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

IN RE TROY ANTHONY DAVIS	* * *	Civil Case No. 4:09-CV-130 (WTM)

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APPLICATION FOR CERTIFICATE OF APPEALABILITY

Pursuant to 28 U.S.C. § 2253(c) and 11th Cir. R. 22-1(a), Mr. Davis respectfully requests that this Court issue a Certificate of Appealability as to all issues in this case.

On May 19, 2009, Mr. Davis filed his Petition for Writ of Habeas Corpus in the Supreme Court of the United States. In the petition, Mr. Davis argued that his execution would be unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. On August 17, 2009, the Supreme Court invoked its discretionary original habeas jurisdiction and transferred the case to this Court "for hearing and determination" 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." Supreme Court Transfer Order at 1 (Dkt. #1). After holding a hearing on June 23 and 24, 2010, this Court denied relief in an order entered on August 24, 2010. See Final Order Denying Petition for Habeas Corpus (Dkt. #92) ("Final Order"). Mr. Davis wishes to appeal from the denial of relief on his constitutional claims and all issues that arise out of the hearing and this Court's Final Order.

I. AUTHORITY AND STANDARD FOR ISSUANCE OF A CERTIFICATE OF APPEALABILITY

Under 28 U.S.C. § 2253(c), Fed. R. App. P. 22(b), and 11th Cir. R. 22.1(a), this Court has the authority to issue a Certificate of Appealability ("COA") for each issue with respect to which the Petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Gonzalez v. Sec'y for the Dept. of Corr., 366 F.3d 1253, 1267 (11th Cir. 2004) (en banc). Evidentiary and procedural errors can be issues subject to a Certificate of Appealability. See Slack v. McDaniel, 529 U.S. 473, 483 (2000) ("… [U]nder § 2253(c), Congress expressed no intention to allow trial court procedural error to bar vindication of substantial constitutional rights on appeal.").

The standard for granting a COA under AEDPA is "materially identical" to that under pre-AEDPA law. Hardwick v. Singletary, 126 F.3d 1312, 1313 (11th Cir. 1997), overruled on other grounds by People v. Haley, 227 F.3d 1342, 1346 n.2 (11th Cir. 2000). Prior to AEDPA, the petitioner was required to make "'a substantial showing of the denial of [a] federal right."' Barefoot v. Estelle, 463 U.S. 880, 893 (1983) (quoting Steward v. Beto, 454 F.2d 268, 270 n.2 (5th Cir. 1971)). The Barefoot standard does *not* require the petitioner to show he would "prevail on the merits." Barefoot, 463 U.S. at 893 n.4; see also Miller-El v. Cockrell, 537 U.S. 322, 337 (2003). Rather, it has been understood as a formulation of the "debatability" standard. See Miller-El, 537 U.S. at 336-338. Under that standard, a petitioner was entitled to issuance of a certificate of probable cause — and therefore Mr. Davis is entitled to the issuance of a COA — where "reasonable jurists could debate whether (or, for that matter, agree that) the petition

should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Id. at 336 (internal quotations omitted). To put it another way, a petitioner need show only that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack, 529 U.S. at 484. "The question is the debatability of the underlying claim, not the resolution of that debate." Miller-El, 537 U.S. at 342.

Furthermore, "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . . ." Barefoot, 463 U.S. at 893; see also McDaniel v. Valerio, 306 F.3d 742, 767 (9th Cir. 2002) ("Because this is a capital case, we resolve in [petitioner's] favor any doubt about whether he has met the standard for a COA."); Jermyn v. Horn, 266 F.3d 257, 279 n.7 (3d Cir. 2001). Thus, the fact that Mr. Davis's life is at stake tips the balance toward granting a certificate.

II. REASONABLE JURISTS COULD FIND THIS COURT'S ASSESSMENT OF MR. DAVIS'S INNOCENCE CLAIM DEBATABLE

Mr. Davis seeks a Certificate of Appealability as to all issues that led this Court to deny his freestanding innocence claim.

A. REASONABLE JURISTS DISAGREE AS TO THE APPROPRIATE BURDEN OF PROOF FOR A STAND-ALONE INNOCENCE CLAIM

This Court correctly noted that "the cognizability of freestanding claims of actual innocence is an open question" and recognized that the Supreme Court has debated, but

not determined, the appropriate burden of proof for such a claim.[1] Despite the debate among the Supreme Court's justices, this Court decided the open question for the first time by borrowing "clear and convincing evidence" standard from Sawyer v. Whitley, 505 U.S. 333 (1992), and applying it to Mr. Davis's freestanding actual innocence claim. In Sawyer, however, the Court did not craft a standard for petitioners who were actually innocent of the crime for which they were to be executed, but, instead, adopted a burden of proof for petitioners who challenged only the appropriateness of their death sentence without regard to their guilt or innocence of the underlying crime.

The use of the Sawyer standard to evaluate an actual innocence claim is not only unprecedented, but has been explicitly rejected by several justices of the Supreme Court. In Herrera v. Collins, Justices Blackmun, Stevens, and Souter advocated a standard for freestanding innocence claims in which a petitioner must prove that he is "probably actually innocent." Herrera v. Collins, 506 U.S. 390, 434-35 (1993) (Blackmun, J., dissenting, with whom Souter and Stevens, JJ., joined). Those three justices considered and rejected the "clear and convincing" Sawyer standard this Court applied here. The justices reasoned, in part, that the Sawyer standard was inapplicable to innocence claims

[1] Final Order at 91, 115. Although a majority of justices in Herrera v. Collins, 506 U.S. 390 (1993), agreed that a petitioner would be entitled to a new trial upon a "truly persuasive demonstration" of actual innocence, id. at 417, they did not agree upon a legal standard by which such a "truly persuasive demonstration" is to be measured. See id. at 417 (Rehnquist, C.J., opinion of the court, in which O'Connor, Scalia, Kennedy, and Thomas, JJ., joined) ("[T]he threshold showing ... would necessarily be extraordinarily high"); id. at 429 (White, J., concurring in judgment) ("[p]etitioner would at the very least be required to show that based on proffered newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond reasonable doubt.'") (citation omitted); id. at 442 (Blackmun, J., dissenting, with whom Souter and Stevens, JJ., joined) ("[T]o obtain relief on a claim of actual innocence, the petitioner must show that he probably is innocent.").

