CAPITAL CASE
No. 10-950

IN THE

Supreme Court of the United States

TROY ANTHONY DAVIS,
Appellant / Petitioner,

v.

CARL HUMPHREY, Warden,
Appellee / Respondent.

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

REPLY BRIEF

PHILIP W. HORTON
Counsel of Record
JASON EWART
R. REEVES ANDERSON
STEPHEN MARSH
WELLS BENNETT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Philip.Horton@aporter.com

Counsel for Troy Anthony Davis

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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ARGUMENT

Troy Davis has made a sufficient showing of innocence so that he cannot constitutionally be executed. Respondent does not address the constitutional standard that should apply to actual innocence claims, arguing instead that this Court should defer entirely to the district court's factual assessment. If Respondent's theory that the district court acted as a "special master" is correct, this Court owes the district court no particular deference. A holistic review of the record shows Mr. Davis's innocence.

I. IF THE DISTRICT COURT ACTED AS A SPECIAL MASTER, THIS COURT OWES NO PARTICULAR DEFERENCE TO THAT COURT'S FINDINGS.

Respondent admits this Court's jurisdiction over Mr. Davis's appeal but suggests that the scope of review is limited because the Court supposedly delegated its fact-finding authority and appointed the district court as "a magistrate, or akin to a Special Master." J.S. Opp. 1.

If the district court was acting as a quasi-Special Master, its order is entitled to minimal deference. In reviewing a Special Master's report, the Court conducts an independent assessment of the record. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984) (A Special Master's findings "deserve respect and a tacit presumption of correctness, [but] the ultimate responsibility for deciding what are correct findings of fact remains with us."); 17 Wright & Miller, Fed. Prac. & Proc. Juris. § 4054 (3d ed. 2010) ("[T]he Court remains responsible for deciding what are correct findings of fact, without any limitation by the standard of clear error applied to review of a district judge.").

II. AN INDEPENDENT REVIEW OF THE RECORD SHOWS THAT MR. DAVIS IS INNOCENT.

Respondent argues that this case does not present "an appropriate vehicle to determine the cognizability and the standard of proof of a freestanding 'actual innocence' claim" because "Petitioner is not innocent." J.S. Opp. 15, 14. An independent review of the record, however, demonstrates that the district court ignored compelling evidence exonerating Davis while

simultaneously relying on trial testimony that no reasonable juror would credit given the current record.

A. Benjamin Gordon's Detailed And Credible Testimony Identified "Redd" Coles As The Shooter.

Benjamin Gordon, whose eyewitness testimony was not before the Court when Davis filed his habeas petition in 2009, identified his relative Sylvester "Redd" Coles as the shooter. J.S. 13-15. The district court and Respondent dismiss Gordon's testimony without any evidence suggesting that Gordon would fabricate his account.

Respondent disputes that Gordon was present during the shooting or could have seen the shooting from his vantage point. J.S. Opp. 19-20. Gordon's detailed description of the shooting and contemporary police reports refute this argument. Gordon recounted that "three individuals" were "exchanging words" before the shooting; that Coles "walk[ed] up to the [officer] laying on the ground and fire[d] the shot"; and that Coles ran directly to his sister Valerie Gordon's house minutes after the shooting. Evidentiary Hearing Transcript, Volume 1 ("E.H. 1") at 193-95. These details mirror undisputed facts in the record, and neither Respondent nor the district court question the accuracy of those descriptions. Indeed, Respondent's witnesses at the hearing placed Gordon at the scene in view of the shooting. J.S. 14.

The district court did not question Gordon's credibility on the basis of his courtroom demeanor or a lack of clarity; instead, it pointed only to the fact that Gordon's 2008 affidavit related a confession by Coles but did not explicitly reveal that Coles was

the shooter. Gordon understandably withheld the most damning evidence against Coles given Coles's reputation for violence. The trial record demonstrates that Coles carried a gun and started altercations over such trivial slights as refusing to give him a beer. Trial Transcript ("T.") at 927, 902. Accordingly, Gordon explained that Coles "is a type of person that will harm you if it came down to it, and he just don't make threats, he carry them out." E.H. 1 at 202.

Gordon's 2008 affidavit recounts how he urged Coles to "straighten it out because they had someone else locked up for the murder"; in response, Coles began to cry. Pet's E.H. Ex. 4. By the 2010 evidentiary hearing, Coles had not "straightened it out," and Gordon testified that he "made a decision to come in today and just let the truth be known." E.H. 1 at 207.

