. 13 at 1.) In addition, the Board reviewed "the voluminous trial transcript, the police investigation report and the initial statements of all witnesses." (*Id.*) Finally, the Board retested some of the physical evidence in the case and interviewed Mr. Davis. (*Id.*) Following their exhaustive review, the Board concluded that Mr. Davis's showing was insufficient to warrant clemency. (*Id.*)

G. Application to File Second Habeas Petition

On October 22, 2008, Mr. Davis submitted an application to file a second habeas petition to the Eleventh Circuit. *In re Davis*, 565 F.3d 810 (11th Cir. 2009). In his application, Mr. Davis argued that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he is actually innocent of the crime of murder. *Id.* at 813. In denying the application, a divided Eleventh Circuit panel, relying solely on the affidavit of Benjamin Gordon, concluded that

Davis has not even come close to making a prima facie showing that his [] claim relies on facts (i) that could not have been discovered previously through the exercise of due diligence, *and* (ii) that 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.”

Id. at 824 (*quoting* 28 U.S.C. § 2244(b)(2)(B)). The dissenter would have granted Mr. Davis’s application, reasoning that “where a defendant who can make a viable claim of actual innocence is facing execution, the fundamental miscarriage of justice exception should apply and AEDPA’s procedural bars should not prohibit the filing of a second or successive habeas petition.” *Id.* at 831 (Barkett, J., dissenting).

H. Petition for Writ of Habeas Corpus filed in the Supreme Court of the United States

On May 19, 2009, Mr. Davis filed a Petition for Writ of Habeas Corpus within the original jurisdiction of the United States Supreme Court. (Doc. 2.) In the petition, Mr. Davis again argued that his execution would be unconstitutional under both the Eighth and Fourteenth Amendments. (*Id.* at 28.) On August 17, 2009, the Supreme Court transferred Mr. Davis’s petition to this Court with instructions to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes [Mr. Davis’s] innocence.” *Davis*, 130 S. Ct. at 1. As instructed, this Court held a hearing on June 24, 2010, allowing Mr. Davis to present live witnesses and other evidence supporting his claim of innocence. (Docs. 78, 82, 83.) In addition, the Court directed the parties to brief several issues relating to the cognizability of and

appropriate evidentiary burden for a claim for actual innocence.¹⁴ (Doc. 77 at 1-2.)

ANALYSIS

The Court begins its analysis by considering the cognizability of a freestanding claim of actual innocence. Concluding that the claim is cognizable, the Court then determines the appropriate burden of proof and fronty whether Mr. Davis has met that burden.

I. COGNIZABILITY OF FREESTANDING CLAIMS OF ACTUAL INNOCENCE

The Supreme Court recently reiterated that the cognizability of freestanding claims of actual innocence is an open question. *Dist. Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. ___, 129 S. Ct. 2308, 2321 (2009) (“Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of ‘actual innocence.’ Whether such a federal right exists is an open question.”). While the cognizability of a freestanding claim of actual innocence is an open question, it is not a novel one. The Court considers the present state of the law prior to considering the underlying constitutional question.¹⁵

¹⁴ The Court discusses the evidence proffered at this proceeding in the analysis section.

¹⁵ The State of Georgia concedes that it would be unconstitutional to execute an innocent man (Doc. 79 at 2), apparently abandoning its initial arguments to the contrary (*see* Doc. 21 at 56-62). However, the State now urges this Court to dodge the cognizability issue by finding Mr. Davis’s claim insufficient on its merits. (Doc. 79 at 2.) When courts find a *Herrera* claim insufficient after lengthy factfinding regarding innocence, it is usually because the extensive factfinding was already necessary

A. Background Case Law

i. *Herrera v. Collins*

The Supreme Court has discussed the cognizability of a freestanding claim of actual innocence at length only once. *See Herrera v. Collins*, 506 U.S. 390 (1993). In *Herrera*, petitioner Leonel Torres Herrera was sentenced to death for the murder of two police officers—Carrisalez and Rucker. 506 U.S. at 394-95. After multiple unsuccessful appeals and collateral attacks, Herrera asserted a freestanding claim of actual innocence in a second federal habeas petition. *Id.* at 397-98. The district court stayed the execution to hear the claim, but that stay was vacated by the Fifth Circuit Court of Appeals, which held that freestanding claims of actual innocence were not cognizable. *Id.* Herrera successfully petitioned the Supreme Court for certiorari. *Id.* at 398.

The factual resolution of the case was as clear as the underlying constitutional question was muddled. And, it was the facts around which the majority congealed. As Justice O'Connor explained, "[d]ispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word." *Id.* at 419 (O'Connor, J., concurring); *see also id.* at

to determine a *Schlup* claim, and the *Herrera* claim can be resolved by reference to the *Schlup* determination. *See House v. Bell*, 547 U.S. 518 (2006). By contrast, this Court has already expended significant resources taking in evidence specifically regarding Mr. Davis's *Herrera* claim. It will have to expend even more resources to review the evidence and determine the merits of the *Herrera* claim, which is not facially insufficient even though it fails upon close examination. The expenditure of those resources can, and should, be avoided if this claim is not cognizable. Accordingly, the Court declines to dodge the question that is squarely before it.

429 (White, J., concurring); *id.* at 418-19 (majority opinion) (“[Herrera’s] showing of innocence 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.”). Ultimately, the Court rejected Herrera’s claim on the merits by assuming, without deciding, the cognizability of the freestanding claim of actual innocence. *Id.* at 417-19.

Herrera’s guilt was obvious both because of the overwhelming evidence presented at his trial and the weakness of his new evidence of innocence. The proof of guilt at Herrera’s trial¹⁶ was ironclad, consisting of physical evidence, Herrera’s handwritten confession, and positive eyewitness identifications.¹⁷ *Id.* Herrera’s newly discovered proof of innocence consisted of four dubious affidavits implicating his deceased brother as the murderer. *Id.* at 396-97. The affidavits were internally inconsistent, composed largely of hearsay, and pointed to a conveniently dead suspect. *Id.* At 417-19. When the affidavits were “considered in light of the proof of petitioner’s guilt at trial,” they fell far short of proving that a jury would have found reasonable doubt. *Id.* at 418. That is, the affidavits did not shift the balance of proof in Herrera’s case. *See id.* at 418 (“That proof, even when considered

¹⁶ Herrera was tried for the murder of Carrisalez. *Herrera*, 506 U.S. at 395. He later pled guilty to the murder of Rucker. *Id.* at 394.

¹⁷ There were two identifications of Herrera, one by Carrisalez’s partner and the other by Carrisalez himself, who survived for several days after the shooting. *Herrera*, 506 U.S. at 394. Herrera’s social security card was found at the scene of Rucker’s murder, and Rucker’s blood and hair were found on Herrera’s car, jeans, and wallet. *Id.* at 394. In addition, Herrera was carrying a handwritten confession when he was arrested. *Id.* at 394-95.

alongside petitioner's belated affidavits, points strongly to petitioner's guilt.").

Because the Supreme Court simply assumed that freestanding claims of actual innocence were cognizable, it became unnecessary for the court to state a concrete position on the issue. Indeed, four Justices provided only suggestive dicta on either side of the question. *See id.* at 419 (O'Connor, J., concurring); *see also id.* at 429 (White, J., concurring); *id.* at 398-417 (majority opinion). Two Justices expressly stated that the constitution does not recognize the claim. *Id.* at 427-29 ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction.") (Scalia, J., dissenting). Three others explicitly recognized such a claim. *Id.* at 430-31 (Blackmun, J., dissenting) ("We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, I do not see how the answer can be anything but 'yes.'" (internal citation omitted)). In short, two justices denied the existence of the claim, three recognized it, and four stated no express opinion, causing the question of the cognizability of freestanding claims of actual innocence to remain open. *See Osborne*, 129 S. Ct. at 2321.

While the actual holding of *Herrera* was narrow, the opinion contains broad, sweeping dicta that sheds some light on considerations relevant to the cognizability of freestanding actual innocence claims. First, those justices doubting or disagreeing with the

cognizability of the claim set out several concerns regarding recognizing this right.¹⁸ *Herrera*, 506 U.S. at 400-04, 411-18. Second, Justices O'Connor and Kennedy, in their concurrence, provided dicta suggesting that they supported the cognizability of the claim and, when paired with the dissents, suggests

¹⁸ One of the *Herrera* concerns, that “the passage of time only diminishes the reliability of criminal adjudications,” 506 U.S. at 403, has been significantly eroded since *Herrera* was decided. While it remains true that the reliability of witness testimony will decrease with time as memory fades, the vastly increased importance of forensic science has created an opposite force. Unlike memory, scientific ability improves with time. While forensic science has always played some role in the consideration of cases, the use of scientific evidence has become pervasive since *Herrera*. Compare Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901), with Kenworthy Bilz, *The Fall of the Confession Era*, 97 J. Crim. L. & Criminology 367, 379 (2005) (“The science of DNA testing did not hit the mainstream of criminal investigations until the 1990’s in this country, and [] this evidence has come to play an increasingly integral part in prosecutions . . .”), and Paul C. Giannelli, *Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World*, 89 Cornell L. Rev. 1305 (2004). Where it is science that allows for increased accuracy, and the new science occurs post-trial, it can be fairly said that the accuracy of the guilt determination increases with time. Examples of such advances include DNA fingerprinting and new knowledge in the science of arson. See Brandon L. Garrett, *Judging Innocence*, 108 Colum. L. Rev. 55, 56 (2008); David Grann, *Trial by Fire: Did Texas Execute an Innocent Man?*, The New Yorker (Sept. 7, 2009), available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?currentPage=all (discussing advances in arson detection science that disproved various forensics associated with arson detection such as the importance of V-shaped burn marks, certain puddle configurations, and low burns on walls and floors). However, in this case, none of the reasons why forensic science would cause an adjudication to become less reliable over time are present.

that a majority of the *Herrera* court believed that the execution of the innocent violated the Constitution. *Id.* at 419 (O'Connor, J., concurring). Ultimately, while the dicta of *Herrera* is meaningful, the most important aspect of *Herrera* is the question it left unanswered: Are freestanding claims of actual innocence cognizable? *Osborne*, 129 S. Ct. at 2321.

ii. *Schlup v. Delo and House v. Bell*

Herrera's progeny address the question only obliquely. See, e.g., *House v. Bell*, 547 U.S. 518 (2006); *Schlup v. Delo*, 513 U.S. 298 (1995). In *Schlup v. Delo*, *Herrera* was discussed, but only to contrast its hypothetical freestanding claim of actual innocence to the long-recognized exception to procedural default for a miscarriage of justice. *Schlup*, 513 U.S. at 315-16. *House v. Bell* also briefly touched on the question of freestanding claims of actual innocence, assuming that such a claim would exist, but finding that the petitioner had not made a sufficient showing to require consideration of the claim. 547 U.S. at 554-55. Neither case answered the ultimate question of whether there is a right of the innocent to be released upon a showing of actual innocence. As noted above, that question remains open. See *Osborne*, 129 S. Ct. at 2321. The Court now considers that question.

B. Eighth Amendment

The Eighth Amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁹ U.S. Const. amend. VII. “The Eighth Amendment stands

¹⁹ The Eighth Amendment is applicable to the states through the Fourteenth Amendment. See *Kennedy v. Louisiana*, 544 U.S. 128 S. Ct. 2641, 2649 (2008).

to assure that the State's power to punish is 'exercised within the limits of civilized standards.'" *Woodson v. North Carolina*, 428 U.S. 280, 288 (1976) (plurality opinion) (*quoting Trop v. Dulles*, 356 U.S. 86, 100 (1958) (plurality opinion)). The scope of the Amendment is not static. Its reach is defined by looking beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." *Trop*, 356 U.S. at 101. " 'This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " *Graham v. Florida*, 560 U.S. ___, 130 S. Ct. 2011, 2021 (2010) (*quoting Kennedy v. Louisiana*, 554 U.S. ___, 128 S. Ct. 2641, 2649 (2008)) (alterations in original).

Recently, the Supreme Court has clarified its Eighth Amendment jurisprudence. *See Graham*, 130 S. Ct. 2011. In *Graham*, the Supreme Court divided its Eighth Amendment cases into two classifications: (1) those that "challenge[d] the length of term-of-years sentences given all the circumstances in a particular case" and (2) those "in which the Court implements the proportionality standard by certain categorical restrictions on the death penalty." *Id.* at 2021-22. The Supreme Court then went further and divided this latter grouping into two subsets, one focusing on the nature of the offense and the other on the characteristics of the offender.²⁰ *Id.* at 2022.

²⁰ This latter division does not affect the applicable analysis; both subsets apply the approach stemming from *Trop*, 356 U.S. 86 (plurality opinion). Compare *Kennedy*, 128 S. Ct. at 2649 (applying *Trop* analysis to an Eighth Amendment challenge to the punishment of death for child rape), with *Roper v. Simmons*,

That latter subset turns on the culpability of a defendant with a certain characteristic²¹ that significantly diminishes the offender's culpability. See *Roper v. Simmons*, 543 U.S. 551, 568 (2005). As a result of the diminished culpability, the justifications for imposing the death penalty are no longer applicable, rendering the imposition of the death penalty unconstitutional.²² See *id.* ("Capital punishment must be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 319 (2002))); see *Atkins*, 536 U.S. at 323.

543 U.S. 551, 560-61 (2005) (applying *Trop* analysis to an Eighth Amendment challenge to the execution of minors).

²¹ In addition to personal characteristics, a defendant's culpability is based on the nature of his conduct. See generally *Irizarry v. United States*, 553 U.S. 708 (2008).

²² Moreover, where the state attempts to punish an individual who has no culpability at all, the Eighth Amendment prohibits the imposition of any punishment. *Robinson v. California*, 370 U.S. 660, 667 (1962). As the Supreme Court explained:

We hold that a state law which imprisons a person thus afflicted [with an addiction to narcotics] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.

Id.

This Eighth Amendment challenge calls into question the permissibility of capital punishment²³ based upon a characteristic of the offender: a total lack of culpability, which is demonstrated through a showing of factual innocence based upon evidence discovered subsequent to a full and fair trial.²⁴

²³ The Supreme Court has stated that the open question underlying this case extends beyond the capital context. See *Osborne*, 129 S. Ct. at 2321. However, in *Herrera*, the assumed right was contingent upon the fact that the case was a capital one. 506 U.S. at 417 (“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” (emphasis added)). It is unclear whether that distinction remains good law. See *Graham*, 130 S. Ct. at 2046 (“Today’s decision eviscerates that distinction. ‘Death is different’ no longer.”) (Thomas, J., dissenting). Regardless, the present case is a capital one, so the Court limits its consideration to capital cases based upon the definition of the assumed right in *Herrera*.

²⁴ Abstract conceptualizations of this challenge may be clarified by a simple hypothetical. A defendant is convicted of the murder of his child after a full and fair trial, and he is then sentenced to death. Ten years later, the defendant discovers the “murdered” child has been safely living on a remote island, conclusively disproving defendant’s guilt. The defendant then goes before the state with his living child, but is denied relief and the state prepares to move forward with his execution. The challenge under these circumstances is whether, in spite of the truly persuasive proof of innocence, the state may proceed with the execution without violating the Eighth Amendment of the United States Constitution.

At one time, such a hypothetical would draw the objection that this factual scenario could never occur because any serious showing of innocence would result in state relief by clemency or state judicial process. This is, the state would always admit its mistake and rectify it. While it remains the case that state officials denying relief under such circumstances would be an

Graham held that challenges grounded in individual culpability are to be considered using the *Trop* analysis. 130 S. Ct. at 2021-22. Therefore, the Court applies the *Trop* analysis here.²⁵

extreme rarity, events since *Herrera* shatter the notion of a perfect “fail safe” system for truly persuasive proof of innocence. See, e.g., *Watkins v. Miller*, 92 F. Supp. 2d 824, 836 (S.D. Ind. 2000) (“In an effort to keep Jerry Watkins in prison, the state has clung to this theoretical possibility. A close look at this possibility shows it is farfetched, both as a matter of science and in terms of the overall evidence in the case. The theoretical possibility is also completely inconsistent with the theory of the case that the prosecution presented to the jury.”); cf. Brandon L. Garrett, Exoneree Post-Conviction Data, http://www.law.Virginia.edu/pdf/faculty/garrett/judging_innocence/exonereespost_conviction_dna_testing.pdf (showing that of 225 DNA exonérations, prosecutors opposed vacating the conviction in 22 cases (9.8%)).