because it was developed for petitioners "who are concededly guilty of capital crimes," not for a petitioner who "claims that he is actually innocent of the capital crime." Id. at 442 n.6. Likewise, in Schlup v. Delo, the Supreme Court noted that "the Sawyer standard was fashioned to reflect the relative importance of a claim of an erroneous sentence" and that there is "*significant difference* between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." 513 U.S. 298, 325, 326 n.44 (1995) (emphasis added). These cases show that reasonable jurists (i.e., three Supreme Court justices in Herrera and a majority of the Court in Schlup) find the application of the Sawyer "clear and convincing" standard for innocence claims to be inappropriate. Application of that standard here is therefore also inappropriate, and not merely "debatable."

B. REASONABLE JURISTS COULD DEBATE WHETHER MR. DAVIS ESTABLISHED HIS INNOCENCE TO THE REQUISITE DEGREE TO RENDER HIS EXECUTION UNCONSTITUTIONAL

This Court erred by making independent judgments and legalistic determinations about the weight and credibility of certain evidence rather than assessing the impact the evidence would have on a reasonable jury. Weighing the evidence from the perspective of a reasonable juror, it is clear, much less debatable, that Mr. Davis has established his innocence to the degree required to demonstrate that his execution would be unconstitutional.

In House v. Bell, the Supreme Court made clear that a federal habeas judge deciding an innocence claim must make a "probabilistic determination about what reasonable, properly instructed jurors would do." House v. Bell, 547 U.S. 518, 538

(2007) (quoting Schlup v. Delo, 513 U.S. 298, 328 (1995)). The inquiry does not turn on "the district court's independent judgment" or upon "discrete findings on disputed points of fact." Id. at 540. Instead, the district court must assess how reasonable jurors would vote, in light of "all the evidence," both "old and new." Id. at 538. This includes an assessment of the impact of evidence pointing to the alternative suspect, see id. at 540, confessions from the alternative suspect, id. at 549, the significance of physical evidence, id. at 547, the lack of motive "when identity is in question", id. at 540, and "the credibility of the witnesses presented at trial," id. at 538. Indeed, the Court in House reversed the district court's denial of habeas relief because the lower court did not "clearly apply" the "predictive standard as to whether reasonable jurors would have reasonable doubt." Id. at 538.

Reasonable jurists would debate whether this Court clearly predicted the impact of all the evidence on reasonable jurors in light of the little or no weight it gave (or, in some cases its total failure to consider) evidence that a jury would find to be important.

1. Reasonable Jurists Could Debate Whether a Jury Would Have Given Eyewitness Testimony Identifying Redd Coles as the Shooter No Weight

This Court erred by giving the testimony of Benjamin Gordon no weight. At the hearing, Benjamin Gordon testified unequivocally that he was present near the scene when Officer MacPhail was murdered, that he knew Coles well, and that he unmistakably saw Coles shoot Officer MacPhail. Gordon recounted details of the murder that track evidence in the record, including the fact that three individuals were "exchanging words" before the altercation, that the shooter "walk[ed] up to the individual laying on the

ground and fire[d] [a second] shot" and that Redd Coles ran to his sister's house — who was also Gordon's aunt — shortly after the shooting. See June 23, 2010 Evidentiary Hearing Transcript Volume 1 ("EH Vol. 1") at 193-95.

Gordon's physical location when he witnessed the murder was also confirmed by a contemporary police statement taken by Respondent's evidentiary hearing witnesses. Detective Whitcomb and Sergeant Sweeny interviewed Lamar Brown only hours after the shooting. Brown reported that he and Benjamin Gordon were close enough to the crime scene to see "two people running toward the Trust Company Bank." See Petitioner's Evidentiary Hearing Exhibit ("PX") 32M. Detective Whitcomb and Sergeant Sweeney agreed that Brown's statement indicated that both Gordon and Brown were near the Burger King parking lot at the time of the shooting and that Brown's description of the events leading up to the second shot—two people running toward the Trust Company Bank—was consistent with other eyewitness accounts. See EH Vol. 1 at 281; see also June 24, 2010 Evidentiary Hearing Transcript Volume 2 ("EH Vol. 2") at 386. This evidence clearly shows that Benjamin Gordon was in view of the Burger King parking lot when Officer MacPhail was killed.

Benjamin Gordon had no reason to help Mr. Davis and every reason to avoid identifying Redd Coles. Gordon was a relative of Coles and testified that he had known Coles his entire life. EH Vol. 1 at 185. Conversely, Gordon scarcely knew Mr. Davis. EH Vol. 1 at 184. Gordon explained that he avoided identifying Coles earlier because he felt that his testimony placed him in "danger" since he was in prison and his family was "on the outside." Gordon explained that he feared "retaliation" from Coles, but decided

to identify Coles because it was "the truth" and that his refusal to tell the whole truth had become a "burden." EH Vol. 1 at 207, 219.

This Court, however, made the "independent judgment" that Gordon was not credible merely because he had refused to identify his relative Coles in his 2008 affidavit. See PX 4. The Court explained that "[i]t is difficult to understand why fear prevented Mr. Gordon from previously relating that he saw Mr. Coles shoot Officer MacPhail if, [in his 2008 affidavit], he felt comfortable relating Mr. Coles's confession to the murder." Final Order at 158. This Court, however, ignores the fact that a reasonable jury would understand that fear of retribution is a matter of degree: the more damning the evidence provided, the more harsh or swift retribution is likely to be. A clear eyewitness identification by a relative who could recognize Coles at first sight was more likely to provoke ire from Mr. Coles than testimony that Coles made a remorseful admission. The impact of testimony from Mr. Gordon—who had little to no connection to Mr. Davis, was related to Coles, and was present at the scene—cannot be avoided merely because Mr. Gordon initially feared the consequences of telling the whole truth in 2008. Moreover, a reasonable jury would have a tough time believing this Court's independent determination that Mr. Gordon—who the State contends was shot at by Mr. Davis in an event that Gordon repeatedly described as "traumatic" (EH Vol. 1 at 189, 198)—identified his relative Coles in an epic quest to "secure Mr. Davis's release" from prison. Final Order at 158.