With respect to the three most important elements bearing on Gordon's credibility—he was in a position to view the shooting, his account comports with the other record evidence, and he had no reason to testify falsely—Respondent offers no reason to doubt Gordon's testimony.

B. Coles's Confessions Should Receive The Same Or Greater Weight As The Confession Evidence In *House v. Bell*.

Redd Coles spontaneously confessed to three witnesses who had no motive to lie or assist Mr. Davis. Although Respondent dismisses this evidence as "marginally probative," J.S. Opp. 22, he fails to distinguish Coles's confessions from the confessions this Court considered "of [the] most importance" in *House v. Bell*, 547 U.S. 518, 549 (2006).

In *House*, the Court considered two hearsay confessions of the alternative suspect—William Muncey—as integral to the petitioner's innocence claim. *Id.* The Court credited the testimony because the evidence in the record showed that the witnesses had been "lifelong acquaintances" of the confessor with "no reason to . . . frame him" or help the petitioner. *Id.* at 551. Similarly, the three confession witnesses in this case all knew Coles for most of their lives and had no connection to Davis. Neither Respondent nor the district court pointed to any evidence why these witnesses would want to frame Coles or help Davis.

Instead, Respondent argues that the confessions "presented in this case came years after the murder and [] occurred when the witnesses and Coles were drinking or smoking marijuana." J.S. Opp. 25. First, Coles's confessions do not lose their probative value merely because those confessions are recent. It makes sense that Coles would open up only years later, when he felt safe. Second, Respondent misstates the record, which contains no evidence that Benjamin Gordon or Quiana Glover were "drinking or smoking marijuana" when Coles confessed. Third, the fact that Coles may have been intoxicated when he confessed is indistinguishable from *House*, where confession witnesses acknowledged that Mr. Muncey had been "drinking heavily" and appeared "pretty well blistered" when he confessed. *House*, 547 U.S. at 549-550. The Court gave the confessions no less weight as a result. *Id.*

Respondent does not defend the district court's abrupt and unprecedented refusal to allow Quiana Glover to testify. As *amicus curiae* observes, "the court below may be the first court ever to preclude purported hearsay evidence in support of a claim of

actual innocence because the confessor was 'available' to testify." Brief of *Amicus Curiae* the Innocence Project at 11, 12 (discussing cases). Glover knew Coles since she was a child and had no connection to Troy Davis. E.H. 2 at 488-89. Thus, her testimony has probative value "of [the] most importance." *House*, 547 U.S. at 549. The district court's preclusion of Glover's testimony reveals a hostility towards the rule that hearsay evidence must be considered in an actual innocence proceeding.

C. Kevin McQueen's "Obvious" Perjury Casts Significant Doubt On The Conviction.

At trial, the prosecution sponsored perjured testimony of Kevin McQueen and highlighted it in closing argument. J.S. 21. Later the Georgia Supreme Court relied on McQueen's testimony when affirming Davis's conviction and death sentence. *Id.* At the evidentiary hearing, McQueen admitted that there was "[n]o truth" to his testimony, E.H. 1 at 30; the district court agreed, finding that McQueen's testimony was "clearly fabricated" and its "obvious[] fals[ity]" should have been "apparent to all" at the time of trial. Pet. App. 129a-130a. Nevertheless, the district court determined that McQueen's recantation did little damage to the prosecution's case. *Id.* at 130a n.60.

The district court misunderstood the import of its finding that McQueen's "clearly fabricated" trial testimony was "apparent to all." *Id.* at 129a-130a. Davis's conviction rested almost entirely on witness testimony. In addition to proving that key evidence used to convict Davis was "patently false," *id.* at 144a, McQueen's perjury demonstrates that the prosecution made little effort to ensure the veracity of

its trial witnesses and was willing to proffer and endorse fabricated testimony. The prosecution's misconduct would have tainted the jurors' assessment of the prosecution's other barely-credible witnesses. *See infra* at II.E. Accordingly, McQueen's perjury should "reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," *Kyles v. Whitley*, 514 U.S. 419, 435 (1995), and casts great suspicion on "the credibility of witnesses present at trial." *House*, 547 U.S. at 539.