²⁵ In reality, the closest cousin of this case is *Robinson v. California*, 370 U.S. 660 (1962), holding that any punishment is disproportionate where the convict has no culpability. *Robinson* analyzed the case using a common sense approach that does not accord with either test recognized in *Graham*. 130 S. Ct. at 2021-23. Presumably, because *Robinson* turned on an issue of culpability, if the case were reheard today it would be analyzed under *Trop*. See *Graham*, 130 S. Ct. at 2022-23. Accordingly, while common sense and long-held historical views proscribe the punishment of the innocent, see *Patterson v. New York*, 432 U.S. 197, 208 (1977) (“[I]t is far worse to convict an innocent man than to let a guilty man go free.” (quoting *In re Winship*, 397 U.S. 358, 372 (1970))); *Winship*, 397 U.S. at 364 (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”); *Coffin v. United States*, 156 U.S. 432, 455-56 (1895); Alexander Volokh, *nGuilty Men*, 146 U. Pa. L. Rev. 173 (1997) (tracing the concept of the paramount importance of innocence as far back as ancient Greece), this Court will

When addressing categorical challenges under *Trop*, the proper approach is a two step inquiry. First, a court “considers ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice’ to determine whether there is a national consensus against the sentencing practice at issue.” *Id.* at 2022 (*quoting Roper*, 543 U.S. at 572). Second, a court must independently determine whether the punishment in question violates the constitution based upon precedent and the court’s “understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” *Id.* at 2022 (*quoting Kennedy*, 128 S. Ct. at 2650). The societal consensus presently at issue is whether it would be cruel to allow the execution on an individual who can clearly establish his innocence of the crime of conviction based on evidence discovered subsequent to a full and fair trial.

i. Objective Indicia of Societal Standards

“The analysis begins with objective indicia of national consensus.” *Id.* at 2023. The Supreme Court has “emphasized that legislation is the ‘clearest and most reliable objective evidence of contemporary values.’” *Atkins*, 536 U.S. at 323 (*quoting Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)). While the inability of the state to punish an innocent person has long been recognized,²⁶ recent state legislation demon-

go beyond common sense and tradition in this case, and into the deeper analysis required under *Graham*.

²⁶ It has long been established that the constitution prohibits states from punishing the innocent. *See, e.g., Herrera*, 506 U.S. at 419 (O’Connor, J., concurring) (“I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution.”); *United States v. U.S. Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring)

strates increasing consternation with the execution²⁷ of innocent convicts. Since Herrera, forty-seven states²⁸ and the District of Columbia have enacted statutes designed to help innocent convicts prove that

(“[T]he government has no legitimate interest in punishing those innocent of wrongdoing.”); *Robinson*, 370 U.S. at 667 (“Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold.”) *Calder v. Bull*, 3 U.S. 386, 388 (1798) (“The Legislature may . . . declare new crimes . . . but they cannot change innocence into guilt; or punish innocence as a crime . . .”).

²⁷ Despite considering this right in the context of capital punishment, the Court looks to the laws of all fifty states regarding the permissibility of post-conviction exoneration to determine societal consensus. Because laws pertaining to the conviction of the innocent usually extend beyond capital convictions, *see, e.g.*, Ariz. Rev. Stat. Ann. § 13-4240 (2000); S.C. Code. Ann. § 17-28-30 (2008), the Court has indulged in the assumption that for states without the death penalty, their existing practices regarding post-conviction exoneration would also extend into the capital context were such punishment available. Had the Court limited its review of state law to only those states with the death penalty; it would have found that, of the thirty-five states with the death penalty, only Oklahoma provides no avenues to secure evidence of innocence in the post-conviction setting. *See* Death Penalty Information Center, States With and Without the Death Penalty, <http://www.deathpenaltyinfo.org/states-and-without-death-penalty>. That is, 97.1% of states with a death penalty provide some avenue through which to seek evidence necessary to prove innocence subsequent to a conviction. Whether one limits the inquiry to states with capital punishment, or considers all fifty states, the consensus regarding punishment of the innocent remains constant.

²⁸ The three states that have not enacted modern reforms to ensure that convicts are actually innocent are Massachusetts, Alaska, and Oklahoma. Of these three, only Oklahoma utilizes the death penalty. *See Roper*, 543 U.S. at 1201; Okla. Stat. tit. 21, § 701.10 (2002).

their convictions were erroneous.²⁹ In so doing, the statutes themselves recognize that their protections will be used to disprove erroneous jury verdicts and avoid punishment of the innocent.³⁰ Indeed, if states

²⁹ The baseline protection enacted involves DNA testing. However, multiple states have enacted laws that allow for additional factfinding procedures regarding the innocence of the convicted, including fingerprint analysis and other additional forensic testing. Ala. Code § 15-18-200 (2009); Ariz. Rev. Stat. Ann. § 13-4240 (2000); Ark. Code Ann. § 16-112-202 (2001); Cal. Penal Code § 1405 (West 2001); Colo. Rev. Stat. § 18-1-413 (2004); Conn. Gen. Stat. § 54-102kk (2003); Del. Code Ann. tit. 11, § 4504 (2000); D.C. Code § 22-4133 (2002); Fla. Stat. § 925.11 (2006); Ga. Code Ann. § 5-5-41 (2003); Haw. Rev. Stat. § 844D-123 (2005); Idaho Code Ann. § 19-4902 (2010); 725 III. Comp. Stat. 5/116-3 (2003); Ind. Code § 35-38-7-5 (2003); Iowa Code § 81.10 (2005); Kan. Stat. Ann. § 21-2512 (2001); Ky. Rev. Stat. Ann. § 422.285 (West 2002); La. Code Crim. Proc. Ann. art. 926.1 (2001); Me. Rev. Stat. tit. 15, § 2137 (2001); Md. Code Ann., Crim. Proc. § 8-201 (West 2001); Mich. Comp. Laws § 770.16 (2000); Minn. Stat. 590.01 (1999); Miss. Code Ann. § 99-39-5 (1995); Mo. Rev. Stat. § 547.035; Mont. Code Ann. § 46-21-110 (2003); Neb. Rev. Stat. § 29-4120 (2001); Nev. Rev. Stat. § 176.0918 (2003); N.H. Rev. Stat. Ann. § 651-D:2 (2004); N.J. Stat. Ann. § 2A:84A-32a (West 2001); N.M. Stat. Ann. § 31-1A-2 (2003); N.Y. Crim. Pro. Law § 440.30(1-a) (McKinney 1994); N.C. Gen. Stat. 15A-269 (2001); N.D. Cent. Code § 29-32.1-15 (2005); Ohio Rev. Code Ann. § 2953.72 (West 2010); Or. Rev. Stat. § 138.690 (2001); 42 Pa. Cons. Stat. § 9543.1 (2002); R.I. Gen. Laws § 10-9.1-12 (2002); S.C. Code Ann. § 17-28-30 (2008); S.D. Codified Laws § 23-5B-1 (2009); Tenn. Code Ann. § 40-30-304 (2001); Tex. Code Crim. Proc. Ann. art. 64.01 (West 2001); Utah Code Ann. § 78B-9-301 (West 2008); Vt. Stat. Ann. tit. 13, § 5561 (2007); Va. Code Ann. § 19.2-327.1 (2001); Wash. Rev. Code § 10.73.170 (2000); W. Va. Code § 15-2B-14 (2004); Wis. Stat. § 974.07 (2001); Wyo. Stat. Ann. § 7-12-303 (2008).

³⁰ Ala. Code § 15-18-200(e)(3) (2009); Ariz. Rev. Stat. Ann. § 13-4240(B)(1) (2000); Ark. Code Ann. § 16-112-202(6)(B) (2001); Cal. Penal Code § 1405(e)(4)-(5) (West 2001); Colo. Rev. Stat. § 18-1-413(1)(a) (2004); Conn. Gen. Stat. § 54-102kk(b)(4)

were not concerned with preventing punishment of the wrongfully convicted, it would be difficult to understand why they would allow validly convicted persons avenues with which to secure evidence of their innocence. Moreover, over the course of American history several states have gone further to avoid executing the innocent, adopting over-inclusive

(2003); Del. Code Ann. tit. 11, § 4504(a)(5) (2000); D.C. Code § 22-4135 (2002); Fla. Stat. § 925.11(1)(a) (2006); Ga. Code Ann. § 5-5-41(c)(3)(C) (2003); Haw. Rev. Stat. § 844D-123(b)(1) (2005); Idaho Code Ann. § 19-4902(e)(1) (2010); 725 Ill. Comp. Stat. 5/122-1 (2003); Ind. Code §§ 35-38-7-8(4), 35-38-7-19 (2004); Iowa Code § 81.10(7)(e) (2005); Kan. Stat. Ann. § 21- 2512(c) (2001); Ky. Rev. Stat. Ann. § 422.285(3)(a) (West 2002); La. Code Crim. Proc. Ann. art. 926.1(B)(1) (2001); Me. Rev. Stat. tit. 15, § 2138(10)(C)(1) (2001); Md. Code. Ann., Crim. Proc. § 8-301 (West 2009); Minn. Stat. § 590.01(1)(2) (1999); Miss. Code Ann. § 99-39-5(1)(e) (1995); Mo. Rev. Stat § 547.037 (2001) Mont. Code Ann. § 46-21-110(1)(c) (2003); Neb. Rev. Stat. §§ 29-4119, 29-4120(5) (2001); Nev. Rev. Stat. §§ 176.515(3), 176.0918 (3)(b) (2003); N.H. Rev. Stat. Ann. § 651-D:2(I)(b) (2004); N.J. Stat. Ann. § 2A:84A-32a(1)(b) (West 2001); N.M. Stat. Ann. § 31-1A-2(A) (2003); N.Y. Crim. Pro. Law § 440.30(1a) (McKinney 1994); N.C. Gen. Stat. § 15A-269(b)(2) (2001); N.D. Cent. Code Ann. §§ 29-32.1-01(1)(e), 29-32.1-15(1) (2005); Ohio Rev. Code Ann. § 2953.71(L) (West 2010); Or. Rev. Stat. § 138.692 (1) (a) (A) (ii) (2001); 42 Pa. Cons. Stat. § 9543.1(2)(1) (2002); R.I. Gen. Laws § 10-9.1-11(a)(4) (2002); S.C. Code Ann. § 17-28-30(A), (B) (2008); S.D. Codified Laws §§ 23-5B-1(9)(b), 23-5B-16 (2009); Tenn. Code Ann. § 40-30-304(4) (2001); Tex. Code Crim. Proc. Ann. art. 64.04 (West 2001); Utah Code Ann. § 78B-9-402 (West 2008); Vt. Stat. Ann. tit. 13, § 5561(a)(1) (2007); Va. Code Ann. § 19.2-327.2 (2001); Wash. Rev. Code § 10.73.170(3) (2000); W. Va. Code § 15-2B-14(b)(1) (2004); Wis. Stat. § 974.07(7)(a)(1) (2001); Wyo. Stat. Ann. § 7-12- 303(c)(ix) (2008).

solutions by abolishing the death penalty or requiring absolute certainty as to guilt.³¹

The states, then, are showing an increased concern for protecting legally convicted individuals whom are shown to be factually innocent subsequent to a trial.³² This consensus is shown mostly through enacting statutes that allow convicts to seek evidence of their innocence after a valid adjudication of guilt and occasionally through the adoption of over-inclusive solu-

³¹ This concern has been raised twice in the past three years with the repeal of the death penalty in New Mexico and severe limitation of the death penalty in Maryland. Statement of Governor Bill Richardson, *Governor Bill Richardson Signs Repeal of the Death Penalty* (2009), <http://www.deathpenaltyinfo.org/documents/Richardsonstatement.pdf>; Maryland Commission on Capital Punishment, Final Report 18-19 (2008), available at <http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf>. It also appears that protecting the innocent from execution was a motivating factor in some popular historical movements to abolish capital punishment in the states, including Michigan's abolition of capital punishment in 1846, Rhode Island's abolition of the death penalty in 1852, and Maine's abolition of the death penalty in 1876. See Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 76 (1987).

³² While these enactments show near unanimous consensus among the states, Mr. Davis goes further by offering other evidence that the Court finds too general to be helpful in its inquiry. For example, while it is true that the overall number of death sentences in America is declining (*see* Doc. 80 at 10-11), there is no way to know whether this decline is caused by accuracy concerns, decreased societal support for the death penalty, newfound prosecutorial restraint in seeking imposition of the death penalty, or some other unknown reason.

tions to avoid executing the innocent. Accordingly, the Court concludes that objective indicia of societal standards indicates a consensus that the execution of innocent convicts should be prohibited, whether that innocence is proved before or after trial. Indeed, the national consensus among the states appears nearly unanimous on this score.

ii. Precedent and Understanding

While national consensus is important, the task of interpreting the Constitution, including the Eighth Amendment, remains in the hands of federal courts. *Graham*, 130 S. Ct. at 2026. “The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.” *Id.* This inquiry also considers whether the practice at issue serves “legitimate penological goals.” *Id.*; *Roper*, 543 U.S. at 571-72. And, a court must consider prior precedent and understanding of the Eighth Amendment. *Kennedy*, 128 S. Ct. at 2658.

a. Punishment, Innocence, and the Requirement that the Convict Kill

The Court begins with prior precedent regarding innocence and punishment. If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court. It is well established that the punishment of the innocent or those otherwise without culpability is at odds with the constitution, including the Eighth Amendment.³³

³³ The Court does not understand the dicta in *Herrera* to dispute this foundational legal principle. Rather, the dicta in

E.g., *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); *U.S. Coin & Currency*, 401 U.S. at 726 (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing . . ."); *Robinson*, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); *Thompson v. City of Louisville*, 362 U.S. 199, 206 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt."); *Mooney v. Holohan*, 294 U.S. 103, 113 (1935) (holding that where defendant asserted his innocence and a wrongful conviction due to perjured testimony and improperly suppressed evidence, habeas courts must hear the claim); *Calder*, 3 U.S. at 388 ("The Legislature may . . . declare new crimes . . . but they

Herrera questions whether the right of the innocent not to be punished can be asserted in the post-trial context, specifically in the context of federal habeas. *See Herrera*, 506 U.S. at 400-02. While not all constitutional violations pertaining to criminal rights may be asserted post-trial, *see Stone v. Powell*, 428 U.S. 465, 486 (1976), it appears that the cruel and unusual punishment clause maintains its vitality in the habeas context, *see Ford v. Wainwright*, 477 U.S. 399, 411-12 (1986). Moreover, to the extent that the objection regarding the reach of habeas is historical, it bears noting that much of the modern reach of habeas corpus is beyond historical conceptions of habeas corpus, *see* Harlan Grant Cohen, "Undead" *Wartime Cases: Stare Decisis and the Lessons of History*, 84 Tul. L. Rev. 957 (2010), and cursory reviews of habeas corpus history generally referenced by courts do not even begin to do justice to the complicated question of what historical figures would have understood habeas to reach, *see* Paul D. Halliday & G. Edward White, *The Suspension Clause: English Text, Imperial Contexts, and American Implications*, 94 Va. L.R. 575 (2008).

cannot change innocence into guilt; or punish innocence as a crime . . .”).

Further, “[t]he Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers.” *Graham*, 130 S. Ct. at 2027. Indeed,

if a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability; the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence.

Cabana v. Bullock, 474 U.S. 376, 386 (1986), *abrogated on other grounds by Pope v. Illinois*, 481 U.S. 497, 503 n.7 (1987). That is, to justify the imposition of the death penalty, the condemned must have killed. While these precedents refer to a crime of conviction rather than an individualized assessment of guilt, the motivating concern would remain the same: each defendant sentenced to death must have engaged in conduct giving rise to the requisite culpability. It is unclear why a patently erroneous, but fair, criminal adjudication would change the transcendental fact that one who has not actually murdered cannot be executed.

b. Legitimate Penological Goals

“[C]apital punishment is excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of

capital crimes.” *Kennedy*, 128 S. Ct. at 2661. The Court considers whether executing innocent convicts furthers these goals.³⁴

Punishment deters crime by affecting the relevant cost—benefit analysis of the potential criminal. *Roper*, 543 U.S. at 561-62; *Thompson v. Oklahoma*, 487 U.S. 815, 837 (1988) (plurality opinion). Because deterrence functions by altering the incentive structure surrounding the potential criminal’s cost—benefit analysis, “capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.” *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (quoting *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). For this reason, the court has found deterrence wanting where the individual in question was not capable of a sufficient cost—benefit analysis due to a lack of mental sophistication or lack of an opportunity to engage in the requisite calculus. *Roper*, 543 U.S. at 571-72; *Atkins*, 536 U.S. at 319-20; *Enmund*, 458 U.S. at 799-800 (“[T]here is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself.”). Because the innocent convict never murders, he never engages in the requisite cost—benefit analysis and therefore lacks the opportunity to be deterred. Stated differently, deterrence is not served in the case of the innocent convict because there is no conduct to deter.