2. Reasonable Jurists Could Debate Whether the Evidence that Coles Confessed Was of "Minimal Probative Value"

This Court erred by placing little to no weight on the confessions of Sylvester Coles. At the June 23-24, 2010 evidentiary hearing, Mr. Davis proffered the testimony of Quiana Glover and presented the testimony of Anthony Hargrove and Benjamin Gordon. Mr. Gordon and Mr. Hargrove testified that Mr. Coles had confessed that he—not Mr. Davis—shot and killed Officer MacPhail. Ms. Glover would have testified to the same fact—that she had heard Redd Coles confess to the murder. These witnesses—who included a relative of Mr. Coles, a friend of Mr. Coles, and an acquaintance—offered independent, first-hand accounts of Mr. Coles's confessions.

This Court did not assess the impact Mr. Coles's confessions would have had on a reasonable jury, but, instead, gave the confession evidence little or no weight because it determined the evidence was hearsay and that Mr. Coles may have simply been bragging to "enhance" his reputation. Final Order at 153. The Court's conclusion is erroneous as a matter of law and merely speculates on Mr. Coles's motives rather than assessing the evidence presented to the Court.

First, as this Court initially recognized, the fact that a confession may be hearsay "is of little moment when a reviewing Court passes on the question of actual innocence." June 8, 2010 Order at 1 (Dkt. #56) ("June 8th Order") (citing Schlup, 513 U.S. at 327-28; Herrera v. Collins, 506 U.S. 390, 418 (1993); House, 547 U.S. at 538). In House, the Supreme Court considered the hearsay confessions of the alternative suspect William Muncey as substantive evidence and characterized the confessions as "of [the] most importance." House, 547 U.S. at 549. The fact that the confessions in House may have been hearsay had no bearing on the Court's assessment of the petitioner's innocence.

Instead, the confessions were admissible as substantive evidence "of [the] most importance" because, in determining an innocence claim, the "rules of admissibility at trial" do not apply. House, 547 U.S. at 538.

Second, this Court's speculation that Coles may have confessed falsely because "he believed that his reputation as a dangerous individual would be enhanced if he took credit for murdering Officer MacPhail," (Final Order at 153), runs counter to the evidence presented at the hearing. At the June 23, 2010 hearing, Mr. Gordon testified that Mr. Coles—a relative of Mr. Gordon—confessed to the shooting and then "started crying." EH Vol. 1 at 203-04. Quiana Glover, whose live testimony was excluded by this Court, would have testified that Mr. Coles confessed out of frustration and fear to the killing of Officer MacPhail. Ms. Glover's affidavit stated that Mr. Coles complained that "this shit is about to kill me." See Affidavit of Quiana Glover at 2 (Dkt. #27, Attachment A). At that point, Ms. Glover's friend assured Mr. Coles, "They can't touch you no more." Id. Ms. Glover asked what Mr. Coles was talking about, and Coles explained, "Man, looky here. I'm the one that killed that mother fucker. But, if they want to hold Troy's ass then let them hold him. Besides, I've got kids to raise." Id.

Thus, this Court's unfounded conclusion that Mr. Coles was merely bragging to enhance his street credibility (rather than confessing to murder out of remorse and fear) is mere speculation without support in the record. Like jurors, courts are required to decide cases based on evidence, not speculation. See Victor v. Nebraska, 511 U.S. 1, 21-22 (1994) (endorsing the following jury instruction: "In determining any questions of fact presented in this case, you should be governed solely by the evidence introduced before

you. You should not indulge in speculation, conjectures, or inferences not supported by the evidence."). Reasonable jurists would—and have—given greater weight to confession evidence from an alternative suspect. See House, 547 U.S. at 549; see also Wright v. Marshall, No. 98-10507, 2008 WL 2783288 (D. Mass. July 17, 2008) (crediting hearsay confession testimony in an actual innocence proceeding).

3. Reasonable Jurists Could Debate Whether This Court's Unprecedented Exclusion of Confession Testimony in an Actual Innocence Proceeding Was Error

This Court erred by refusing to allow Quiana Glover to testify. The Court reasoned that in order to solicit Ms. Glover's testimony Mr. Davis was required first to preemptively call Mr. Coles to testify. In other words requiring Mr. Davis to potentially rebut his own witnesses. However, as Mr. Davis explained before in his Motion for Reconsideration of Evidentiary Ruling (Dkt. #84), Mr. Davis was not required to call Mr. Coles and the Court's contrary ruling was erroneous.

Ms. Glover would have testified that she heard Redd Coles confess to the murder, but Ms. Glover was precluded from testifying by the Court because it determined her testimony was hearsay and, after Mr. Davis's continued objection, determined that Ms. Glover's testimony was also "cumulative." Final Order at 151, n.82. This ruling—a complete reversal of its prior June 8th, 2010 Order holding that hearsay is "of little moment when a reviewing Court passes on the question of actual innocence"—was plainly "debatable" in that it contradicts the conclusions of every other court to consider this issue.

First, following Schlup and House, lower courts have uniformly understood that the formal rules of evidence should not be used to preclude substantive and relevant evidence of actual innocence. See, e.g., Wolfe v. Johnson, 565 F.3d 140, 155, 170 (4th Cir. 2009) ("The Supreme Court emphasized in Schlup, however, that a habeas court is not bound by the rules of evidence, carefully explaining that it must 'focus the inquiry on actual innocence.'"); Doe v. Menefee, 391 F.3d 147, 170 n.20 (2d Cir. 2004) (Sotomayor, J.) ("It is worth noting that both Storino's testimony on this issue and his notes rest on the hearsay statements of O'Rourke and Kyle. We need not consider whether this evidence would be admissible at trial, however, because Schlup allows us to consider all evidence in the record."); Royal v. Taylor, 188 F.3d 239, 244 (4th Cir. 1999) (Motz, J.) ("[A] district court undertaking [an actual innocence] inquiry is not bound by the rules of admissibility and should make its assessment in light of all available evidence."). More specifically, Petitioner can find no other occasion in which a court has precluded purported hearsay evidence in support of a claim of actual innocence because the confessor was "available." See, e.g., Wright, No. 98-10507, 2008 WL 2783288 (crediting hearsay confession testimony despite the declarant's availability in an actual innocence proceeding).