D. Record Evidence Supports The Recantations Of Darrell Collins And Jeffrey Sapp.

Jeffrey Sapp and Darrell Collins recanted their trial testimony and recounted that their initial testimony resulted from police coercion. E.H. 1 at 55-57, 93-97. Respondent denies that the Savannah police made "'threats' to civilians during the investigation," J.S. Opp. 11-12, but the record proves otherwise. Davis presented a recorded interrogation during which police warned Michael Wilds (who was asleep at home during the shooting) that "this is not an ordinary crime." Pet's E.H. Ex. 21-B (audio recording). The police officers threatened Wilds:

> Detective Zapal: [A]nything you tell us, any lie we catch you in . . .
>
> Unidentified officer: Makes you an accessory.
>
> Detective Zapal: Do you know what a material witness is? . . . A material witness is somebody that if we think they have knowledge and we don't want them to go, to flee from us, to leave us, we don't want them to get hurt. We put them in the county jail. We can do this. They're not charged with a crime. . . . And we put them in

> protective custody, which means you'll be classified as a snitch. . . . And we're willing, we're willing to do that. You think I'm kidding?

Id.

Respondent attempts to downplay the significance of the recorded threat by claiming, "[t]here is no yelling on the audio and all the persons on the tape appear calm." J.S. Opp. 12. The import of the threats, however, is unmistakable: Detective Zapal acknowledged at the hearing that labeling someone a "snitch" provokes a fear of retribution, E.H. 1 at 241, and the recording shows that he threatened to label Mr. Wilds a snitch and put him in jail.

Officers also threatened to charge Wilds as an "accessory," just as Darrell Collins testified police threatened him. E.H. 1 at 94-96, 130. Respondent suggests that because Wilds "did not feel so 'threatened or coerced' to give a false statement," other threatened witnesses also should not have felt pressured to lie. J.S. Opp. 12. Obviously, the fear of being charged as an accessory was higher for Collins (who was admittedly at the scene) than Wilds (who was asleep at home).

Lastly, Respondent misstates the evidentiary hearing testimony of Collins and Sapp. J.S. Opp. 30-32. Respondent's cross-examination of Collins alternated between questions asking Collins whether the content of his police statement was true and questions asking him whether it was true that certain facts appeared in his statement. E.H. 1 at 121-22. Collins initially responded that it was "true" that he had said Davis was wearing a white shirt that night. On redirect, however, Collins explained that the *content* of that statement was "not" true, *id.* at 136; he meant

only that "[i]t was true that it was written on the statement." *Id.* at 134.

Respondent also argues that Sapp "attempted to lie" at the evidentiary hearing by disclaiming knowledge of Davis's street name: "RAH." J.S. Opp. 31. Sapp did not disclaim such knowledge; he explained that Davis's nickname was Raheem and that people in "the neighborhood" said it meant "Rough as Hell" in reference to Davis's "nice blue car" ("rough" being colloquial for "nice"). E.H. 1 at 65. At trial, Sapp similarly told the jury that Davis's street name was "Raheem" and explained that "brothers in the neighborhood" said it stood for "Rough as Hell," without further explaining its colloquial meaning. T. at 1256. Why the district court and Respondent interpret this consistent testimony as a "lie" is baffling, especially in light of the fact that Sapp was a *prosecution* witness at Davis's trial, and Respondent now highlights this exchange in an attempt to *discredit* Sapp's hearing testimony.

E. The District Court Relied On Dubious Eyewitness Testimony.

Like the district court, Respondent never considers whether a reasonable juror would now doubt "the credibility of witnesses present at trial." *House*, 547 U.S. at 539. The district court disregarded the credibility deficiencies of several prosecution witnesses:

- Steven Sanders claimed, for the first time at trial, that he could identify Davis two years after the shooting, despite his initial police statement that "I wouldn't recognize [the assailant or the other two men] again except for their clothes." Pet's E.H. Ex. 32-EE.

- Dorothy Ferrell—who recanted by affidavit—had only a side view of the shooter wearing a hat in a poorly-lit parking lot at 1:00 a.m. when she was at a hotel situated on the other side of a four-lane, tree-lined boulevard. J.S. 28. Ferrell identified Davis only after seeing his image on the news. *Id.*[1]

- Larry Young—who also recanted by affidavit—was never able to identify his attacker or the shooter, and he initially identified Davis as the person wearing the yellow shirt (not the white shirt allegedly worn by the shooter), T. at 805-06, and noted that Davis and Coles looked alike. *Id.* at 832. Young suffered massive head trauma that necessitated multiple surgeries and he remained intoxicated *hours* after the incident occurred. T. at 803, 837; Pet's E.H. Ex. 32-B.