³⁴ While this analysis may appear axiomatic, the Court nonetheless considers whether any penological goal is served in executing those who can demonstrate their innocence, as per the analysis required under *Graham*.

Accordingly, deterrence does not justify executing the “actually” innocent.

Retribution is also not furthered by executing the innocent. Retribution can be understood as either an attempt to express the community’s moral outrage or to restore balance for the wrong to the victim.³⁵ *Roper*, 543 U.S. at 571. “The heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender.” *Tison v. Arizona*, 481 U.S. 137, 149 (1987). Individuals may lack the requisite culpability for retribution through capital punishment where diminished mental function erodes culpability, *Roper*, 543 U.S. at 572, or where their actions are not sufficiently evil, *Enmund*, 458 U.S. at 801. As the Supreme Court explained when considering the death penalty for felony murder:

For purposes of imposing the death penalty, Enmund’s criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit

³⁵ While retribution and revenge overlap, they are not the same. Retribution aims to restore a harmonious balance to society; revenge sates individual desires. Retribution restores balance by providing a wrongdoer with his just deserts. *Graham*, 130 S. Ct. at 2028, *Enmund*, 458 U.S. at 801. However, balance is restored only with accuracy; a mislaid blow, no matter how swift, only increases the moral imbalance by imposing additional unjustified suffering. Revenge, meanwhile, requires only that another suffer as much as the victim. It desires swiftness, but requires minimal accuracy. Revenge may be derived from either the deserving party or a simple scapegoat. When retribution is taken against the correct party, both revenge and retribution may be had, but neither should be mistaken for the other.

and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

Id. at 801. If a person who commits a robbery that results in felony murder lacks the requisite culpability for retribution through capital punishment, one who commits no crime surely lacks the culpability to justify capital punishment on the basis of retribution. Accordingly, neither retribution nor deterrence is served by the execution of the innocent.

iii. Conclusion

The consensus among the states appears to be that a truly persuasive demonstration of innocence subsequent to trial renders punishment unconstitutional. Prior precedent and understanding of the Eighth Amendment accords with this consensus. Moreover, executions of the “actually” innocent do not serve any legitimate penological purpose. Accordingly, the execution of those who can make a truly persuasive demonstration of innocence fails each step of the *Graham* analysis. It can be said, then, that executing the “actually” innocent violates the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution.³⁶

³⁶ It bears noting that this constitutional right will have little effect on the finality of state judgments. First, the right will not lengthen the present process because, presumably, it is subject to all the normal rules regarding when constitutional violations may be raised in habeas petitions. Second, the present system already allows habeas petitioners to assert their innocence sub-

II. BURDEN OF PROOF

Having recognized the claim, the Court must determine the burden of proof to apply. In *Herrera*, the Supreme Court explained:

[B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on

sequent to a trial, it simply requires the claim of innocence be coupled with another constitutional violation or a showing of due diligence. *See* 28 U.S.C. § 2244(b)(2)(B)(ii); *House*, 547 U.S. 518; *Schlup*, 513 U.S. 298. Because trials are not a perfect science, a defendant with a strong case of innocence will always find a “constitutional violation” that he can attach to his innocence claim, allowing him to challenge his conviction. *See, e.g., Goldman v. Winn*, 565 F. Supp. 2d 200 (D. Mass. 2008); *Wilson v. Vaughn*, 304 F. Supp. 2d 652 (E.D. Pa. 2004), *rev’d*, 533 F.3d 208 (3d Cir. 2008) (illustrating that an innocent defendant will find marginal constitutional violations to attach to a persuasive claim of innocence). One would not expect any real change in the number or frequency of habeas petitions because all claims of innocence are likely already being made under present law. Third, once one acknowledges that innocent mistakes are made and discovered—as one must in light of DNA exonerations over the past twenty years—it becomes apparent that the present system does more harm to societal respect for the criminal justice system and its judgments than a system that allows for the assertion of innocent, but clear, mistake. As a practical matter, by forcing mistakenly convicted individuals to tether those claims to constitutional mistake, the system suffers twice—once for its mistake and again for the “error” that was manufactured to allow the claim of innocence to be heard. Finally, even if this right does implicate a state’s interest in finality of judgment, it is difficult to imagine that a state’s finality interest can actually override an innocent individual’s interest in not being punished. *Cf. Patterson*, 432 U.S. at 208 (“[I]t is far worse to convict an innocent man than to let a guilty man go free.” (*quoting Winship*, 397 U.S. at 372)); *Winship*, 397 U.S. at 364 (“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.”).

the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be *extraordinarily high*.

506 U.S. at 417 (emphasis added). This language was later elaborated on in *House* when the Supreme Court explained that “[t]he 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. The Supreme Court has also stated:

The meaning of actual innocence as formulated by *Sawyer*, and *Carrier* does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court’s independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Schlup, 513 U.S. at 329 (emphasis added). Accordingly, it is clear that the standard must be (1) extraordinarily high, (2) more demanding than *Schlup*,

and (3) crafted from the perspective of a reasonable juror.

Mr. Davis contends that the proper burden of proof is to require a showing of “a clear probability that any reasonable juror would have reasonable doubt about his guilt.” (Doc. 27 at 30 (emphasis omitted).) Arguing before this Court, Mr. Davis clarified “clear probability” to mean a sixty percent chance. (Evidentiary Hearing Transcript at 513.) Based on Justice White’s lone concurrence in *Herrera* and the dissent in *House*, the State argues that the standard should be that “no rational trier of fact could find proof of guilt beyond a reasonable doubt.”³⁷ (Doc. 21 at 51-52 (quotations and alterations in original omitted).)

Schlup offers a guiding principle for crafting the appropriate burden of proof: “a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.” *Schlup*, 513 U.S. at 325 (quoting *Winship*, 397 U.S. at 369 (Harlan, J., concurring)). This suggests that the burden should be directly related to how much confidence can be placed in a jury verdict in a given situation. Conceptually, there are three general reasons why a jury might reach an erroneous verdict: (1) a

³⁷ This is essentially the same burden of proof applicable to a claim under *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”), which sets forth the burden for showing that the evidence at trial was insufficient to establish guilt beyond a reasonable doubt.

constitutional error led a jury to consider something inappropriate or caused patently important evidence to be withheld, (2) a jury heard a set of facts that was complete at the time of trial but later found to be incomplete based on evidence that surfaced subsequent to the trial, and (3) a jury made an innocent mistake based upon the evidence before it. Said differently, the totality of the evidence heard by the jury vis-a-vis the understanding of that evidence at the time of habeas can be described three ways: (1) corrupted, (2) incomplete, or (3) complete.

The highest degree of confidence can be placed in a jury verdict when the jury heard the complete body of relevant evidence. This scenario has already given rise to a standard of review on habeas. When a petitioner challenges the sufficiency of the evidence at his trial, *Jackson v. Virginia* asks whether, “after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” 443 U.S. 307, 318-19 (1979). Because there should be more confidence in a jury verdict rendered after a jury has heard a complete body of evidence, the Court concludes that this standard—the one proffered by the State—is too high.

The lowest degree of confidence in a jury verdict would presumably occur when the jury hears a corrupted body of evidence. Because the procedural protections in place to protect the innocent from conviction have been breached, confidence in the result of the trial is generally undermined. Accordingly, the Supreme Court has adopted a relatively low burden of proof in these cases, requiring a petitioner to show that “it is more likely than not that no reasonable

juror would have convicted him in the light of the new evidence.” *Schlup*, 513 U.S. at 327. As the Supreme Court has already explained, this burden of proof is too low for this case.³⁸ *House*, 547 U.S. at 555.

This case, which argues that the evidence heard at trial was incomplete³⁹ in some key manner, falls in the middle. It requires a burden higher than *House*, but lower than *Jackson*. In *Schlup*, the Supreme Court discussed three standards: the “more likely than not”⁴⁰ standard adopted by *Schlup*, the “no rational trier of fact” standard from *Jackson*, and the “clear and convincing”⁴¹ standard in *Sawyer*. *Schlup*,

³⁸ While Mr. Davis asserts that *Schlup* equates to a fifty-one percent chance, and his standard requires a sixty percent likelihood, the Court does not see any meaningful difference between those two standards. Even if this nine percent difference is meaningful, proof to a sixty percent certainty is not an “extraordinarily high” burden of proof. For example, if one were to receive sixty percent of his paycheck each month, he would not say that he was receiving an extraordinarily high portion of his paycheck. Accordingly, the Court rejects Mr. Davis’s proposed standard as inconsistent with existing law. See *Herrera*, 506 U.S. at 417.

³⁹ The Court finds it fair to characterize recantation evidence or new scientific evidence as evidence that bears on the completeness of the body of evidence at trial. While the new evidence may change the manner in which the prior evidence is interpreted and the ultimate outcome of the case, it does not nullify the existence of the prior evidence.

⁴⁰ This standard was originally announced in *Murray v. Carrier*, 477 U.S. 478, 496 (1986), and adopted as the appropriate standard for gateway claims of actual innocence in *Schlup*, 513 U.S. at 327-32.

⁴¹ *Sawyer v. Whitley*, 505 U.S. 333 (1992) set the standard of proof for showing “actual innocence” in the context of an erroneous jury verdict with respect to the sentencing phase of a capital trial. The *Sawyer* standard requires a petitioner to show “by

513 U.S. at 327-30. The Supreme Court has already explained that the showing of “more likely than not” imposes a lower burden of proof than the “clear and convincing” standard required under *Sawyer*. *Schlup*, 513 U.S. at 327. And, in the same opinion, it implied that the *Sawyer* standard was not quite as high as that of *Jackson*, which required a “binary response” as to whether “the trier of fact has power as a matter of law or it does not.” *Schlup*, 513 U.S. at 330. While *Sawyer* is a factually distinct case,⁴² it represents the only standard for considering actual innocence endorsed by the Supreme Court that falls in between *Schlup* and *Jackson* and appears to meet the “extraordinarily high” requirement of *Herrera*. Accordingly, the Court will borrow the “clear and convincing” language of *Sawyer* for this context. Mr. Davis must show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence.⁴³

clear and convincing evidence that but for constitutional error, no reasonable juror would find him eligible for the death penalty under [State] law.” 505 U.S. at 348.

⁴² *Sawyer* applies in the context where one is “actually innocent of the death penalty.” *Schlup*, 513 U.S. at 323 (internal quotations omitted). The Court has not borrowed this standard because it considers the question in this case analogous to the question of whether Mr. Davis is innocent of the death penalty. Rather, the Court has borrowed it because, based upon other Supreme Court case law, it is the only language that appears to accord with the other requirements for crafting a burden of proof in this case.

⁴³ The Court believes this standard to be appropriate because it comports with the high level of respect society has for jury verdicts rendered subsequent to an uncorrupted process, while acknowledging that even the best efforts of society may occasionally yield results that later prove clearly incorrect.

III. APPLICATION OF FACTS TO LAW

The Court now considers whether Mr. Davis has shown, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the evidence he has presented since trial.⁴⁴ Mr. Davis's post-trial evidence can be categorized by purpose: evidence that diminishes the State's initial showing of guilt and evidence that tends to prove innocence. The Court first considers each piece of evidence individually and then considers it holistically.

A. AEDPA and Factual Deference

Even in the context of an original habeas petition, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") requires deference to prior state court factual determinations.⁴⁵ 28 U.S.C. § 2254(d)(2),

⁴⁴ In the case currently before this Court, Mr. Davis's guilt was proven at trial beyond a reasonable doubt, but not to a mathematical certainty. However, Mr. Davis does not challenge his conviction based on residual doubt. Nor can he, as such a challenge appears foreclosed by Supreme Court precedent. *Cf. Oregon v. Guzek*, 546 U.S. 517 (2006) (doubting that there is a right to even introduce mitigation evidence regarding residual doubt much less a mandate that elimination of all residual doubt is required prior to the imposition of the death penalty). If state prosecutors in Georgia are comfortable seeking the death penalty in cases of heinous crimes where their proof creates less than an absolute certainty of guilt, and the people of Georgia, through their validly enacted laws allow such a system knowing that it may occasionally result in the erroneous imposition of punishment, *Guzek* suggests that the Constitution will not interfere. Regardless, this question is not before the Court and will not be considered further. The Court considers only whether Mr. Davis has satisfied the requirements for establishing a freestanding claim of actual innocence as defined above.

⁴⁵ The State contends that language in the transfer order requires 28 U.S.C. § 2244(b) to be applied. (Doc. 21 at 37, 62-63.) The Court disagrees. The transfer order required this Court to

determine “whether *evidence that could not have been obtained at the time of trial* clearly establishes petitioner’s innocence.” *Davis*, 130 S. Ct. at 1 (emphasis added). Section 2244(b)(2)(B) bars a Court from considering a claim unless its factual predicate could not be discovered through the exercise of “due diligence” and there is a showing of innocence. Section 2244(b)(2)(B)’s due diligence requirement addresses the availability of a claim at all stages of litigation, including prior collateral review, not simply its availability at trial. *See In re Magwood*, 113 F.3d 1544, 1548 (11th Cir. 1997). Accordingly, the language requiring this Court to consider the availability of evidence only post-trial does not track § 2244(b). And, as this Court has already explained, the Supreme Court’s order actually implies that § 2244(b) is inapplicable. (Doc. 11 at 3 n.3.)

There are at least two reasons why these bars may not be applicable. First, applying these bars in the Supreme Court’s original jurisdiction creates an oddity that allows the decision of a district court to bind the Supreme Court or limit its jurisdiction based on implied repeal of jurisdiction under AEDPA. *Cf. McCleskey v. Zant*, 499 U.S. 467, 479-81 (1991) (discussing the history of § 2244(b) and res judicata); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (implied repeals of jurisdiction are disfavored). Second, § 2244(b) likely binds only lower courts. The Supreme Court has already suggested that § 2244(b) does not bind it but only “informs” its jurisdiction. *Felker v. Turpin*, 518 U.S. 651, 662-63 (1996). This reading accords with both the structure of the bill, *see* 28 U.S.C. § 2244 (b) (specifically referencing circuit and district courts in § (b)(3), (4) respectively, and requiring each type of court to apply different burdens of proof to § (b)(1), (2), a structure that avoids the creation of duplicative text that would otherwise be required to reprint § (b)(1), (2) under § (b)(3), (4)), and AEDPA’s legislative history, *see* 141 Cong. Rec. S7596-02 (daily ed. May 26, 1995) (statement of Senator Orrin Hatch) (“ [W]e restrict the filing of repetitive petitions by requiring that any second petition be approved for filing *in the district court by the court of appeals*. A repetitive petition would only be permitted in two circumstances: One, if it raises the claim based on a new rule of constitutional law that is retroactively applicable; or, two, if it is based on newly discovered evidence that could not have been discovered through due diligence in time to present the claim in the first petition

(e)(1); *Felker v. Turpin*, 518 U.S. 651, 662 (1996) (“Our authority to grant habeas relief to state prisoners is limited by § 2254. . . .”). 28 U.S.C. § 2254(d)(2)⁴⁶ requires federal courts to defer to state court adjudications unless the state adjudication was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(e)(1)⁴⁷ requires federal courts to defer to state court factual determinations unless they are disproven by clear and convincing evidence.⁴⁸ These two

and that, if proven, would show by a clear and convincing evidence that the defendant was innocent.” (emphasis added)).

⁴⁶ 28 U.S.C. § 2254(d)(2) 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 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.

⁴⁷ 28 U.S.C. § 2254(e)(1) provides:

In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

⁴⁸ It bears noting that § 2254(e)(1) deference is often inapplicable in this case. First, the State concedes this deference is inapplicable to witnesses who testified at the federal hearing, even if these witnesses’ affidavits were considered by the state court. (Doc. 79 at 25-26.) Second, the order of the Supreme Court of Georgia mostly rejected the affidavits as insufficiently material to prove the ultimate fact in issue—Mr. Davis’s innocence. *Davis*, 283 Ga. at 441-48, 660 S.E.2d at 358-63. Such determinations are relevant to § 2254(d)(2) deference rather than § 2254(e)(1).

sections provide independent standards of deference that courts must be careful not to merge.⁴⁹ *Miller-El v. Cockrell*, 537 U.S. 322, 341-42 (2003).