Second, this Court adopted an erroneous, and thus debatable, reading of the Federal Rules of Evidence that cannot be squared with the Supreme Court's treatment of confession evidence in House v. Bell. In House, the Supreme Court considered the confessions of the alternative suspect William Muncey as substantive evidence despite

the fact that strict adherence to the rules of evidence would have precluded his testimony.[2]

Finally, the Court's application of limiting evidentiary principles operated exclusively to the detriment of Petitioner, as Respondent's evidence was admitted notwithstanding the refusal of the Attorney General to call out-of-court declarants as witnesses. Indeed, Respondent was permitted to introduce a forensic report (via an incompetent witness) that purported to describe scientific testimony of physical evidence without being required to have the person who conducted the tests appear in court and explain the significance and results of their tests. EH Vol. 2 at 452-53, 457-59. And when Mr. Davis's counsel objected to testimony that constituted *triple* hearsay, the Court overruled the objection, stating, "What's good for the goose is good for the gander." EH Vol. 1 at 255.

4. Reasonable Jurists Could Debate the Effect That the Recantation Evidence Would Have Had on a Reasonable Jury

This Court erred by failing to assess the impact on a reasonable jury of the testimony of Antoine Williams, Jeffrey Sapp, and Darrell Collins.

[2] Under the Federal Rules of Evidence, out-of-court statements may be introduced as substantive evidence only in limited circumstances. Rule 801(d)(1)(A) allows for the admission of a declarant's prior inconsistent statement as substantive evidence only if the declarant testifies at the trial or hearing and the prior inconsistent statement "was given under oath subject to the penalty of perjury at a trial, hearing or other proceeding, or in a deposition." FED. R. EVID. 801(d)(1)(A). Mr. Muncey's confessions in House—like the confessions of Mr. Coles in this case—were not given under oath at a trial, hearing or deposition. See House, 547 U.S. at 549-50. Similarly, Mr. Muncey's confession would also not have qualified under the "statement against interest" hearsay exception provided in Rule 804(b)(3) because that exception requires that the declarant be "unavailable." See FED. R. EVID. 804(b). Mr. Muncey was obviously available as he was called as a witness by the State of Tennessee and denied his confession. See House, 547 U.S. at 552.

First, a reasonable jury would have given great weight to Mr. Williams's expression of a lack of confidence in his identification of Mr. Davis at trial.[3] The Court relies heavily on the fact that Mr. Williams expressed a certainty level of only sixty percent during a pretrial identification of a photograph, but the Court ignores the in-court identification. Mr. Williams was asked to identify the person he saw that night, and he did not "qualify" that statement: he pointed at the only African-American in the well of the court, Mr. Davis. During the evidentiary hearing, Mr. Williams acknowledged that when he made this identification, he did not know that the person to whom he was pointing was the person who shot Officer McPhail. EH Vol. 1 at 12, 16. Mr. Williams even explained that he felt "it was his duty" to identify Mr. Davis at trial because the prosecution "came and got me all the way from New York." EH Vol. 1 at 16. Contrary to this Court's characterization, Mr. Williams did not testify that his identification of the shooter would have been better at the time of the crime. See EH Vol. 1 at 18-19.

The Court's description of Mr. Williams's testimony — that it did not indicate his prior testimony was false — mischaracterizes the record and constitutes clear error. That error was compounded by the Court's unduly narrow approach to recantation evidence in which the Court deemed Mr. Williams's testimony not to be "recantation" evidence merely because he did not specifically describe his prior testimony as false, even though

[3] While this Court presumes that Mr. Davis would "exaggerate" Mr. Williams's testimony in objecting to the Court's findings, see Final Order at 130, n.58, that presumption is neither appropriate nor accurate.

his description of events was fundamentally inconsistent with the testimony he provided at trial.

Second, a reasonable jury would have given weight to the recantation testimony of Jeffrey Sapp and Darrell Collins, especially in light of the evidence Mr. Davis presented showing Savannah police threatening Michael Wilds. Jeffrey Sapp testified at trial that Mr. Davis confessed to Officer McPhail's shooting. Mr. Sapp testified at the evidentiary hearing that his trial testimony was not true and was the product of police suggestion and threats. EH Vol. 1 at 54-60. Likewise, Mr. Collins recalled that police officers waited until his parents left the room and threatened to charge him as accessory to the murder if he did not implicate Mr. Davis. Mr. Davis introduced a tape recording (PX 21A and 21B) showing that Savannah police detectives recounted that "this is no ordinary crime" and threatened to label Michael Wilds as a "snitch" and put him Chatham County jail on the night Officer MacPhail was killed. The recorded threats are similar to those recounted by Mr. Sapp and Mr. Collins described in their unrecorded police interrogations, and a reasonable jury would have taken these recordings into account in assessing the credibility of their testimony.

5. Reasonable Jurists Could Debate Whether the State Witnesses at Mr. Davis's Trial Were Credible

This Court failed to assess the credibility of witnesses presented at Mr. Davis's trial who did not testify at the evidentiary hearing. A reasonable jury would likely have given the testimony of Dorothy Ferrell, Harriet Murray, Larry Young, and Steve Sanders little weight because of their lack of credibility at trial.