- Harriet Murray initially claimed that she "couldn't put a face" on the shooter when she was shown Davis's photo, E.H. 2 at 394-95, and then described the shooter as the person following and arguing with Larry Young (*i.e.*, Redd Coles).

None of these witnesses provides reliable, much less compelling, evidence of Davis's guilt. The dubious eyewitness testimony here comports with

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[1] Respondent wrongly claims that Davis "prevent[ed]" Ms. Ferrell from testifying. J.S. Opp. 33. Davis subpoenaed Ferrell to attend the hearing, but ultimately decided not to call her to the stand. Nothing prevented Respondent from calling Ferrell if he believed he could impeach her recantation affidavit. Indeed, the fact that Respondent decided not to call Ferrell despite her availability suggests that Respondent had doubts about what Ferrell might say and chose to leave her affidavit un-rebutted.

studies cited by *amicus curiae*. Innocence Project Br. at 14-15. However, the district court made no reference to evidence that would have called these witnesses' trial testimony into doubt when it assessed the remaining strength of the prosecution's case.[2]

Rather than defend these witnesses' identifications of Davis, Respondent focuses on shirt color. But the testimony about shirt color is just as ambiguous and contradictory. Murray identified Davis as the shooter at the preliminary hearing, but when asked about the person arguing with Young (*i.e.*, Redd Coles), she described Coles as wearing a white shirt; when pressed whether she had "any doubt" about the shirt colors, she responded "no." Prelim. Hr'g at 91. Young, too, initially put Mr. Davis in the yellow shirt, not the white shirt. T. at 805. Respondent fails to acknowledge the absence of credible evidence proving that Coles was wearing the generic yellow shirt he belatedly produced. Instead, the record shows: [1] Coles's sister produced a shirt twelve days after the shooting; [2] Coles initially claimed he did not have the shirt because he had given it to Davis; and [3] the shirt Coles produced had a prominent logo that was never mentioned by any of the eyewitnesses. T. 1318, 945-46, 925.[3]

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[2] For instance, the district court failed to acknowledge Young's intoxication and Coles's "innocent" participation in the crime-scene re-enactment.

[3] Respondent's gratuitous allusion to "bloody shorts," J.S. Opp. 25 n.19, is a ploy to inject evidence so deficient that the Respondent "conceded [at the hearing] this evidence lacked any probative value of guilt." Pet. App. 154a n.97. The district court concluded that "the shorts in no way linked Mr. Davis to the murder of Officer MacPhail" and "it is not even clear that the

The lack of other reliable identification witnesses makes Antoine Williams's recantation crucial; he was the most credible of the prosecution's eyewitnesses. The jury likely afforded greater weight to Williams's testimony because he was not intoxicated or injured (in contrast to Larry Young); he was close to the scene (in contrast to Dorothy Ferrell); his testimony had not been tainted by the crime scene re-enactment involving Coles (in contrast to Murray and Young); and he had not expressed a complete inability to identify the assailant (in contrast to Murray and Sanders).

Williams's probable influence on the jury explains why the district court took such pains to conclude that Williams did not recant his prior testimony. Williams not only recanted his testimony, he recanted the most crucial fact of his trial testimony: Williams stated that he identified Davis at trial even though Williams did not, at trial, know whether Davis or some other person actually shot Officer MacPhail. E.H. 1 at 12, 16. Williams's evidentiary hearing testimony cannot be reconciled with the testimony heard by the jury.

* * *

Redd Coles had the motive, weapon, and opportunity to commit this crime. J.S. 5-7. Compelling evidence of Coles's guilt, combined with serious doubt of the shooter's identity as a result of new ballistics evidence (J.S. 30-32) and witness recantations, would prevent any reasonable juror from returning a guilty verdict against Mr. Davis today. The district court erred in concluding otherwise.

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substance is blood." *Id.* Davis never suggested that the district court relied on such evidence.

CONCLUSION

Unless the Court grants the petition for certiorari, the Court should note probable jurisdiction.

Respectfully submitted,

PHILIP W. HORTON
Counsel of Record
JASON EWART
R. REEVES ANDERSON
STEPHEN MARSH
WELLS BENNETT
ARNOLD & PORTER LLP
555 12th Street, NW
Washington, DC 20004
(202) 942-5000
Philip.Horton@aporter.com

Counsel for Troy Anthony Davis

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