The application of 28 U.S.C. § 2254(d)(2) and (e)(1) is especially convoluted in this case because this Court held an evidentiary hearing while the state court did not. The Eleventh Circuit has explained the problem created by AEDPA deference under these circumstances:

The argument as to why § 2254(d) might not apply in certain instances in which a federal evidentiary hearing is premised in sound practicality. If the federal evidentiary hearing uncovers new, relevant evidence that impacts upon a petitioner's claim(s) and was not before the state court, it is problematic to ascertain how a federal court would defer to the state court's determination. That is, the new, relevant evidence was never before the state court so it never considered the impact of the evidence when denying relief, and there is arguably nothing to defer to.

In contrast, the argument that a federal evidentiary hearing does not alter the federal standard of review is as follows. AEDPA places a highly deferential standard of review in habeas

⁴⁹ Courts distinguish these sections as follows:

§ 2254(d)(2)'s reasonableness standard would apply to the final decision reached by the state court on a determinative factual question, [and] § 2254(e)(1)'s presumption of correctness . . . to the individual factfindings, which might underlie the state court's final decision or which might be determinative of new legal *issues* considered by the habeas court.

Teti v. Bender, 507 F.3d 50, 58 (1st Cir. 2007). The Court will follow this distinction while adjudicating Mr. Davis's claim.

cases and provides that habeas relief “shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings” unless certain conditions are met. 28 U.S.C. § 2254(d). The words “shall” and “any” are powerful words and render AEDPA applicable to all claims raised in a habeas petition regardless of whether a federal evidentiary hearing is held. After all, AEDPA itself dictates under what circumstances a federal evidentiary hearing can be held. *See* 28 U.S.C. § 2254(e). A petitioner’s habeas claim, even if subject to a proper federal evidentiary hearing, is still “any” claim for the purposes of § 2254(d)’s highly deferential standard of review, and the new evidence in the federal proceeding is considered in determining whether the state court reached an unreasonable determination.

LeCroy v. Sec’y, Fl. Dept. of Corr., 421 F.3d 1237, 1263 n.30 (11th Cir. 2005). The Supreme Court has not resolved this issue, and the circuit courts are split. Some hold AEDPA deference inapplicable under these circumstances. *Bryan v. Mullin*, 335 F.3d 1207, 1216 (10th Cir. 2003) (en banc); *Nunes v. Mueller*, 350 F.3d 1045, 1055 (9th Cir. 2003). One finds both sections applicable. *Morrow v. Dretke*, 367 F.3d 309, 315 (5th Cir. 2004). The majority of circuits adopt a middle ground that deference is applicable, but operates with decreased force. *Teti*, 507 F.3d at 58 (“[T]he extent to which a state court provides a full and fair hearing is no longer a threshold requirement before deference applies; but it might be a consideration while applying deference under § 2254(d)(2) and § 2254(e)(1).” (quoting *Lambert v. Blackwell*, 387 F.3d 210, 235 (3d Cir. 2004))); *Lambert*, 387 F.3d at 235 (same); *see Brown v. Smith*,

551 F.3d 424, 429 (6th Cir. 2008) (where federal habeas evidentiary hearing uncovers “substantial” new evidence, AEDPA deference does not apply); *Matheney v. Anderson*, 377 F.3d 740, 747 (7th Cir. 2004) (“The evidence obtained in such a hearing is quite likely to bear on the reasonableness of the state courts’ adjudication . . . but we do not see why it should alter the *standard* of federal review.” (quoting *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002) (alterations in original))). This Court concurs with the middle approach and applies it here. The Court now considers Mr. Davis’s showing.⁵⁰

B. Evidence Diminishing the State’s Showing at Trial (Recantation Evidence)⁵¹

The Court begins by considering the recantation evidence. Courts look upon recantation evidence with suspicion. *E.g.*, *United States v. Baker*, 479 F.3d 574, 578 (8th Cir. 2007); *United States v. Santiago*, 837 F.2d 1545, 1550 (11th Cir. 1988); *United States v. Hedman*, 655 F.2d 813, 818 (7th Cir. 1981). As the Eighth Circuit Court of Appeals has explained:

It is easy to understand why this should be so. The trial is the main event in the criminal process. The witnesses are there, they are sworn, they are subject to cross-examination, and the

⁵⁰ The Court notes that while AEDPA deference is applicable, it has not affected any of this Court’s determinations. In all cases where this deference was applicable, this Court found itself in accord with the Supreme Court of Georgia’s determinations.

⁵¹ To the extent that it is relevant, the evidence regarding the bullets and shell casings both diminishes the State’s showing at trial and tends to show innocence. As the primary focus is on Mr. Davis’s ability to prove his innocence, the Court has discussed this evidence in the section regarding innocence. *See* Analysis Part III.C.iv.

jury determines whether to believe them. The stability and finality of verdicts would be greatly disturbed if courts were too ready to entertain testimony from witnesses who have changed their minds, or who claim to have lied at the trial.

United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997).

Additionally, it bears noting that even with regard to credible recantations, not all recantations are of equal value. A witness may recant only a small, insignificant portion of his prior testimony, making the recantation irrelevant. In its closing argument at trial, the State explained that the evidence of the MacPhail murder⁵² was (1) eyewitness testimony regarding who was wearing the white and yellow shirts, and the actions taken by the individual in each shirt⁵³ (2) personal identifications of Mr. Davis as the shooter; and (3) secondhand confessions by Mr. Davis. (*See* Trial Transcript at 1496-1502.) Accordingly, to actually diminish the State's case in a meaningful manner, a recantation would have to somehow attack one of these three types of evidence. With this background, the Court considers the recantation evidence.

⁵² The State also referenced the evidence regarding bullets and shell casings. (Trial Transcript at 1502.) However, this evidence was offered to show that the same person who was responsible for the murder of Officer MacPhail was also responsible for the Cloverdale shooting, it was not offered as evidence to show that any specific individual committed either crime. (*Id.* at 1502-03.)

⁵³ The Court includes under this heading testimony that the same person—the one in the white shirt—both assaulted Larry Young and shot Officer MacPhail. (Trial Transcript at 1497.)

i. Antoine Williams

Antoine Williams was the night porter at the Burger King on the night of the shooting. At trial, his testimony was used to establish that the person in the white shirt both struck Larry Young with the pistol and shot Officer MacPhail, and to directly identify Mr. Davis as the person in the white shirt. (Trial Transcript at 958-64, 969-70, 1497, 1499-1500.) Mr. Davis contends that Mr. Williams has since recanted his direct identification. (Doc. 2 at 6-7.)

The earliest statements from Antoine Williams are two statements given to the police in the days following the murder. In his first statement, he explains that the same person struck Larry Young and shot Officer MacPhail, and that this person was wearing a white shirt. (Pet. Ex. 32-OO at 1-2.) In his second statement, Antoine Williams identified Mr. Davis as the shooter from a photo array with a sixty percent certainty. (Pet. Ex. 32-PP at 1-2.) He also stated that he could distinguish yellow and white on the night in question, despite watching the events through the tinted windows of his car. (*Id.* at 1-2.)

At trial, Mr. Williams identified Mr. Davis as the shooter and testified that the same person who struck Larry Young shot Officer MacPhail. (Trial Transcript at 958-64.) However, he initially backed off his earlier statement about his ability to distinguish the yellow and white shirts.⁵⁴ (*Id.*) Mr. Williams next statement, the recantation affidavit, stated that

⁵⁴ Despite initially recanting his statement regarding the shirt colors, Mr. Williams ultimately reaffirmed his statement to the police, explaining that his memory would have been better closer to the events in question. (See Trial Transcript at 958-60.)

he was unsure of his direct identification of Mr. Davis as the shooter.⁵⁵ (Doc. 3, Ex. 4 at 3.)

At the evidentiary hearing, Mr. Williams testified that he was not sure who shot the police officer and that he felt pressure to identify Mr. Davis as the shooter at trial. (Evidentiary Hearing Transcript at 12-15.) However, Mr. Williams never testified that his earlier statement or testimony were false, only that he could not remember what he said.⁵⁶ (*Id.* at 15-21.) He also contradicted his testimony regarding feeling pressured at trial during cross-examination:

Q: But it's your testimony the police never pressured you to say anything in those two statements from August 19th or August—

A: Ma'am, nobody never pressured me, ma'am. I just . . .

Q: And nobody suggested for you to say anything specific?

A: No, ma'am, never.

(*Id.* at 24.)

⁵⁵ In his affidavit and at the evidentiary hearing, Mr. Williams also explained that he signed his police statements without reviewing them because he cannot read. (Doc. 3, Ex. 4 at 3; Evidentiary Hearing Transcript at 12-13.) However, this fact is a red herring. While Mr. Williams may have been unable to read his police statements, he does not contest the accuracy of their contents. (Evidentiary Hearing Transcript at 10-26.)

⁵⁶ For example, with respect to his initial identification of Mr. Davis, Mr. Williams testified: "Q: Do you remember telling [Detective Ramsey] you were 60 percent sure that Troy Davis was the person that shot Officer MacPhail? A: I maybe did, ma'am. I can't remember. Being honest, I can't." (Evidentiary Hearing Transcript at 21.) Saying that one cannot remember his prior testimony is different from admitting that it is false.

Mr. Williams's testimony does not diminish the State's case. First, it is not proper to consider Mr. Williams's testimony a recantation—he never indicated that his earlier statements were false, only that he can no longer remember what he said. And, to the extent that his present testimony is inconsistent with what he had previously said, he indicated that his memory would have been better at the time of the crime. (*Id.* at 18.) Second, Mr. Williams testified that his prior testimony was never coerced by state officials.⁵⁷ (*Id.* at 18-19, 24.) This testimony accords with the record; Mr. Williams's statements were far from ideal and if the State was to coerce testimony, it surely would have coerced testimony more favorable than that actually provided by Mr. Williams. (See Pet. Ex. 32-PP at 1 (direct identification was only sixty percent certain); Trial Transcript at 958-60, 972 (unable to distinguish between yellow and white shirt).) Accordingly, Mr. Williams's testimony established only that his statements were never coerced and that he can no longer remember his previous statements—not that his prior testimony was false or, more importantly, that Mr. Davis was not the shooter.⁵⁸

⁵⁷ Although Mr. Williams's own testimony undermines allegations of coercion, there was also credible testimony by the officers and prosecutors that Mr. Williams was not coerced. (Evidentiary Hearing Transcript at 306, 347, 442.)

⁵⁸ Mr. Davis will surely object to this finding, claiming that Mr. Williams unequivocally identified Mr. Davis at trial as the shooter and has now "recanted" that identification. However, such a claim would be an exaggeration both as to the recantation and trial testimony. At trial, Mr. Williams's identification was not unequivocal, he testified on cross-examination that his initial identification was to a certainty of only sixty percent (Trial Transcript at 969-70) and never stated that his certainty

ii. Kevin McQueen

Kevin McQueen was the “jailhouse snitch.” At trial, his testimony was used to relate Mr. Davis’s confession to the MacPhail murder. (Trial Transcript at 1230-32, 1501.) Mr. Davis contends that Mr. McQueen admits his prior testimony was a “complete fabrication.” (Doc. 2 at 7.)

At trial, Mr. McQueen claimed that Mr. Davis confessed the following events to him. Mr. Davis began his night by shooting at the group from Yamacraw—the Cloverdale shooting. (Trial Transcript at 1230.) Mr. Davis then went to his girlfriend’s house for a time, and later to the Burger King to eat breakfast. (*Id.* at 1231.) While at Burger King, Mr. Davis ran into someone who “owed [him] money to buy dope.” (*Id.*) There was a fight regarding the drug money, and when Officer MacPhail came over, Mr. Davis shot him. (*Id.* at 1231-32.)

At the hearing before this Court, Mr. McQueen testified that there was “no truth” to his trial testimony. (Evidentiary Hearing Transcript at 28.) He claimed that he fabricated the testimony to get revenge on Mr. Davis for an altercation in the jail and because he received benefits from the State. (*Id.* at 29, 32.) Mr. McQueen put the same recantation

had increased by the time of trial. Before this Court, Mr. Williams again expressed uncertainty as to the shooter’s identity, but he never testified that Mr. Davis was, in fact, not the shooter. (*See* Evidentiary Hearing Transcript at 10-26.) This is a far cry from Mr. Williams testifying that he lied under oath when identifying Mr. Davis at trial or that, despite his prior statements, he is now sure that Mr. Davis was, in fact, not the shooter. Moreover, Mr. Williams testified that his memory would have been better closer to the events in question, implicitly deferring to his prior statements. (*See id.* at 18.)

into an affidavit on December 5, 1996, but stated his only reason for testifying falsely was the altercation between he and Mr. Davis. (Doc. 3, Ex. 6 at 1-2.)

Other than claiming that Mr. Davis was guilty of both the MacPhail murder and Cloverdale shooting, Mr. McQueen's trial testimony totally contradicts the events of the night as described by numerous other State witnesses. *Supra* Background Part III.N. Indeed, while other witnesses described a fight over alcohol, Mr. McQueen described a fight over drugs; and while other witnesses claimed Mr. Davis went to shoot pool immediately prior to the murder, Mr. McQueen claimed Mr. Davis went to get breakfast. *Id.* These inconsistencies make it clear that Mr. McQueen's trial testimony was false, a fact confirmed by Mr. McQueen's recantation.⁵⁹ (Evidentiary Hearing Transcript at 31.) Given that Mr. McQueen's trial testimony was so clearly fabricated, and was actually contrary to the State's theory of the case, it is unclear why the State persists in trying to support its veracity. (*Id.* at 33-39.) Regardless, the recantation is credible, with the exception of the allegation of prosecutorial inducements, but only minimally reduces the

⁵⁹ While the Court credits Mr. McQueen's recantation, it does not credit the portion of his testimony claiming that he received inducements to testify at trial. As Mr. Lock credibility testified, Mr. McQueen received no favorable treatment for his testimony. (Evidentiary Hearing Transcript at 453-54 ("Q: So my question to you, Mr. Lock, is: to your knowledge as the chief assistant district attorney at this time did Mr. McQueen get any benefit for the information that he was giving . . . regarding Mr. Davis? A: No, and I'm relatively certain that any assistant district attorney that contemplated doing that would have come to me about doing it.").)

State's showing at trial given the obviously false nature of the trial testimony.⁶⁰

iii. Jeffery Sapp

Jeffery Sapp was a long-time friend of Mr. Davis. At trial, Mr. Sapp's testimony was used to relate Mr. Davis's confession to the MacPhail shooting.⁶¹ (Trial Transcript at 1251-52, 1501.) Mr. Davis contends that Mr. Sapp has "recanted his testimony in full" and that his false trial testimony was "the result of police pressure." (Doc. 2 at 7-8.)

Jeffery Sapp testified twice in this case, first at Recorder's Court and then at trial. Both times he testified that Mr. Davis confessed to shooting Officer MacPhail, but that Mr. Davis claimed the shooting was in self-defense. (Recorder's Court Transcript at 166-67; Trial Transcript at 1251-52.) Under direct-examination at trial, Mr. Sapp further testified that he had made up a portion of Mr. Davis's confession. (Trial Transcript at 1253.) In his recantation affidavit, Mr. Sapp claimed that he fabricated the entire

⁶⁰ That is to say, if a witness testified credibly at trial and then recanted, that recantation would obviously be much more damaging to the State's case than a recantation by a witness who only confirmed what should have been apparent to all at the time of trial—that the testimony was fabricated.

⁶¹ Monty Holmes provided similar statements to the police regarding a confession by Mr. Davis. *Supra* Background Part I.T. Monty Holmes, who did not testify at trial, has since recanted his police statement, claiming police coercion. (Doc. 3, Ex. 33 at 2.) Because Mr. Holmes's testimony did not form a portion of the evidence presented to the jury, his recantation does not diminish the proof at trial. Moreover, the State provided credible, live testimony from Officers Ramsey and Oglesby that Mr. Holmes was not coerced by police. (Evidentiary Hearing Transcript at 247, 317.)

confession due to police harassment. (Doc. 3, Ex. 7 at 1-2.) At the hearing before this Court, Mr. Sapp again testified that he falsified Mr. Davis's entire confession due to police pressure. (Evidentiary Hearing Transcript at 51-57.) In addition to this testimony, Mr. Sapp attempted to lie about other facts regarding this case to exculpate Mr. Davis. For example, he attempted to hide his knowledge of Mr. Davis's street name: Rough as Hell ("RAH").⁶² (*Id.* at 61.)