Dorothy Ferrell testified in 1991 that she was able to identify Mr. Davis despite the fact that, by her own account, Mr. Davis was a complete stranger, she caught only a side view of the shooter, the shooter was wearing a hat, and she witnessed the crime from across four lanes of road and a tree-lined boulevard at 1:00 in the morning. See Respondent's Exhibit ("RE") 30 at Defendant's Trial Exhibit #3 (picture of Ferrell's vantage point of the crime in broad daylight); RE 26, pp. 1034, 1058, 1053, 1049. Instead, Ms. Ferrell was only able to identify Mr. Davis after 10 days of media coverage, in which she saw Mr. Davis paraded in front of the media in handcuffs. In light of the inherent incredibility of her testimony, the fact that Ms. Ferrell recanted that testimony and disclaimed any positive knowledge about the identity of the shooter in a post-trial affidavit would cause a reasonable jury to conclude that her trial testimony cannot be used as a basis for establishing Mr. Davis guilt.

This is especially true in light of trial evidence that the jury did not hear. The trial record shows that soon after Ms. Ferrell testified, the wife of Mr. Davis's trial counsel received a call stating Ms. Ferrell lied at trial because the district attorney had promised to help her while she was in jail. RE 27, p. 1476. Soon after, the district attorney disclosed a letter he received from Ms. Ferrell before trial. The letter from Ferrell asks for the district attorney's help getting out of jail. No one else knew about the request made in the letter but Ferrell, the district attorney and the caller. Thus, there is credible evidence in the record that Ferrell recanted to a friend immediately after she testified. Ferrell confirmed in her post-trial affidavit that the caller was a friend of hers to whom

she had admitted that she testified falsely. See Affidavit of Dorothy Farrell (Dkt. #3, Exhibit 1).

Reasonable jurors would also find that Harriet Murray's identification of Mr. Davis at trial deserves little weight. Murray's identification of Mr. Davis as the shooter at trial is belied by her initial statements and testimony. Redd Coles admitted at trial and the preliminary hearing that he, and he alone, argued with Larry Young. RE 26, pp. 904, 906, 934, 937, 902, 822; RE 8, pp. 96-97, 108-111. Only two weeks after the shooting, Ms. Murray testified at the preliminary hearing that the person *"arguing"* with Larry Young (i.e., Redd Coles) was wearing a white shirt (RE 7, p. 69) and that the person in the white shirt threatened to shoot Young, pistol-whipped him, and then shot Officer MacPhail. RE 7, pp. 70-71, 58, 61. At the time, Murray expressed "no doubt" about her memory as to who was wearing the white shirt. RE 7, p. 91.

Two years later at trial, Murray reversed the shirt colors, but consistently testified that the man arguing with Young (i.e., Redd Coles) threatened to shoot Young while digging into the front of his pants for a gun. See RE 26, pp. 845, 861. At the June 2010 evidentiary hearing, Detective Fagerstrom told this Court that it was clear to him now, and when he filed his supplemental report shortly after the shooting, that Murray told him on the night of the shooting that person who threatened to shoot Larry Young while digging into the front of his pants (i.e., Redd Coles in both Murray's preliminary hearing and trial testimony) was the shooter. EH Vol. 2 at 297-99.

Moreover, Murray identified Mr. Davis's photograph by process of elimination when she was shown a Coles-free photo array immediately after Detective Ramsey had

Murray, Coles, Collins, and Young reenact the shooting in the Burger King parking lot with Coles playing the innocent bystander. RE 27, pp. 1324-25. According to Ms. Murray's August 24, 1989 police statement, she picked Mr. Davis's picture after the reenactment because Mr. Davis was "the only one left." PX 32V at 2. In light of Ms. Murray's inconsistent statements and her initial descriptions of Coles as shooter — a description in which she expressed "no doubt" shortly after the murder — reasonable jurors would not have given her identification of Mr. Davis any weight.

A reasonable jury would also give Larry Young's testimony no weight. On the night of the murder Mr. Young was intoxicated and suffered a brain injury in which he later underwent multiple surgeries. A blood toxicology reports shows that several hours after the incident, Mr. Young had a blood alcohol level of .08. See PX 32B. Moreover, Young was never able to identify Mr. Davis as his assailant. In fact, Young admittedly *misidentified* Troy Davis. According to Detective Ramsey's testimony at the evidentiary hearing, Young was shown a photo array that included Mr. Davis (but not Redd Coles) and was asked to identify the man with whom Young was arguing on the night of the assault. EH Vol. 2 at 375-77. Young selected Mr. Davis's photo and then later reversed his identification when he saw Mr. Coles in the waiting room of the police station. As a result, Young's post-trial affidavit admitting that he could not remember "what different people were wearing . . . [and] just couldn't tell who did what" is more consistent with the record than Young's trial testimony in which he hesitantly expressed an opinion that he didn't think it was Coles who assaulted him. See PX 17; RE 26, p. 811.

No reasonable juror could find Stephen Sanders's courtroom identification of Mr. Davis credible. Stephen Sanders testified at trial that he was seated in the passenger-side seat of the van parked in the Burger King parking lot when Officer MacPhail was shot. RE 26, p. 977. Only four hours after the shooting, Sanders told the police "I wouldn't recognize [the assailant or the other two men] again except for their clothes." PX 32EE. Sanders was never shown a photographic array, and it was not until two years after the incident and one day after seeing Troy Davis's picture in the newspaper, that Sanders identified Mr. Davis as the assailant for the *first time* in the courtroom. RE 26, pp. 984-85. In light of this evidence, no reasonable juror would have placed any weight on Sanders's in-court identification of Mr. Davis.

6. Reasonable Jurists Could Debate the Probative Value of Mr. Davis's New Ballistics Evidence

This Court failed to assess the probative value the new ballistics evidence would have had on a reasonable jury. According to this Court, neither the ballistics evidence nor evidence of Petitioner's innocence of the Cloverdale shooting were relevant to Petitioner's innocence or guilt of the MacPhail murder.[4] Final Order at 163-64. This

[4] This reflected the Court's more general and mistaken conclusion that "the conviction for the Cloverdale shooting is not specifically challenged in this petition[.]" Final Order at 157 n.92; see also id. at 163 n.96 (expressing no view regarding Petitioner's conviction for the Cloverdale assault, because "that is issue is not before the Court."). This was clear error. Since the case's inception, Petitioner has maintained his innocence as to *all* of his convictions — including his conviction for assaulting Michael Cooper — and *nowhere* conceded guilt as to any count. For that reason, in both his Petition for a Writ of Habeas Corpus and during the evidentiary hearing, Petitioner presented evidence that he did not commit the Cloverdale shooting. See, e.g., Dkt. #2 at 3 (recounting Valerie Gordon's testimony and statements regarding an argument between Joseph Blige and Redd Coles on the night of the shooting, in which Blige's expresses a belief that Coles had tried to kill him); EH Vol. 1 at 144 (April Hester's hearing testimony as to Coles's presence at the party, and his quarrel with another party guest).

evidence, however, undercuts the State's theory at trial that the Cloverdale shooting was Mr. Davis's motive to shoot Officer MacPhail.

At trial, the State argued that the Cloverdale shooting provided "a motive that Davis may have had, *a motive that cannot be ascribed to Coles*, a motive that Davis may have had for shooting Officer MacPhail … out of fear that he would [have been] arrested and connected with the Cloverdale incident, unless he could escape Officer MacPhail." RE 28, pp. 1552-53 (emphasis added). The State concocted a motive by arguing that Mr. Davis "using the same gun, shot Michael Cooper and murdered Officer MacPhail," and pointed to evidence that Redd Coles was not at the party and expert testimony that "[t]here were ***enough similarities in the bullets*** to say that the bullet that was shot in Cloverdale into Michael Cooper was shot — was possibly shot from the same gun that shot into the body of Officer MacPhail." RE 28, p. 1502 (emphasis added).

The 2007 GBI Ballistics Report, however, states that there were not "enough similarities in the bullets" to connect the Cloverdale bullet with the bullet that killed Officer Macphail, finding that "[m]icroscopic examination and comparison fails to reveal sufficient characteristics to determine that the [bullet found in Michael Cooper] and the [bullet shot into the body of Officer MacPhail], were fired from the same firearm." PX 31. Without the State's "same gun" theory, a reasonable jury would likely have disregarded the State's evidence of motive, because almost no other evidence connected Mr. Davis to the Cloverdale shooting.

First, it is likely that the two shell casings belong to bullets fired from weapons which were not, in fact used in either the MacPhail or Cooper shootings. Numerous

witnesses at the June 2010 evidentiary hearing testified that Mark Wilds and Lamar Brown had multiple guns and were in both places in which the matching shell casings were recovered: 1528 Cloverdale and the Trust Company Bank on Fahm Street. See EH Vol. 1 at 190-91; 279-280; EH Vol. 2 at 336-37. Detective Whitcomb admitted that Lamar Brown had no reason to lie in 1989 when he told Whitcomb that he and Wilds shot at the party in Cloverdale, drove to Fahm Street and then Wilds took "the guns" from the car and walked down Fahm street toward the Trust Company Bank, where the matching shell casing was found. EH Vol. 1 at 280; PX 32M. Benjamin Gordon's testimony at the hearing confirms Brown's 1989 police statement, showing that Wilds and Brown shot at the party at 1528 Cloverdale and then returned to Fahm street with their guns in tow. See EH Vol. 1 at 190-91; 279-280; EH Vol. 2 at 336-37. This evidence undercuts the State's theory that the shell casings did not necessarily come from a single weapon used in both the Michael Cooper and Office MacPhail shootings.

Second, there was no other evidence adduced at trial identifying Mr. Davis as the Cloverdale shooter. The only State witnesses near the scene when Michael Cooper was shot were Michael Cooper, Benjamin Gordon, Darrell Collins and Eric Ellison. Nowhere in the trial record do any of these witnesses — or any other witness — identify Mr. Davis as the shooter. See (RE 27, p. 1187) (Michael Cooper testifying that he did not see who shot him); (RE 27, pp. 1199-1203) (Benjamin Gordon testifying that he did not see who had shot Cooper and did not know what the shooter was wearing, but only heard about the shooter from others in the car); (RE 27, pp. 1120, 1127) (Darrell Collins testifying that he did not see who shot Michael Cooper); (RE 27, pp. 1221-22) (Eric Ellison

testifying that he did not see who shot Michael Cooper). Indeed, Brown and Wilds, who saw the Cloverdale shooter, were shown a photo array late in the evening on August 19, 1989 and did not identify Mr. Davis as the shooter. See PX 32M; 32Q.

Moreover, Mr. Davis presented testimony at the hearing from the co-host of the Cloverdale party who specifically recalled that Redd Coles attended her party. Moreover, Mr. Davis has pointed to evidence in the record that Jospeph Blige, who was riding in the car with Cooper when Cooper was shot, fought with Coles after the incident and exclaimed "I thought y'all were trying to kill me." Dkt. #2 at 3.

The Court specifically declined to address any of this evidence, claiming that the Cloverdale shooting and the ballistics evidence "is not relevant to Mr. Davis's guilt of the MacPhail murder … ." Final Order at 164; see also id. at 163 n.96 (expressing no view regarding Petitioner's conviction for the Cloverdale assault, because "that issue is not before this Court."). Reasonable jurists, however, could debate whether evidence disproving the State's theory of motive would be relevant to a reasonable jury. See, e.g., House, 547 U.S. at 540. ("When identity is in question, motive is key.").

C. REASONABLE JURISTS DISAGREE AS TO THE LEVEL OF DEFERENCE TO BE GIVEN TO THE STATE COURT'S FINDINGS OF FACT

Reasonable jurists could debate both the level of deference applicable under AEDPA as well as whether AEDPA's provisions contained in § 2254(d)(2) and § 2254(e)(1) apply in this case.