Jeffery Sapp's recantation is valueless because it is not credible. First, as noted above, his false exculpatory testimony at the hearing indicates that he was not a credible witness. Second, the truth of his trial testimony is corroborated by other statements given to police. (*Id.* at 351.) Third, his claims of state coercion are impossible to square with various aspects of his allegedly false testimony, such as claiming that Mr. Davis acted in self-defense.⁶³ (Trial Transcript at 1253.) Indeed, if the State wanted to coerce false testimony, they would not include within it an affirmative defense. Also, Mr. Sapp felt

⁶² Sapp testified as follows:

Q: And what does Rah stand for?

A: Raheem.

Q: Does it also stand for "Rough as Hell?"

A: No, ma'am. It's like a Muslim name that the older guys gave us to quit eating pork.

(Evidentiary Hearing Transcript at 61.) This testimony cannot be characterized as anything other than a direct lie by Mr. Sapp, who long ago testified to his knowledge of what RAH stood for. (Recorder's Court Transcript at 162.)

⁶³ Ironically, at the hearing there was credible testimony from Officer Ramsey that Mr. Davis's mother threatened Mr. Sapp should he testify at trial. (Evidentiary Hearing Transcript at 350-51.)

comfortable enough at trial to claim that a portion of his police statement was false, dealing with some details of Mr. Davis's confession, but still testified that Mr. Davis confessed to the MacPhail shooting.⁶⁴ (*Id.* at 1251-55.) Fourth, his claims of state coercion are refuted by credible, contrary testimony from both prosecutors and Officer Ramsey. (Evidentiary Hearing Transcript at 240, 442, 465.) In sum, neither Mr.

⁶⁴ Even if Mr. Sapp's claims of fabricating a confession were credible, they are not new evidence that was unavailable prior to trial. At trial he testified:

Q: Do you recall making a statement to the police about this matter?

A: Yeah.

Q: Do you recall making the statement on August 21 in the middle of the afternoon?

A: No, they came to my house that morning, about two o'clock in the morning.

Q: Two o'clock in the morning?

A: Yeah, beating on my door, woke me up, so you know, I just said a lot of stuff that I ain't even meant. *A lot of stuff he didn't even tell me, I just made up.*

* * *

Q: Do you remember what you said in that statement?

A: No, I can't remember what I said.

* * *

A: He shot the officer and got a good look at him, and it was self-defense. And all the rest, I just said. He never did tell me any of that.

(Trial Transcript at 1253.) His present recantation is a second attempt at recantation in which he goes further than he did at trial; it is new only in its breadth and rationale, not in its existence. Moreover, it is unclear why, if Mr. Sapp was being coerced to testify, he felt comfortable testifying that his previous inculpatory testimony was largely false.

Sapp's recantation nor his claims of police coercion are credible. Accordingly, his recantation does not diminish the State's case.

iv. Darrell Collins

Darrell Collins was the third individual involved in the altercation with Larry Young. At trial, he testified that Mr. Davis was wearing the white shirt and assaulted Larry Young.⁶⁵ (Trial Transcript at 1124, 1128, 1158, 1497.) According to Mr. Davis, Darrell Collins has since recanted the latter portion of that testimony, which was originally secured through police coercion. (Doc. 2 at 6.)

In statements that Mr. Collins gave to the police in the days following the shootings, he stated that Mr. Davis was responsible for the Cloverdale shooting, struck Larry Young on the head, and wore a white shirt on the night of the incidents. (Pet. Ex. 32-C at 1-2, Pet. Ex. 32-D at 2.) At the trial, Mr. Collins reaffirmed that Mr. Davis was wearing the white shirt and assaulted Mr. Young. (Trial Transcript at 1124, 1128, 1158.) However, Mr. Collins testified that he lied about Mr. Davis's involvement in the Cloverdale shooting due to police intimidation. (*Id.* at 1120.)

In his recantation affidavit, Mr. Collins claimed a second lie—that he never saw Mr. Davis strike Larry Young. (Doc. 3, Ex. 3 at 2-3.) He averred that he was comfortable revealing the first lie at trial but not the second because he felt the police cared more about whether Mr. Davis assaulted Mr. Young than Mr.

⁶⁵ Mr. Collins also told the police that Mr. Davis was responsible for the Cloverdale shooting, but recanted this testimony at trial. (Trial Transcript at 1120.) He also testified at trial that he included this in his police statement due to police coercion. (*Id.* at 1137.)

Davis's responsibility for the Cloverdale shooting. (*Id.*) At the hearing, Mr. Collins again claimed that he lied about both the assault on Larry Young and the Cloverdale incident due to police coercion. (Evidentiary Hearing Transcript at 83, 91, 94.) Specifically, he claims that he simply parroted what the police told him to say. (*Id.* at 88-91, 96, 106-07, 118.) However, he did not recant his earlier testimony that Mr. Davis was wearing the white shirt on the night of the shootings.⁶⁶ (*Id.* at 115, 129.)

Mr. Collins testimony is neither credible nor a full recantation. First, regardless of the recantation, Mr. Collins's previous testimony, that has never been unequivocally recanted, still provides significant evidence of Mr. Davis's guilt by placing him in the white shirt. Second, if Mr. Collins's claim that he simply parroted false statements fed to him by police is truthful, query why Mr. Collins never directly identified Mr. Davis as Officer MacPhail's murderer. Surely, this would have been the best available false testimony, and given Mr. Collins's proximity to the murder it would have been as reasonable as any other false testimony. Third, there was credible testimony from Officer Sweeney and Mr. Lock that Mr.

⁶⁶ At the hearing, Mr. Collins did not recant his testimony regarding the white shirt. Instead, he testified that he presently had no memory of what color shirt Mr. Davis was wearing that night, but would assume that whatever he told the police about the color of Mr. Davis's shirt would have been a lie because all inculpatory testimony he provided is presumptively false in his mind. (Evidentiary Hearing Transcript at 129.) Of course, that statement is very different from stating that, as a matter of his own knowledge, he is sure that he was lying when he placed Mr. Davis in the white shirt.

Collins's testimony was not coerced.⁶⁷ (*Id.* at 322-23, 442.) Fourth, Mr. Collins generally lacked credibility, testifying to an implausible version of events: that he was less than ten feet⁶⁸ from Larry Young when the assault occurred and did not turn away from the confrontation until Officer MacPhail arrived, but saw nothing. (*Id.* at 83-84, 109-10.) Given the close proximity, it would be safe to assume that surely Mr. Collins saw either Mr. Coles or Mr. Davis strike Mr. Young—not that Mr. Coles simply saw nothing. Because Mr. Collins continues to provide evidence of Mr. Davis's guilt and his recantation is not credible, his testimony does not diminish the State's case.

v. Harriett Murray

Harriett Murray was Larry Young's girlfriend. At trial, her testimony was used to place Mr. Davis in the white shirt and to directly identify him as the gunman in the MacPhail shooting. (Trial Transcript

⁶⁷ Further, even if Mr. Collins's allegations regarding coercion and false testimony are true, they are not new. Mr. Collins testified at trial that he was coerced and that his statements regarding Mr. Davis's involvement in the Cloverdale shooting were fabricated. (Trial Transcript at 1143.) Moreover, his explanation as to why he revealed only the lie regarding the Cloverdale shooting at trial is not believable. (*See* Doc. 3, Ex. 3 at 2-3 (explaining that Mr. Collins believed the police cared more about his false testimony regarding Mr. Young than the Cloverdale incident).) Indeed, it would be puzzling to think that the police would not find Mr. Collins's accusations of harassment in the context of the Cloverdale shooting offensive but would be bothered by the exact same allegations with respect to the assault on Larry Young.

⁶⁸ Mr. Collins testified that he was as close to the assault as he was to the court reporter while he was on the witness stand—a distance of approximately five feet. (Evidentiary Hearing Transcript at 112.)

at 846-51, 856, 1497-98.) Mr. Davis contends that Ms. Murray's "recantation" affidavit is important because it described Mr. Coles and not Mr. Davis as the shooter. (Doc. 2 at 7.) Ms. Murray is deceased and did not testify at the evidentiary hearing.

The first recorded statements by Ms. Murray are two police statements; one on August 19, 1989 and one on August 24, 1989. In the former, she described Officer MacPhail's shooter as wearing a white shirt. (Pet. Ex. 32-U at 2.) In the latter, Ms. Murray identified Troy Davis as the shooter by first identifying Mr. Davis as one of the three men at the shooting, and then using a process of elimination—she eliminated Mr. Coles as the shooter because she recognized him as the person in the yellow shirt and Mr. Collins because he was too short to be the person in the white shirt. (Pet. Ex. 32-V at 2.)

During her Recorder's Court and trial testimony, Ms. Murray testified that the shooter was wearing a white shirt and was the same person who assaulted Mr. Young. (Recorder's Court Transcript at 56-58, 60-63; Trial Transcript at 846-51.) At trial, Ms. Murray also directly identified Mr. Davis as the gunman. (*Id.* at 865.) Ms. Murray was also thoroughly cross-examined at trial as to discrepancies between her various statements regarding the assault on Larry Young, and her difficulty in indentifying Mr. Davis as Officer MacPhail's murderer. (*Id.* at 871-79, 888-89.)

Ms. Murray's "recantation" is an unnotarized affidavit, begrudgingly obtained. (Evidentiary Hearing Transcript at 41 ("Q: Mr. Hanusz, can you explain why the affidavit was not notarized. A: The affidavit was not notarized because neither Mr. Mack nor myself are South Carolina notaries, and Ms. Murray would not allow us time to get a notary or accompany

us to a notary to have it sworn.”.) It does not contain any direct recantation, any admission that Ms. Murray lied under oath, or even a statement that Ms. Murray was aware that her affidavit varied from her trial testimony.⁶⁹ (Doc. 3, Ex. 8 at 1.) The only “recantation” in the affidavit is an indirect one—Ms. Murray states that she saw the “man who was arguing with Larry, chasing him from the Time-Saver, and who slapped Larry shoot the police officer.” (*Id.* (emphasis added).) Mr. Davis finds this change important because Ms. Murray indicated that Mr. Coles was arguing with Mr. Young, despite testifying that Mr. Davis slapped Larry Young and shot Officer MacPhail. On this basis, Mr. Davis reasons that Ms. Murray has now identified Mr. Coles as the shooter instead of Mr. Davis. (Doc. 2 at 7.)

This affidavit is not helpful to Mr. Davis’s showing because it seems unlikely that it was intended to recant or alter Ms. Murray’s testimony regarding who shot Officer MacPhail. It would have been a simple matter for Ms. Murray to directly state that her identification at trial of Mr. Davis as the murderer was mistaken, but she chose not to do so. To the contrary, her affidavit, at first blush, actually appears to affirm her trial testimony; only a close examination reveals the minor inconsistency—that the same person who shot Officer MacPhail and assaulted Larry Young, also argued with Larry Young. (*See* Doc. 3, Ex. 8.) Given that Ms. Murray spent a minimal amount of time reviewing the affidavit, even refusing to wait to have it notarized, it

⁶⁹ The affidavit does not allege police coercion. (Doc. 3, Ex. 8.) However, it bears noting that there was credible testimony at the hearing that Ms. Murray was not coerced. (Evidentiary Hearing Transcript at 288-89.)

seems likely that she was unaware of this inconsistency. (See Evidentiary Hearing Transcript at 41.) This reading is confirmed by her behavior regarding the securing of the affidavit. Surely if Ms. Murray believed her testimony placed an innocent man on death row, she would have found time to wait for a notary public to validate her statement.

More importantly, it is not obvious that the implication of this “recantation” even exculpates Mr. Davis. Ms. Murray’s affidavit simply states that the same individual who assaulted Larry Young and shot Officer MacPhail, also argued with Larry Young. (Doc. 3, Ex. 8 at 11.) Nowhere does it provide any identifying information as to who took all three actions. That is, there is no way to know whether Ms. Murray believed that Mr. Coles or Mr. Davis took all three actions. Moreover, the affidavit states that the individual argued with Larry Young, it does not attribute any specific threats to him. (*Id.*) It could easily be that Ms. Murray considered all three of the individuals to have been “arguing” with Larry Young, an interpretation that does not require any implied recantation of Ms. Murray’s prior testimony. Accordingly, the Court finds this affidavit valueless to Mr. Davis’s showing.⁷⁰

⁷⁰ Even if this Court adopted Mr. Davis’s reading of this affidavit, it would be valueless because it contains no new evidence. As Mr. Davis notes, the only way to understand this affidavit as a recantation is by reference to inconsistencies between her initial police statements and later testimony. (Doc. 2 at 7.) These same inconsistencies were known to Mr. Davis at trial and were put before the jury. (*Id.* at 871-79, 888-89.)

vi. Dorothy Ferrell⁷¹

Dorothy Ferrell was a guest at the Thunderbird Motel, located across Oglethorpe Avenue from the Burger King parking lot. At trial, Ms. Ferrell's testimony was used to show that the shooter was wearing a white shirt and to directly identify Mr. Davis as the gunman. (Trial Transcript at 1015, 1021, 1497, 1499.) Mr. Davis contends that Ms. Ferrell has clearly disavowed her prior statement, stating that she lied at his trial based on promises of favorable treatment by the District Attorney. (Doc. 2 at 5-6.) Mr. Davis intentionally declined to allow Ms. Ferrell to testify, preventing her testimony from being challenged on cross-examination and denying this Court the opportunity to personally assess her credibility. (Evidentiary Hearing Transcript at 272-73.)

Ms. Ferrell gave two statements to the police: one on August 19, 1989 and one on August 24, 1989. In the former, she described the shooter as wearing a white shirt. (Pet. Ex. 32-Y at 2.) In the latter, she again related that the shooter was wearing a white shirt. (Pet. Ex. 32-Z at 4.) She also identified Mr. Davis from a photo line-up and discussed a prior identification of Mr. Davis based on a picture she saw in a police cruiser; however, she admitted to seeing a picture of Mr. Davis on the news between the two identifications. (*Id.* at 2-4.) Both at the probable cause hearing and at trial, Ms. Ferrell testified that

⁷¹ At the hearing, the admission of Ms. Ferrell's affidavit was discussed, but never decided due to an intervening discussion. (Evidentiary Hearing Transcript at 468-73.) However, Ms. Ferrell's affidavit is already in the record in this case because it was presented with Mr. Davis's first federal habeas petition. (See Doc. 3 at 2.) Therefore, resubmitting it at the hearing was unnecessary to require its consideration by this Court.

that shooter was wearing a white shirt and directly identified Mr. Davis as the shooter. (Recorder's Court Transcript at 137-40; Trial Transcript at 1015, 1021.) At trial, a number of inconsistencies between her trial testimony and prior testimony were pointed out for the jury during cross-examination. (*Id.* at 1043-52.)

In her recantation affidavit, Ms. Ferrell claims that she never saw who shot the police officer and that her testimony was coerced. (Doc. 3, Ex. 1.) Mr. Davis has also submitted a letter from Ms. Ferrell to District Attorney Spencer Lawton, asking for special treatment for her trial testimony.⁷² (Doc. 3, Ex. 2.) Ms. Ferrell did not testify at the evidentiary hearing.⁷³ Unlike Ms. Murray, Ms. Ferrell was available to testify and, in fact, was sitting just outside the courtroom waiting to be called to testify. (Evidentiary Hearing Transcript at 272-73.) Despite her ready availability, Mr. Davis made the tactical decision not to call her to the witness stand.⁷⁴ (*Id.*) This decision is

⁷² At the evidentiary hearing, Ms. Ferrell did not testify at all, and Mr. Lawton was never questioned regarding inducements to Dorothy Ferrell. (Evidentiary Hearing Transcript at 456-65.) Even if the letter was sent, there is no evidence that Mr. Lawton offered any inducement to Ms. Ferrell in exchange for her testimony.

⁷³ Given that Mr. Davis specifically requested this hearing, claiming that a determination based on affidavits was insufficient (Doc. 2 at 28), his decision to rely on an affidavit where live testimony was readily available strongly suggests his belief that this recantation would not have held up under cross-examination.

⁷⁴ Mr. Davis explained the decision not to call Ms. Ferrell as based upon "the circumstances under which she's been avoiding the Petitioner made us reluctant to call her, even though she was perfectly willing to meet with the state yesterday." (Evidentiary Hearing Transcript at 273.)

especially curious because, based upon the contents of her affidavit and her lack of any obvious connections to Mr. Davis, it would appear she should have been his star witness.