1. Reasonable Jurists Could Debate Whether the Georgia Supreme Court's Factual Findings—Made Without the Benefit of a Hearing—Deserve Any Deference Under AEDPA

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

Conversely, the Fifth Circuit has held that a "full and fair hearing is not a precondition" to accord the State court's factual determinations deference under §§ 2254(d)(2) or (e)(1). Valdez v. Cockrell, 274 F.3d 941, 951 (5th Cir. 2001). The First and Third Circuits have taken the middle ground, finding that the lack of an evidentiary hearing in State Court should be a consideration in applying deference under § 2254(d)(2) and (e)(1). Teti v. Bender, 507 F.3d 50, 59 (1st Cir. 2007) ("While it might seem questionable to presume the correctness of material facts not derived from a full and fair hearing in state court, the veracity of those facts can be tested through an evidentiary hearing before the district court where appropriate"); Rolan v. Vaughn, 445 F.3d 671, 679-80 (3d Cir. 2006) ("after AEDPA, state fact-finding procedures may be relevant when deciding whether the determination was 'reasonable' or whether a petitioner has adequately rebutted a fact, the procedures are not relevant in assessing whether deference

applies to those facts."). As a result of the circuit split, this Court's decision to adopt the approach of the First and Third Circuits is clearly a debatable issue.

Regardless of the appropriate level of deference, the Georgia Supreme Court's factual findings without the benefit of a hearing in this case led it to misread the evidence and make unreasonable factual determinations. A sharply-divided Georgia Supreme Court erroneously concluded that Mr. Davis's affidavits "merely stated that they now do not feel able to identify the shooter." Davis v. Georgia, 283 Ga. 438, 447 (2008). As Mr. Davis demonstrated in his Petition and at the evidentiary hearing before this Court, the state court's factual determination is rebutted by the plain words of each affidavit and the testimony of the witnesses. The hearing testimony and the submitted affidavits show that each recanting eyewitness was unable to identify the shooter at trial and on the night of the crime. For example, Darrell Collins during the evidentiary hearing that he saw neither the shooting nor the assault on Larry Young. EH Vol. 1 at 93-94. Similarly, Antoine Williams testified at the hearing that he was unable to identify the shooter at the time of the crime. EH Vol. 1 at 12-13. Larry Young's affidavit shows that he "never" — at trial or the night of the shooting — was able to identify the shooter or what he was wearing. See PX 17. Dorothy Ferrell's affidavit clearly states that she was not able to identify the shooter at trial or on the night of the crime. See Affidavit of Dorothy Farrell (Dkt. #3, Exhibit 1).

The errors of the Georgia Supreme Court, however, do not end there. The Georgia Supreme Court made the erroneous factual conclusion that "[t]estimony at trial identified Davis as the person who shot Michael Cooper." Davis v. Georgia, 283 Ga. 438, 440

(2008). The state court's conclusion is factual error and shows the total lack of depth of its analysis. The only State witnesses near the scene when Michael Cooper was shot were Michael Cooper, Benjamin Gordon, Darrell Collins and Eric Ellison. Nowhere in the trial record do any of these witnesses — or any other witness — identify Mr. Davis as the shooter. See supra, p. 21. Indeed, the testimony at the June 23, 2010 hearing showed that Benjamin Gordon did not see the Cloverdale shooter, but clearly saw Redd Coles shoot Officer MacPhail. Mr. Gordon was unequivocal on these critical facts.

The state court also erroneously held that "[a] bullet retrieved from Michael Cooper's body during his medical treatment was similar to bullets from the murder scene." Davis, 283 Ga. at 439. The record shows that the state ballistics expert testified to the unremarkable conclusion that the bullet found in Michael Cooper's body (RE 30, State's Exhibit #39; RE 27, p. 1279) was probably fired from the same gun as the bullet found at the scene where Michael Cooper was shot (RE 30, State's Exhibit #41; RE 27, p. 1272) — not the "murder scene" where MacPhail was shot. RE 27, p. 1293. Instead, the 2007 Georgia Bureau of Investigation Ballistics Report concluded that the bullet retrieved from Michael Cooper's body and the bullet retrieved from Officer MacPhail's autopsy "fail[] to reveal sufficient characteristics to determine that the bullets … were fired from the same firearm." See PX 31.[5]

[5] Detective Praylo testified at the June 24, 2010 hearing that item 4D of the 2007 GBI Ballistics Report (see Item 3 of PX 32J) and item 4A of the 2007 GBI Ballistics Report (see item 3 of PX 32K) were the bullets he recovered, respectively, from the MacPhail autopsy and from the hospital where Michael Cooper was treated. The 2007 GBI Ballistics Report (PX 31) shows that "Microscopic examination and comparison fails to reveal sufficient characteristics to determine that the bullets, Items 4A ... and the bullet 4D, were fired from the same gun."

The Georgia Supreme Court repeatedly missed, ignored or misunderstood key facts. Compare, e.g., Davis, 283 Ga. at 439 ("Someone shouted a threat about shooting Young") with Respondent's Answer-Reply at 23 (Dkt. #21) ("Mr. Coles, who was facing Mr. Young, told him not to walk away 'cause you don't know me, I'll shoot you,' and began digging in his pants."). The state court's use of the word "someone" should not be allowed to obscure the undisputed fact that Redd Coles made that threat to shoot Young and that Young's attacker was undisputedly the murderer.

The state court also credited Steve Sanders's identification of Mr. Davis based on trial testimony that is contradicted by the record. State witness Steve Sanders told the police on the night of the shooting that he "wouldn't recognize" the shooter again if he saw him. PX 32EE at 2. Two years later, Sanders incredibly identified Mr. Davis for the first time at trial, only after seeing his picture in the paper the day before.[6] The Georgia Supreme Court credited Sanders's testimony, in part, because Sanders put Mr. Davis in "the location [the assailant] was in when he struck Larry Young." Davis, 283 Ga. at 363. This is wrong. In fact, Mr. Sanders's testimony of where Young's assailant was standing belies his in-court identification of Mr. Davis and implicates Redd Coles.

Sanders testified that the shooter was standing directly in front of Larry Young when Young was pistol-whipped.[7] The Georgia Supreme Court, however, failed to

[6] As Assistant District Attorney Locke testified during the evidentiary hearing, Mr. Davis was also the only African-American man sitting at either the prosecution or defense table. Sanders was never asked to identify Redd Coles. EH Vol. 2 at 461.