Ms. Ferrell's affidavit is a clear recantation, but Mr. Davis's intentional decision to keep Ms. Ferrell from testifying destroys nearly its entire value. In determining actual innocence, "affidavits are disfavored 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. Surely, this general antipathy towards affidavit testimony counts double where the affiant is available, and the affidavit is submitted in lieu of live testimony to prevent cross-examination and credibility determinations.⁷⁵ Moreover, much of Ms. Ferrell's affidavit testimony was directly contradicted by credible, live testimony at the hearing. Officer Ramsey testified that he never coerced her testimony in any way or suggested what the contents of her testimony should be, and that Ms. Ferrell actually approached a different officer without solicitation and identified Mr. Davis as the shooter. (Evidentiary Hearing Transcript at 342-44.) And, Mr. Lock credibly testified that he never attempted to coerce a witness to stick to a prior statement. (Evidentiary Hearing Transcript at 442.) Given the

⁷⁵ This Court made very clear to Mr. Davis that presenting the affidavit instead of live testimony would severely diminish the value of its contents because he was intentionally preventing the State from cross-examining the witness. (Evidentiary Hearing Transcript at 272-73.) Mr. Davis was apparently so concerned as to what Ms. Ferrell would say on the stand that he explained, "[w]e understand that her testimony is not going to be afforded as much weight. We're okay with that." (*Id.* at 273.)

suspicious manner in which this recantation was presented and the credible live testimony contradicting it, the recantation holds very little weight.

vii. Larry Young

Larry Young was the individual assaulted in the Burger King parking lot. At trial, his testimony was used to establish that his assailant was definitely not the person in the yellow shirt, that the person in the yellow shirt was Mr. Coles, and that the person in the white shirt struck him. (Trial Transcript at 801-02, 805-06, 811-13, 832-33, 1497.) Mr. Davis contends that Mr. Young has recanted his trial testimony. (Doc. 2 at 6.)

Mr. Young gave a statement to the police on August 19, 1989. He stated that he was not sure, but that he believed his assailant was the man in the white shirt. (Pet. Ex. 32-N at 3.) He also gave a detailed description of the man in the yellow shirt. (*Id.* at 6.) At the probable cause hearing, Mr. Young testified that the person in the yellow shirt was Mr. Coles, and that he was assaulted by someone other than Mr. Coles, likely the person in the white shirt. (Recorder's Court Transcript at 12-14, 18-21, 43.) At trial, Mr. Young testified that he was arguing with the person in the yellow shirt, that the person in the yellow shirt was not Mr. Davis, and that he was not sure who struck him but did not believe it was the person in the yellow shirt.⁷⁶ (*Id.* at 801-02, 805-06,

⁷⁶ While Mr. Young's testimony indicated that he did not know exactly who struck him, in closing argument the prosecutor did treat Mr. Young's testimony as claiming that the individual in the white shirt assaulted him. (Trial Transcript at 1497.) Accordingly, the Court will treat Mr. Young's testimony as if it was used to help establish that the white shirt assaulted him.

811-13, 832-33.) In his recantation affidavit, he claims that the police refused to allow him medical treatment and that his testimony was coerced. (Doc. 3, Ex. 5.). Like Mr. Collins, Mr. Young claims he testified by simply stating what the police wanted him to say. (*Id.*) Mr. Young was included on Mr. Davis's witness list and was expected to testify at the evidentiary hearing. (Doc. 45 at 1.) However, Mr. Young was never called to the stand.

Like the affidavit of Ms. Ferrell, the value of Mr. Young's affidavit is minimal. First, affidavits are disfavored in this context because they do not allow for cross-examination and credibility determinations. *Herrera*, 506 U.S. at 417. Just as with Ms. Ferrell, Mr. Davis chose to present less reliable affidavit evidence of Mr. Young's testimony to avoid cross-examination. Second, Officer Whitcomb testified credibly that he neither coerced Mr. Young's testimony nor suggested to him what to say. (Evidentiary Hearing Transcript at 253-55.) Mr. Young was not present to contradict this testimony, and his affidavit is insufficient for the task.⁷⁷ Accordingly, this affidavit, like Ms. Ferrell's, carries some, but not much weight.

viii. Summary

Not all recantations are created equal; a witness may recant only a portion of their testimony or the witness may recant in a manner that is not credible. To hear Mr. Davis tell it, this case involves credible,

⁷⁷ Moreover, as with many other witnesses, if the State was prepared to coerce false testimony, they could have coerced much more inculpatory information. Mr. Young was at the scene of the murder and was the victim of the assault. Surely the State would have had Mr. Young directly identify Mr. Davis at trial if they were looking to coerce false testimony.

consistent recantations by seven of nine state witnesses. (Doc. 2 at 5-11.) However, this vastly overstates his evidence. Two of the recanting witnesses neither directly state that they lied at trial nor claim that their previous testimony was coerced. *Supra* Analysis Parts III.B.i (Antoine Williams), III.B.v (Harriet Murray). Two other recantations were impossible to believe, with a host of intrinsic reasons why their author's recantation could not be trusted, and the recantations were contradicted by credible, live testimony. *Id.* Parts III.B.iii (Jeffrey Sapp), III.B.iv (Darrell Collins). Two more recantations were intentionally and suspiciously offered in affidavit form rather than as live testimony, blocking any meaningful cross-examination by the state or credibility determination by this Court. *Id.* Parts III.B.vi (Dorothy Farrell), III.B.vii (Larry Young). Moreover, these affidavit recantations were contradicted by credible, live testimony. While these latter two recantations are not totally valueless, their import is greatly diminished by the suspicious way in which they were offered and the live, contrary testimony. Finally, Kevin McQueen's recantation is credible, but his testimony at trial was patently false, as evidenced by its several inconsistencies with the State's version of the events on the night in question. *Id.* Part III.B.ii (Kevin McQueen). Accordingly, it is hard to believe Mr. McQueen's testimony at trial was important to the conviction, rendering his recantation of limited value. Ultimately, four of Mr. Davis's recantations do not diminish the State's case because a reasonable juror would disregard the recantation, not the earlier testimony; and the three others only minimally diminish the State's case.

C. Other Evidence

Mr. Davis also offers evidence to directly prove his innocence, as opposed to simply diminishing the State's case. This evidence includes: (1) hearsay confessions by Mr. Coles, (2) statements regarding Mr. Coles conduct subsequent to the murder, (3) alternative eyewitness accounts, and (4) new evidence regarding the physical evidence in this case.

i. Hearsay Confessions

Mr. Davis has proffered several hearsay confessions by Mr. Coles regarding the murder of Officer MacPhail. At the hearing, both Mr. Hargrove⁷⁸ and Mr. Gordon⁷⁹ testified that Mr. Coles confessed Officer MacPhail's murder to them. (Evidentiary Hearing Transcript at 156-173, 192-94.) The record also contains affidavits from Shirley Riley⁸⁰ and Darold Taylor⁸¹ relating hearsay confessions. (Doc. 3, Exs. 17, 18.) Mr. Davis contends that these confessions are

⁷⁸ Mr. Hargrove testified that Mr. Coles confessed the murder to him while at a house party. (Evidentiary Hearing Transcript at 157, 162-63.)

⁷⁹ Mr. Gordon contends that Mr. Coles stated that "I shouldn't'a did that shit," but Mr. Gordon can only speculate as to the meaning of these words. (Evidentiary Hearing Transcript at 193-94.) It is not clear that "that shit" refers to murdering Officer MacPhail, it could just as easily refer to hassling Larry Young and starting the events of that evening in motion. However, for the purposes of this petition, the Court will assume that Mr. Coles was referring to Officer MacPhail's murder.

⁸⁰ Ms. Riley averred that Mr. Coles confessed the murder to her, but that she suspected the confession was a lie to impress her. (Doc. 3, Ex. 17 at 1.)

⁸¹ Mr. Taylor stated that Mr. Coles once confessed the murder to him, but told Mr. Taylor to "stay out his business" when pressed on the issue. (Doc. 3, Ex. 18 at 5-6.)

“powerful” evidence of his innocence.⁸² (Doc. 84 at 17.) While the confessions are not meaningless, they lack the power imparted to them by Mr. Davis.

Confessions composed of hearsay are “particularly suspect” because the reliability of the underlying confession will often be impossible to ascertain. *See Herrera*, 506 U.S. at 417. When other petitioners have attempted to use hearsay confessions as part of a *Herrera* showing, the showing was found wanting even when the confessions were offered in conjunction with other evidence of innocence. *See, e.g., House*, 547 U.S. at 555 (“We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.”); *Herrera*, 506 U.S. at 417; *Cooper v. Brown*, 510 F.3d 870, 885 (9th Cir. 2007). The previous failures of such confessions to satisfy *Herrera* lead to the conclusion that while hearsay confessions may tip the balance in an otherwise close case, they will rarely, if ever, form the crux of a showing of actual innocence.⁸³

⁸² Mr. Davis attempted to offer an additional hearsay confession through Ms. Quiana Glover. The Court declined to admit this confession for reasons stated at the hearing and in its order on the motion for reconsideration. (Evidentiary Hearing Transcript at 480-83; Doc. 91.) However, the Court notes that it is aware of the contents of Ms. Glover’s testimony. (Evidentiary Hearing Transcript at 483.) That testimony would have been cumulative and would have suffered from the same defects discussed in this section. Accordingly, had the Court considered the testimony, it would have had no effect on the outcome of this case.

⁸³ This conclusion rests on sound considerations. As the Supreme Court of Georgia noted, if such proof could form the crux of a showing of innocence, it would be easy for “a person [to] subvert the ends of justice by [falsely] admitting the crime

This case illustrates exactly why this type of evidence is only marginally probative. Even if this Court found the witnesses relating the confessions credible, that would not prove that Mr. Coles was being truthful when confessing to these witnesses.⁸⁴ Here, assuming Mr. Coles actually made the confessions, there is an obvious explanation for why he would have confessed falsely—he believed that his reputation as a dangerous individual would be enhanced if he took credit for murdering Officer MacPhail.⁸⁵ (See Doc. 3, Ex. 17 at 1.) Mr. Davis had the burden of proving the confessions were truthful

to others and then absenting himself.” *Davis*, 283 Ga. at 444, 660 S.E.2d at 360 (quoting *Timberlake v. State*, 246 Ga. 488, 492, 271 S.E.2d 792, 796 (1980)) (alteration in original). Likewise, for any minimally connected convict, rounding up several persons who will concoct false confessions should not be difficult. This is likely why such proof has never been sufficient under *Herrera*. Cf. *House*, 547 U.S. at 540; *Herrera*, 506 U.S. at 417.

⁸⁴ One writer has explained the hearsay problem as follows:

In the hearsay situation, two “witnesses” are involved. The first complies with all three of the ideal conditions [—oath, personal presence at trial, and cross-examination—] for the giving of testimony but merely reports what the second “witness” said. The second “witness” is the out-of-court declarant whose statement was not given in compliance with the ideal conditions but contains the critical information.

2 Kenneth S. Broun, McCormick on Evidence § 245 (6th ed. 2009). Because the important witness does not testify under ideal conditions, it becomes very difficult to gauge the accuracy and sincerity of the “second witnesses” testimony. *See id.*

⁸⁵ Indeed, Ms. Riley suspected that Mr. Coles was falsely confessing for this very reason. (Doc. 3, Ex. 17 at 1.)

and not made for the above reason.⁸⁶ Of course, the easiest way to meet that burden would have been to put Mr. Coles on the stand and show him not to be credible on this subject.⁸⁷ Additionally, if Mr. Davis had other highly probative evidence of his innocence or Mr. Coles's guilt—for example, if Mr. Coles's firearm was found and determined to be the murder weapon—that too would render these confessions more meaningful. However, there is no truly persuasive evidence substantiating the hearsay confessions, so they are only of minimal value to this Court.⁸⁸

⁸⁶ Mr. Davis attempts to turn his high burden into a prima facie one. He contends that once a hearsay confession is offered, regardless of its reliability, the Court must assume the truth of the matter asserted and the State has a duty to disprove it. (*See* Doc. 84 at 12.) This is incorrect, the State has no such burden. Of course, if Mr. Davis did offer truly persuasive evidence of the matter asserted in the hearsay confession or of his innocence, the State may have a need to call Mr. Coles to rebut Mr. Davis's case. That is likely why the alternative suspect was called in *House*, where the petitioner presented the hearsay confessions and disproved two highly probative pieces of DNA evidence—blood on House's jeans and semen on the victim's nightgown—used to secure his conviction. 547 U.S. at 540-48.

⁸⁷ As Mr. Davis explained, Mr. Coles will likely deny his involvement in the crime and proffer some explanation for the confessions, or outright deny that he made them. (Evidentiary Hearing Transcript at 158-59.) However, the Court is not required to accept such testimony at face-value. In the end, Mr. Davis appeared to forget that the witness stand is the crucible of credibility; and his reluctance to put Mr. Coles to the test robbed the Court of its ability to accurately assess Mr. Coles's claim that he did not shoot Officer MacPhail.

⁸⁸ Further, it bears noting that one of the persons relating the confession—Mr. Gordon—was not a credible witness. *See infra* Analysis Part III.C.iii. His credibility is discussed fully in the

ii. Mr. Coles's Conduct Immediately After the Shooting

Mr. Davis has presented evidence regarding Mr. Coles's "suspicious" conduct immediately subsequent to the shooting. At the hearing, April Hutchinson testified that, immediately after the murder, Mr. Coles asked her to walk with him so that it would "seem like he didn't do anything."⁸⁹ (Evidentiary Hearing Transcript at 140.) The record also reflects affidavit evidence from Tonya Johnson, reflecting that Mr. Coles and his friend "Terry" disposed of firearms subsequent to the murder, and Anita Saddler, stating that Mr. Coles was carrying a firearm on the night of the MacPhail shooting.⁹⁰ (Doc. 3, Exs. 22, 25.)

Ms. Hutchinson's testimony does little to prove Mr. Coles's guilt. She testified that Mr. Coles wanted to walk with her so that it would "seem like he didn't do anything." (Evidentiary Hearing Transcript at 140.) However, there is no way to know what Mr. Coles

section regarding alternate eyewitness accounts of the murder, which is the true import of his testimony.

⁸⁹ Ms. Hutchinson also offered general testimony that Mr. Coles was a person of whom the community was afraid. (Evidentiary Hearing Transcript at 140-41.) This evidence is not probative of Mr. Coles's guilt—simply because Mr. Coles was feared does not mean that he was responsible for murdering Officer MacPhail.

⁹⁰ Ms. Saddler also averred that Mr. Coles was acting nervous and jittery, and appeared to have some knowledge regarding the MacPhail murder. (Doc. 3, Ex. 25 at 4.) Again, this does not show Mr. Coles's guilt. Given his proximity to the murder, it is not surprising that he appeared both nervous and knowledgeable in the wake of the shooting. Antoine Williams was also knowledgeable and nervous after witnessing the murder, but his nervousness is not meaningful proof that he murdered Officer MacPhail. (See Evidentiary Hearing Transcript at 20.)

meant by “do anything,” rendering this testimony meaningless. When considering this statement, it must be remembered that Mr. Coles instigated the altercation with Larry Young, which lead directly to the assault of one person and the murder of another. It would not be surprising if, at the time, Mr. Coles believed he was responsible for something illegal, even if he was not responsible for shooting Officer MacPhail.

The testimony regarding the guns is not irrelevant, but it is not highly probative either. Apparently, a disturbing number of people were armed on the night Officer MacPhail was murdered. At some point that evening Mr. Coles, Mr. Davis, “Terry,” Mark Wilds, and Lamar Brown all carried a firearm. (Trial Transcript at 912-13; Doc. 3 Ex. 22; Evidentiary Hearing Transcript at 181.) Presumably, these individuals were not licensed to carry firearms, so they were engaging in illegal activity simply by virtue of possessing the weapons and would have had reason to hide their weapons. Indeed, “Terry” was also hiding his firearm, but no one contends that he shot Officer MacPhail. (Doc. 3, Ex. 22.) At best, then, the fact that Mr. Coles possessed a firearm simply shows only that he had the means to shoot Officer MacPhail, not that he was actually the gunman.⁹¹

iii. Alternate Eyewitness Accounts

Mr. Davis has presented several alternative eyewitness accounts regarding the events that occurred in the early hours of August 19, 1989. Two witnesses

⁹¹ Also of import is the fact that this is not new evidence. Less than a week after the MacPhail shooting occurred, Mr. Coles admitted that he possessed a firearm the night of the murder. (Pet. Ex. 24-A.)

now directly state that they witnessed Mr. Coles murder Officer MacPhail. They are, Benjamin Gordon,⁹² who testified at the hearing, and Joseph Washington, who testified at trial and provided his story through an affidavit. (Evidentiary Hearing Transcript at 184-85; Doc. 3, Ex. 27 at 1-2.) Three other witnesses cannot identify the murderer, but provide other potentially relevant details through affidavits. Gary Hargrove saw the body of the officer near Mr. Coles after the shooting. (Doc. 3, Ex. 15 at 1.) Daniel Kinsman avers that the shooter was left-handed and the gun was shiny. (Doc. 3, Ex. 28 at 2.) Peggie Grant claims to have seen Red Coles wearing a white shirt later that night. (Doc. 3, Ex 26 at 1.)