[7] Mr. Davis's trial counsel, Mr. Barker, had Sanders demonstrate Larry Young's assault. The record shows that Barker played the victim Young while Sanders played the attacker. See RE 26,

Footnote continued on next page

understand that the record clearly shows that Redd Coles — not Mr. Davis — was standing in front of Larry Young when Young was pistol-whipped. See RE 25, p. 800 (Young was "face to face" with Coles when he was hit); see also Respondent's Answer-Reply at 23 (Dkt. #21) ("Mr. Coles, who was facing Mr. Young"). Indeed, even Redd Coles admitted that he was in the position where Sanders placed Young's assailant (who also was the shooter). See (RE 8, pp. 98-99) (testimony of Redd Coles) (Q: "[W]ho or what was [Young] looking at when he got hit? A: Me and [Young] was facing each other."). At the June 23, 2010 hearing Detective Whitcomb also confirmed that Antoine Williams told the police only hours after the shooting that Young was attacked from the front. EH Vol. 1 at 275-76.

The state court's erroneous determinations go to the heart of Mr. Davis's innocence claim as they include a misreading of his recantation evidence, a lack of understanding of the Michael Cooper shooting which produced the only physical evidence in the case, and a mistake in reading testimony of Steve Sanders who was the only state eyewitness other than Coles who has not recanted. Plainly, these erroneous factual determinations were "relevant" to the state court's decision. See Jones v. Walker, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (en banc) (applying the "the pre-AEDPA *de novo* standard of review to Jones' habeas claims" because the Georgia Supreme Court's unreasonable determination of facts was "relevant" to petitioner's constitutional claim).

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p. 986. After the demonstration, Mr. Barker asked Sanders: "Q: [] you were standing in front of me, and you made this motion? A: Yes, sir." (RE 26, p. 986) (emphasis added).

Thus, reasonable jurists could debate whether any deference is due to the Georgia Supreme Court's opinion under § 2254(d).

2. Reasonable Jurists Could Debate Whether § 2254(d)(2) and § 2254(e)(1) Apply to an Original Petition for Habeas Corpus

The Supreme Court has not determined the extent to which either § 2254(d)(1) or (d)(2) applies to original habeas cases. As the Court made clear in Felker v. Turpin, the Supreme Court—not Congress—decides what limitations apply to its original habeas authority. 518 U.S. 651 (1996). In Felker, the Supreme Court found that although AEDPA "impose[d] new requirements for the granting of relief under [§ 2254]" the new limitations only "inform" its authority to issue such relief in an original habeas petition. Id. at 663 (emphasis added). In the same vein, the Court found that AEDPA's "gatekeeping" amendments to 28 U.S.C. § 2244 only "inform our consideration of original habeas petitions." Id.

Limits on the Supreme Court's original habeas authority must be self-imposed. The Court has zealously guarded its "discretionary" powers to issue the original writ, deciding whether statutory provisions restrict, inform, or have no effect on its original habeas authority. Indeed, Supreme Court Rule 20.4(a) delineates the standards under which the Court will grant original writs under its "discretionary powers" by requiring a petitioner to satisfy only three provisions: 28 U.S.C. §§ 2241, 2242 and 2254(b). Section 2254(b) requires that a habeas petitioner exhaust his state remedies before filing an original petition. But the Court has determined that this provision limits its power to issue relief in an original habeas action only because 2254(b), adopted in 1948, was

"declaratory" of limits that the Supreme Court had previously placed on its own original habeas authority. See Felker, 518 U.S. at 663 n.4 (citing Ex parte Hawke, 321 U.S. 114, 64 (1944) (original habeas case in which the Court limited its own authority to hear only exhausted claims)). Unlike the state exhaustion requirement contained in § 2254(b), however, the Court has never held that AEDPA's amendments to § 2254(d) limit its authority to issue relief in an original habeas action.

Further, a construction of § 2254(d) that would preclude the Supreme Court from issuing relief in this case would give rise to "substantial constitutional questions" involving the Suspension Clause. The Suspension Clause of the Constitution provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public safety may require it." U.S. CONST. art. I, §9 cl. 2. In INS v. St. Cyr, 533 U.S. 289 (2001), the Court concluded that a construction of AEDPA that eliminated the availability of federal habeas corpus review of immigration orders of deportation "would give rise to substantial constitutional questions" under the Suspension Clause. Id. at 305. Likewise, in Felker the Supreme Court held that the Suspension Clause question was avoided only because AEDPA had not foreclosed the petitioner from seeking relief in original writ to Supreme Court. Felker, 518 U.S. at 660-61, 664-65.

Here, interpreting AEDPA to preclude the Court from issuing relief in this original habeas case would raise substantial constitutional questions. The Court has twice held that Congressional abrogation of its habeas jurisdiction was constitutional only because the statutes did not repeal the Court's power "to entertain" an original writ. Felker, 518

U.S. at 660 (AEDPA was not unconstitutional because the Act "has not repealed our authority to entertain original habeas petitions.") (citing Ex parte Yerger, 8 Wall. 85, 19 L.Ed. 332 (1869) (Act of 1867 was not unconstitutional because it did not repeal the Court's original habeas jurisdiction)). If the Court retains the authority to "entertain" an original habeas writ, then the Court must necessarily also have the power to grant that original writ. Cf. Marbury v. Madison, 5 U.S. 137 (1803) (it is the duty of the Court "to say what the law is" and with every right, there must be a "remedy"); Boumediene v. Bush, 128 S. Ct. 2229, 2266 (2008) (original habeas action in which the Court held that "[w]e do consider it uncontroversial [] that . . . the habeas court must have the power to order the conditional release of an individual unlawfully detained").

CONCLUSION

As shown in this application, Mr. Davis's Petition, the evidentiary hearing, and the briefs and pleadings before this Court, Mr. Davis has made the requisite showing for the issuance of a Certificate of Appealability as to all issues raised in this case. Therefore, Mr. Davis respectfully requests that this Court issue a Certificate of Appealability so that he may appeal his claims to the United States Court of Appeals for the Eleventh Circuit or, alternatively, to the Supreme Court of the United States.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day electronically filed this *Application for Certificate of Appealability* with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following list attorneys of record:

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