The Court begins with the eyewitness account from Mr. Gordon, whose testimony is not credible. At the evidentiary hearing, over twenty years after the murder, Mr. Gordon testified for the first time that he saw Mr. Coles shoot Officer MacPhail. (Evidentiary Hearing Transcript at 184-85.) This testimony marks the third version of Mr. Gordon's post-trial statement, which adds new exculpatory details each time. (*See*

⁹² Mr. Gordon also recanted some of his prior statements regarding who was responsible for the Cloverdale shooting. (Evidentiary Hearing Transcript at 178-79.) Several other affiants also provided testimony exculpating Mr. Davis from the Cloverdale shooting. (*See* Doc. 3, Exs. 30, 31, 32.) The Court does not discuss this testimony because the conviction for the Cloverdale shooting is not specifically challenged in this petition and is largely irrelevant to the murder conviction. (Doc. 2 at 2 ("Since Mr. Davis' trial, evidence has surfaced that shows not only that Troy Davis is innocent, but that Sylvester 'Redd' Coles murdered Officer MacPhail.")) As is explained below, Mr. Davis's conviction for the Cloverdale shooting followed from his conviction for the MacPhail murder, not vice-versa. *Infra* Analysis Part III.C.iv.

Doc. 3, Exs. 13, 14.) Mr. Gordon contends that his new eyewitness account was not provided earlier because he was fearful of Mr. Coles.⁹³ (Evidentiary Hearing Transcript at 191-92.) However, this explanation is belied by Mr. Gordon's previous conduct—this is not the first time he accused Mr. Coles of the murder despite previously stating that he did not see who shot Officer MacPhail. Specifically, in 2008, Mr. Gordon signed an affidavit relating a confession by Mr. Coles to the murder and stating that “I could not tell who done the shooting, but distinctly recall seeing the person fire the second shot.” (Doc. 3, Ex. 13.) It is difficult to understand why fear prevented Mr. Gordon from previously relating that he saw Mr. Coles shoot Officer MacPhail if, at that time, he felt comfortable relating Mr. Coles's confession to the murder. The only explanation for Mr. Gordon's ever-evolving testimony is that it changes to reflect whatever details he believes are necessary to secure Mr. Davis's release. Therefore, his testimony is not credible.

Joseph Washington also claims, through an affidavit, to have witnessed Mr. Coles shoot Officer MacPhail, but his testimony is not credible.⁹⁴ (Doc. 3, Ex. 27 at 1-2.) At trial, Mr. Washington was badly impeached when cross-examination revealed incon-

⁹³ He also testified that he was told to “stick” to his statement at trial. (Evidentiary Hearing Transcript at 203-04.) Given that Mr. Gordon was generally not credible and Mr. Lock testified credibly and contrarily, the Court credits Mr. Lock's testimony on this point. (Evidentiary Hearing Transcript at 442.)

⁹⁴ It is also important to note that Mr. Washington's eyewitness testimony is not new with the exception of the fact that he now avers that Mr. Coles was wearing a white shirt. (Doc. 3, Ex. 27.) Mr. Washington testified at trial that he witnessed Mr. Coles shoot Officer MacPhail. (Trial Transcript at 1341-47.)

sistent or missing details in his testimony, and he claimed the impossibility of having been two places at the same time. *Supra* note 9. Additionally, this testimony is suspect because it is presented in affidavit form, insulating Mr. Washington from being impeached again during a new cross-examination. *Herrera*, 506 U.S. at 417. The fact that Mr. Washington was badly impeached during his initial testimony, coupled with the presentation of this testimony in affidavit form, leads the Court to find it not credible.

The affidavits of Gary Hargrove and Daniel Kinsman provide indirect eyewitness testimony that does not further Mr. Davis's showing of innocence.⁹⁵ Mr. Kinsman stated that the barrel of the gun was "shiny" and that the shooter used his left hand. (Doc. 3, Ex. 28 at 2.) However, there is no evidence that either Mr. Coles or Mr. Davis are left handed. And, regardless of whether the barrel of the weapon was black or chrome, it could still have been "shiny." Therefore, this evidence neither exculpates Mr. Davis nor inculpates Mr. Coles. Gary Hargrove averred that he did not see the shooting, but that he saw the Officer's body near Mr. Coles immediately after the shooting, that Mr. Coles was stopped and facing the Officer when the shooting occurred, and that the person running away was Mr. Davis. This affidavit is not clear evidence of innocence and could be read as further evidence of Mr. Davis's guilt. Indeed, according to trial testimony, it was the individual who was running from the Officer that shot him. (*See*

⁹⁵ The Court reiterates that affidavit testimony is disfavored because it is obtained without the benefit of cross-examination and an opportunity to make credibility determinations. *Herrera*, 506 U.S. at 417.

Trial Transcript at 848-51, 910-11.) Accordingly, these affidavits do not further Mr. Davis's showing.

Finally, Mr. Davis presented the affidavit of Peggie Grant, Ms. Hutchinson's mother. This affidavit places Mr. Coles in the white shirt soon after the murder occurred. (Doc. 3, Ex. 26.) Because this evidence was presented in affidavit form, it is disfavored and its value diminished. *Herrera*, 506 U.S. at 417. Moreover, this evidence is refuted by ample record evidence that either places Mr. Coles in the yellow shirt or Mr. Davis in white shirt. (See Trial Transcript at 805-06, 914, 959-60, 979-82, 1015-21, 1128, 1162-63, 1216-17.)⁹⁶ However, despite the fact that the contents of this affidavit are widely refuted, it does provide a small amount of additional value to Mr. Davis's showing by placing Mr. Coles in a white shirt.

iv. The Shell Casing

The final piece of evidence presented at this hearing was the new Georgia Bureau of Investigation ("GBI") Report regarding the munitions from the Cloverdale shooting and MacPhail murder.⁹⁷ (Pet.

⁹⁶ One of the witnesses who testified on this subject was Eric Ellison. Given Mr. Davis's general allegations of coercion, it bears noting that there was credible testimony at the hearing indicating that Mr. Ellison was not coerced. (Evidentiary Hearing Transcript at 258-59.)

⁹⁷ State introduced evidence regarding Mr. Davis's "bloody" shorts. (See Resp. Ex. 67.) However, even the State conceded that this evidence lacked any probative value of guilt, submitting it only to show what the Board of Pardons and Paroles had before it. (Evidentiary Hearing Transcript at 468-69.) Indeed, there was insufficient DNA to determine who the blood belonged to, so the shorts in no way linked Mr. Davis to the murder of Officer MacPhail. The blood could have belonged to Mr. Davis, Mr. Larry Young, Officer MacPhail, or even have gotten onto the shorts entirely apart from the events of that night. Moreo-

Exs. 31, 31-A.) The new report indicates that it is unclear whether the bullets found at the Cloverdale and MacPhail shooting were fired from the same firearm, despite noting “some agreement of individual characteristics.”⁹⁸ (Pet. Ex. 31.) The shell casing tests were inconsistent, finding that some of the casings from the various shootings were fired in the same gun while others were not. (*Id.*)

In Mr. Davis’s filings, the import of this evidence has become a moving target. Initially, he made little mention of it. (See Doc. 2 at 3.) Later, he used this evidence as proof of Mr. Coles’s guilt and erroneous factfinding by the Georgia Supreme Court. (Doc. 27 at 4, 45.) Presently, he contends the shell casings were deposited by third parties, destroying the link between the two shootings. (Doc. 80 at 18.)

At trial, the munitions evidence was largely used to establish Mr. Davis’s guilt for the Cloverdale shooting by bootstrapping it to his guilt for the MacPhail murder. During closing argument, the State explained the munitions evidence as follows:

And then there are the silent witnesses in this case. *Just as Davis, wearing a white shirt, pistol-whipped Larry and murdered Officer McPhail, so also did Troy Anthony Davis, using the same gun, shoot Micheal Cooper and murder Officer McPhail.*

ver, it is not even clear that the substance was blood. (See Pet. Ex. 46.)

⁹⁸ The Court is able to determine the origin of the bullets and shell casings by correlating the evidence inventory sheets in the police report to the GBI Report. (See Resp. Ex. 30 at 295-302.)

You will recall the testimony of Roger Parian, director of the Crime Lab, when he was discussing the bullets. He was talking about the bullets from the parking lot of the Burger King and from the body of Officer McPhail, and he was talking then about comparing that with the bullet from—that was recovered from Micheal Cooper's head when he'd been shot in the face.

And what Roger Parian told you is that they were possibly shot from the same weapon. There were enough similarities in the bullets to say that the bullet that was shot in Cloverdale into Micheal Cooper was shot—was possibly shot from the same gun that shot into the body of Officer McPhail in the parking lot of the Burger King.

But he was even more certain about the shell casings. . . . He was quite more certain about that, and he said in fact that the one that was recovered from the Trust Company Bank right across from the Burger King parking lot was fired from the same weapon that fired four other shell casings that were recovered in Cloverdale right down the street from the pool party, Cloverdale and Audabon.

(Trial Transcript at 1502-03 (emphasis added).) Reading this argument, two facts are immediately apparent: (1) there was never a definitive contention at trial that the bullets matched and (2) the link between the shootings was used to prove that Mr. Davis not only shot Officer MacPhail but also Michael Cooper. This latter point is confirmed by the balance of the State's closing argument, which is dedicated almost entirely to eyewitness accounts regarding the MacPhail murder. (*Id.* at 1496-1502.)

There are two reasons why this report has limited value to showing Mr. Davis's innocence with respect to the MacPhail murder⁹⁹ First, the munitions evidence only showed that the shootings were linked; it remained for the State to prove Mr. Davis's guilt as to one shooting before this evidence became relevant. Importantly, the shooting the State proved independent of the munitions was the MacPhail murder. (*See* Trial Transcript at 1496-1503.) Accordingly, disproving the munitions evidence is not relevant to Mr. Davis's guilt of the MacPhail murder, even if it is cogent to the Cloverdale shooting. Second, it is not clear that the GBI report varies from the trial testimony. At trial, the testimony indicated a possibility that the bullets matched, a possibility that is also reflected in the GBI report. (*Compare* Trial Transcript at 1292, *with* Pet. Ex. 31.) Likewise, the GBI report does reflect that some of the shell casings matched, and it appears that the shell casings discussed at trial are listed as matching in the GBI report. (*Compare* Trial Transcript at 1294, *with* Pet. Ex. 31 ("Microscopic examination and comparison reveals the cartridge cases, Items 4C, 4F, SC and SF, were fired in the same firearm.").) Accordingly, whatever value this may have with respect to the Cloverdale shooting, it has minimal, if any, value to proving Mr. Davis innocent of the MacPhail murder.

v. Summary

Mr. Davis vastly overstates the value of his evidence of innocence. First, some of the evidence is not credible and would be disregarded by a reasonable

⁹⁹ Court does not express an opinion on the relevance of this report to Mr. Davis's guilt regarding the Cloverdale shooting, as that issue is not before this Court. *See supra* note 92.

juror. Specifically, the eyewitness identifications of Mr. Coles as the shooter by Mr. Gordon and Mr. Washington are not credible. *Supra* Analysis Part III.C.iii. Likewise, regardless of the credibility of the witnesses offering the hearsay confessions, it is difficult to credit the truth of the underlying statement, which is totally uncorroborated.¹⁰⁰ *Id.* Part III.C.i. Indeed, one witness recounting such a confession doubted its truth. *Id.*

Second, other proffered evidence was not exculpatory with respect to the MacPhail murder. Specifically, to the extent that the munitions evidence has actually changed since trial, it is relevant to the Cloverdale shooting, not the MacPhail murder. *Id.* Part III.C.iv. Likewise, the eyewitness accounts of Gary Hargrove and Daniel Kinsman are inapposite. *Id.* Part III.C.iii.

Third, still other evidence that Mr. Davis brought forward is too general to provide anything more than smoke and mirrors. That is, that Mr. Coles was generally feared; possessed a gun, as did an alarming number of people that night; and acted nervous after the murder, as did several other witnesses does very little to actually suggest that Mr. Coles murdered Officer MacPhail. *Id.* Part III.C.ii. These facts could be true about any number of persons, regardless of whether they were murderers.

Fourth, Ms. Grant's affidavit testimony regarding Mr. Coles wearing a white shirt is likely to be discounted in light of an overwhelming body of contrary

¹⁰⁰ As was explained, there is a strong explanation for why Mr. Coles may have confessed falsely, and Mr. Davis has done nothing to disprove this, despite having the burden to do so placed squarely on his shoulders. *See supra* Analysis Part III.C.i.

evidence. *Id.* Part III.C.iii. Finally, much of this evidence was proffered in affidavit form, the value of which is seriously diminished. *Herrera*, 506 U.S. at 417.

D. Balancing of All of the Evidence¹⁰¹

The burden was on Mr. Davis to prove, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence. In making this determination, the Court looks at all the evidence to make “a probabilistic determination about what reasonable, properly instructed jurors would do.” *House*, 547 U.S. at 537-38 (*quoting Schlup*, 513 U.S. at 329).

The Court begins with the evidence that proved Mr. Davis’s guilt. As was explained above, the State provided three types of evidence: (1) eyewitness testimony regarding who was wearing the white and yellow shirts, and what actions the individual in each shirt took; (2) personal identifications of Mr. Davis as the shooter; and (3) secondhand confessions by Mr. Davis. (*See* Trial Transcript 1496-1502.) The State offered significant testimony on these points. The following witnesses identified Mr. Davis as the person in the white shirt: Harriett Murray (*id.* at 846, 850, 862-65), Antoine Williams (*id.* at 959-64), Steven Sanders (*id.* at 979-83), Dorothy Ferrell (*id.* at 1020-21), Darrell Collins (*id.* at 1128), and Eric Ellison (*id.* at 1216-17). Mr. Coles was placed in the yellow shirt by Larry Young (*id.* at 805-06) and Valerie Coles Gordon (*id.* at 1162-63). Four

¹⁰¹ 28 U.S.C. § 2254(d)(2) deference applies to the final factual determination in this case. However, this deference has not played a determinative role, as this Court concurs with the State Court’s conclusion.

witnesses¹⁰² stated that the person in the white shirt murdered Officer MacPhail (*id.* at 850, 959-60, 979, 1015), and four¹⁰³ directly identified Mr. Davis as Officer MacPhail's murderer (*id.* at 862-65, 963-64, 982-83, 1021). In addition, Harriett Murray (*id.* at 847-50), Antoine Williams (*id.* at 960-64), and Steven Sanders (*id.* at 979-82) indicated that the individual in the white shirt both assaulted Larry Young and murdered Officer MacPhail. Finally, Kevin McQueen (*id.* at 1231-32) and Jeffery Sapp (*id.* at 1251-52) related secondhand confessions from Mr. Davis.

Mr. Davis's proof to the contrary at trial included the testimony of Joseph Washington, who identified Mr. Coles as the individual who shot Officer MacPhail. (*Id.* at 1342-43.) Tayna Johnson testified that she observed Mr. Coles at the Cloverdale party on August 18, 1989 wearing a white shirt. (*Id.* at 1362-63.) She also testified that she observed Mr. Coles acting nervous after the MacPhail shooting. (*Id.* at 1361.) Jeffery Sams testified that he saw Mr. Coles, not Mr. Davis, with a firearm the night of the MacPhail shooting. (*Id.* at 1377-81.) Mr. Davis's mother, Virginia Davis, testified that Mr. Davis left the house for the Cloverdale party wearing a multi-color shirt and the Mr. Davis could not have spoken to Mr. Sapp the afternoon of August 19, 1989. (*Id.* at 1389, 1411-12.) Finally, Mr. Davis took the stand in his own defense. He denied shooting at Mr. Ellison's car during the Cloverdale party (*id.* at 1417-18),

¹⁰² These witnesses were Harriett Murray (Trial Transcript at 850), Antoine Williams (*id.* at 959-60), Steven Sanders (*id.* at 979), and Dorothy Ferrell (*id.* at 1015).

¹⁰³ These witnesses were Harriett Murray (*id.* at 862-65), Antoine Williams (*id.* at 963-64), Steven Sanders (*id.* at 982-83), and Dorothy Ferrell (*id.* at 1021).

assaulting Mr. Young (*id.* at 1423), and shooting Officer MacPhail (*id.* at 1424). Mr. Davis testified that he did not see who shot Officer MacPhail (*id.* at 1424), but stated that it was Mr. Coles who slapped Mr. Young (*id.* at 1423). Also, Mr. Davis denied speaking to Mr. Sapp on August 19, 1989. (*Id.* at 1431.)

Mr. Davis's new evidence does not change the balance of proof from trial. Of his seven "recantations," only one is a meaningful, credible recantation. *Supra* Analysis Part III.B. The value of that recantation is diminished because it only confirms that which was obvious at trial—that its author was testifying falsely. *Id.* Part III.B.ii (Kevin McQueen). Four of the remaining six recantations are either not credible or not true recantations and would be disregarded. *Id.* Parts III.B.i (Antoine Williams), III.B.iii (Jeffrey Sapp), III.B.iv (Darrell Collins), III.B.v (Harriet Murray). The remaining two recantations were presented under the most suspicious of circumstances, with Mr. Davis intentionally preventing the validity of the recantation from being challenged in open court through cross-examination. *Id.* Parts III.B.vi (Dorothy Ferrell), III.B.vii (Larry Young). Worse, these witnesses were readily available—one was actually waiting in the courthouse—and Mr. Davis chose not to present their recantations as live testimony.

Mr. Davis's additional, non-recantation evidence also does not change the balance of proof from trial. At the outset, the Court notes that much of this evidence was presented in affidavit form. Affidavit evidence is viewed with great suspicion¹⁰⁴ and has

¹⁰⁴ This suspicion occurs because Mr. Davis has prevented the reliability of this evidence from being tested in open court through cross-examination and credibility determinations. *Herrera*, 506 U.S. at 417.

diminished value. *Herrera*, 506 U.S. at 417. Moreover, this evidence, whether presented as live testimony or in affidavit form, suffers other serious defects. The two witness identifications of Mr. Coles as the shooter were not credible, and Peggie Grant's affidavit testimony placing Mr. Coles in a white shirt is widely refuted in the record. *Id.* Part III.C.iii. The hearsay confessions carry little weight because the underlying confessions are uncorroborated and there is good reason to believe that they were false.¹⁰⁵ *Id.* Part III.C.i. Further diminishing the value of this evidence is the fact that Mr. Davis had the means to test the validity of the underlying confessions by calling and impeaching Mr. Coles, but chose not to do so.¹⁰⁶ Other evidence in this category simply lacks probative value; the munitions evidence and the accounts from April Hutchinson, Tonya Johnson, Anita Saddler, Gary Hargrove, and Daniel Kinsman are either totally inapposite or are of the most minimal probative value. *See id.* Parts III.C.ii, III.C.iii, III.C.iv. As a body, this evidence does not

¹⁰⁵ There is a strong explanation for why Mr. Coles may have confessed falsely, and Mr. Davis has done nothing to disprove this despite having the burden to do so squarely on his shoulders. *See supra* Analysis Part III.C.i. Indeed, one witness recounting such a confession doubted that Mr. Coles was being truthful when confessing. *Id.*

¹⁰⁶ Mr. Davis has made clear that he knew both Mr. Coles's work and home address. (Doc. 84, Ex. 1.) Had Mr. Davis at any time sought the help of this Court to subpoena Mr. Coles prior to the conclusion of the hearing, the Court would have ordered the United States Marshall Service to serve Mr. Coles. Mr. Davis never made such a request, instead choosing to attempt self-service at the eleventh hour. His half-hearted efforts belie his true intentions: to be able to say that he "attempted" to provide Mr. Coles testimony when, in fact, he never intended to do so.

change the balance of proof that was presented at Mr. Davis's trial.

Ultimately, while Mr. Davis's new evidence casts some additional, minimal doubt on his conviction, it is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value. After careful consideration, the Court finds that Mr. Davis has failed to make a showing of actual innocence that would entitle him to habeas relief in federal court.¹⁰⁷ Accordingly, the Petition for a Writ of Habeas Corpus is DENIED.¹⁰⁸

CONCLUSION

Before the Court is Petitioner Troy Anthony Davis's Petition for a Writ of Habeas Corpus. (Doc. 2.) Pursuant to the order of the Supreme Court, this Court has held a hearing and now determines this petition. *Davis*, 130 S. Ct. at 1. For the above stated reasons, this Court concludes that executing an innocent person would violate the Eighth Amendment of the United States Constitution. However, Mr. Davis is not innocent: the evidence produced at the hearing

¹⁰⁷ The Court further notes that whether it adopted the lower burden proposed by Mr. Davis, or even the lowest imaginable burden from *Schlup*, Mr. Davis's showing would have satisfied neither.

¹⁰⁸ After careful consideration and an in-depth review of twenty years of evidence, the Court is left with the firm conviction that while the State's case may not be ironclad, most reasonable jurors would again vote to convict Mr. Davis of Officer MacPhail's murder. A federal court simply cannot interpose itself and set aside the jury verdict in this case absent a truly persuasive showing of innocence. To act contrarily would wreck complete havoc on the criminal justice system. *See Herrera*, 506 U.S. at 417.

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on the merits of Mr. Davis's claim of actual innocence and a complete review of the record in this case does not require the reversal of the jury's judgment that Troy Anthony Davis murdered City of Savannah Police Officer Mark Allen MacPhail on August 19, 1989. Accordingly, the petition is DENIED. The Clerk of Court is DIRECTED to file a copy of this order on the docket and forward this order to the Supreme Court of the United States.

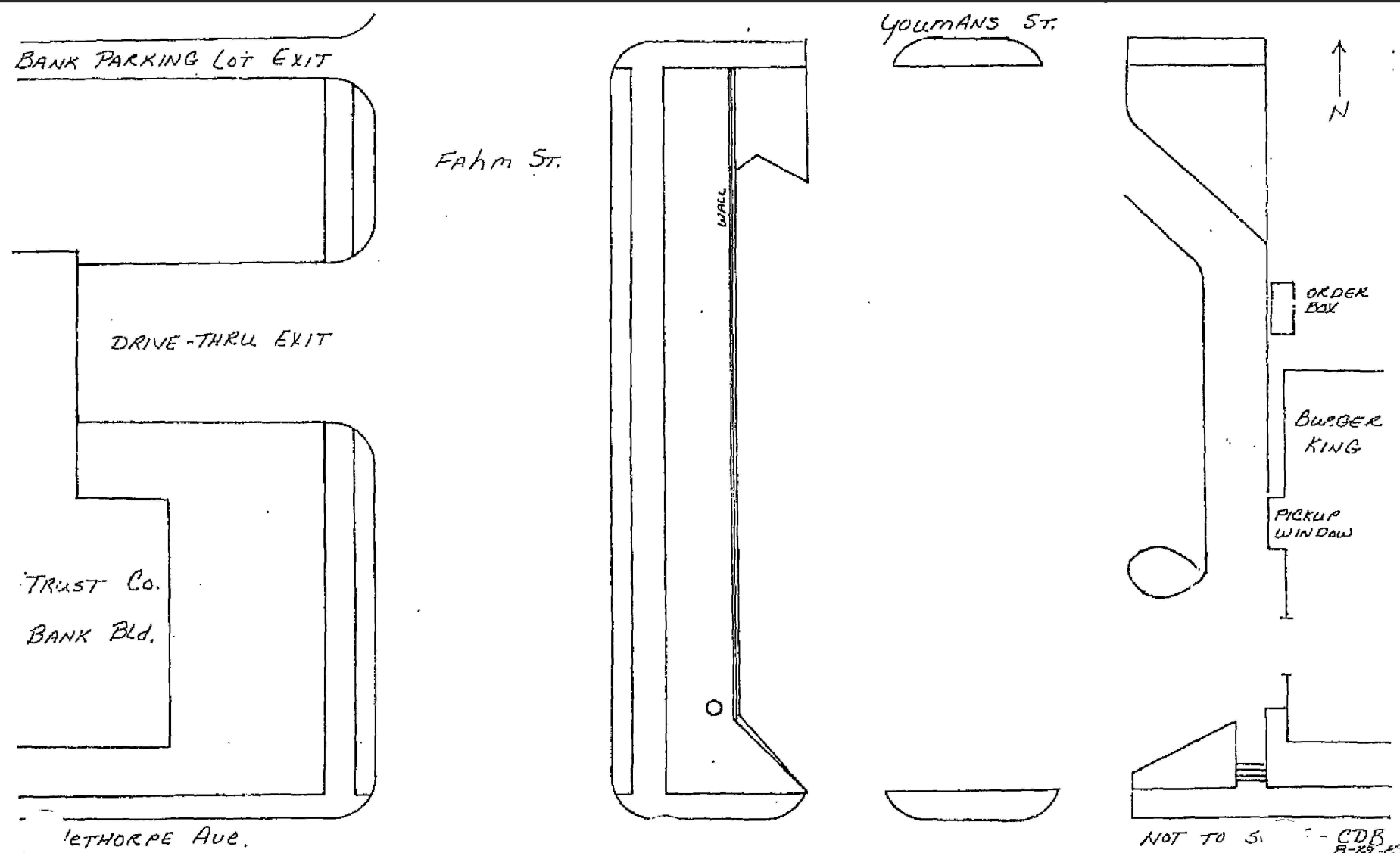
SO ORDERED this 24th day of August 2010.

/s/ WILLIAM T. MOORE, JR.

WILLIAM T. MOORE, JR.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF GEORGIA



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APPENDIX F

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

[Filed June 8, 2010]
Clerk L. Moore
SO. DIST. OF GA.

Civil Case No. 4:09-CV-130 (WTM)

In Re TROY ANTHONY DAVIS

ORDER

Before the Court is Respondent's Motion in Limine to Exclude Petitioner's Affidavit Evidence. (Doc. 49.) The Motion argues that any affidavits not already in the record should be excluded as inadmissible hearsay or beyond the scope of the Supreme Court's Order. (*Id.*) Petitioner has filed a response in opposition.¹ (Doc. 54.) The Court considers each of Respondent's arguments in turn.

¹ Petitioner appears to believe that Respondent's allusion to Federal Rule of Civil Procedure 43(c) is an argument that the Rule bars the admission of affidavit evidence. (Doc. 54 at 6.) However, the reference to Rule 43(c) appears to relate to what can be properly considered a part of the record. (*See* Doc. 49 at 2.) Regardless, it is clear from the face of the Rule that it allows this Court to take evidence through either affidavits or oral testimony. *See* Fed. R. Civ. P. 43(c). Therefore, the Rule does not operate to exclude this evidence.

First, Respondent contends that this evidence is inadmissible hearsay. (Doc. 49 at 2.) While this concern would be relevant in the context of trial, it is of little moment when a reviewing Court passes on the question of actual innocence. Indeed, “the district court is not bound by the rules of admissibility that would govern at trial . . . the emphasis on ‘actual innocence’ allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial.” *Schlup v. Delo*, 513 U.S. 298, 327-28 (1995); *see also Herrera v. Collins*, 506 U.S. 390, 418 (1993) (considering affidavits that consist of hearsay). That is, the habeas court must consider “all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.” *House v. Bell*, 547 U.S. 518, 538 (2006) (internal quotations omitted). Therefore, the fact that the affidavits are hearsay is not relevant to their admissibility in this habeas proceeding.² Accordingly, this argument is unpersuasive.³

Petitioner also contends that the Supreme Court’s Order directed this Court to receive only testimony. (Doc. 49 at 3.) Although the Supreme Court instructed

² While the affidavits are admissible, “affidavits are disfavored because the affiants’ statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations” and affidavits consisting of hearsay are “particularly suspect.” *Herrera*, 506 U.S. at 417.

³ The Court further notes that even if hearsay were excludable in this context, it would be premature to issue a blanket order excluding the affidavits. The affidavits, even if hearsay when offered for the truth of the matter asserted, could be offered as impeachment evidence, should their author testify.

this Court to “receive testimony,” (*id.*) Respondent’s argument fails because it improperly narrows the meaning of the word testimony. Testimony is defined as “[e]vidence that a competent witness under oath or affirmation gives at trial or *in an affidavit* or deposition.” *Black’s Law Dictionary* 1514 (8th ed. 2004) (emphasis added). Again, while the credibility of affidavits is often suspect, *see supra* n.1., the Supreme Court’s Order does not prohibit the Court from receiving such evidence.

The Court has considered Respondent’s Motion in Limine to Exclude Petitioner’s Affidavit Evidence. (Doc. 50.) For the above stated reasons, the Motion is DENIED.

SO ORDERED this 8th day of June 2010.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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APPENDIX G

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

[Filed August 12, 2010]
Clerk [Illegible]
SO. DIST. OF GA.

Civil Case No. 4:09-CV-130 (WTM)

In Re TROY ANTHONY DAVIS

ORDER

Before the Court is Petitioner Troy Anthony Davis's Motion for Reconsideration of Evidentiary Ruling. (Doc. 84.) In the motion, Petitioner asks this Court to reconsider its evidentiary rulings rejecting the affidavit of Dorothy Ferrell and proscribing the testimony of Quiana Glover. (*Id.* at 17.) Petitioner also asks this Court to reopen the hearing to accept additional live testimony. (*Id.*) The State has responded in opposition, arguing that Petitioner has had his day in Court and that the evidence Petitioner seeks to admit is ultimately irrelevant to this case. (Doc. 86.)

Petitioner's consternation regarding Ms. Ferrell is misplaced. The Court never held her affidavit inadmissible, so there is no need to "reconsider" this ruling. Rather, due to no fault of any particular party, the Court never ruled on the admissibility of the affidavit. (Doc. 83 at 468-73.) However, the

record of the previous proceedings already contains Ms. Ferrell's affidavit. (Doc. 17, Ex. 32 at 80.) Accordingly, Ms. Ferrell's affidavit constitutes part of the evidence in this case, regardless of its admission at the hearing.

The Court also does not see any reason to disturb its ruling regarding Ms. Glover. The rule in *House v. Bell* requires a Court to consider "*all the evidence*, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under the rules of admissibility that would govern at trial." 547 U.S. 518, 538 (2006) (*citing Schlup v. Delo*, 513 U.S. 298, 327-28 (1995)) (emphasis added). The *House* rule was derived from an article by Judge Friendly.¹ See *Schlup*, 513 U.S. at 328 (*quoting* Judge Henry J. Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 160 (1970)). According to Judge Friendly, the purpose for admitting otherwise inadmissible evidence was to avoid "the continued punishment of an innocent man" by allowing the Court to consider "*all*" the evidence because consideration of "*all*" the evidence would allow the Court to reach the most accurate determination. Friendly, *supra*, at 160. However, Petitioner was attempting to use the *House* rule to create an incomplete and deceptive record, perverting the purpose of the rule.² By intentionally

¹ It bears noting that the overarching purpose of the article was to propose significant limitations on when collateral attack could be sought; it did not endeavor to create a lax system of review whereby petitioners could repeatedly contest their guilt. See the Honorable Henry J. Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142, 142 (1970).

² The Court is puzzled by Petitioner's contention that he relied on this Court's order when choosing to present

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presenting unreliable hearsay while keeping the declarant out of court, Petitioner was seeking to prevent the Court from receiving all of the evidence, rather than providing the Court with a record on which the most accurate determination could be made.³ Accordingly, the motion is DENIED.

SO ORDERED this 12th day of August 2010.

/s/ William T. Moore, Jr.
WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

unsubstantiated hearsay testimony. (Doc. 84 at 13.) Even if Petitioner misunderstood the Court's order as to the admissibility of hearsay, it would be difficult to miss this Court's clear statement as to its lack of probative value. (Doc. 56 at 2 n.2)

³ In addition, there is no need to disturb this ruling because this Court is aware of what Ms. Glover's testimony would be, and its contents are cumulative of testimony already in evidence. (Doc. 83 at 403.) Accordingly, it will not tip the balance in this case, so there is no need to reopen proceedings to consider it.