CAPITAL CASE
No. 10-___

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

JURISDICTIONAL STATEMENT AND PETITION FOR HABEAS CORPUS AND A COMMON LAW WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Court should grant the concurrently-filed petition for certiorari, reverse the decision of the Eleventh Circuit, and direct the court of appeals to issue a certificate of appealability. *See Hohn v. United States*, 524 U.S. 236 (1998). If that petition is denied, however, Mr. Davis respectfully requests that the Court note probable jurisdiction based on this Jurisdictional Statement and review the merits of this case.

The questions presented are:

1. The Court in *Sawyer v. Whitley*, 505 U.S. 333 (1992), fashioned a standard to review claims of capital sentencing error. The Court has so far refused to adopt the *Sawyer* standard for claims of actual innocence, reasoning that there is a "significant difference between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." *Schlup v. Delo*, 513 U.S. 298, 326 n.44 (1995). Since the Court has not announced a standard applicable to innocence claims that do not also allege a constitutional violation, the district court applied the *Sawyer* standard to Mr. Davis's free-standing innocence claim. Does *Sawyer* supply the appropriate burden of proof for a claim that the execution of an innocent person violates the Eighth Amendment?

2. The Court in *House v. Bell*, 547 U.S. 518 (2006), and *Schlup v. Delo*, 513 U.S. 298 (1995), instructed lower courts to consider the cumulative effect of "all the evidence" when assessing innocence claims, regardless of "the

rules of admissibility that would govern at trial." *House*, 547 U.S. at 538. The district court nevertheless excluded evidence showing that the alternative murder suspect had repeatedly confessed, finding the evidence to be hearsay and cumulative. In the context of an actual innocence proceeding, did the district court give proper consideration to evidence that the alternative suspect confessed?

3. Mr. Davis presented the testimony of several witnesses at the hearing: four of those witnesses recanted their trial testimony; three witnesses testified (or were prepared to testify) that Sylvester "Redd" Coles confessed to the crime; another witness (present at the scene and a relative of Coles) testified unambiguously that he saw Coles shoot Officer MacPhail; new ballistics evidence dispels the prosecution's motive theory; and trial evidence shows that Coles (who faced no police scrutiny during the investigation) had the motive, opportunity, and .38 caliber revolver necessary to have committed this crime. Did Mr. Davis establish his innocence to the requisite degree to render his execution unconstitutional under the Eighth Amendment?

4. Does the court of appeals have jurisdiction under 28 U.S.C. §§ 1291 and 2253 to review the district court's final order in the first instance or does direct appellate review lie exclusively in this Court?

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OPINION BELOW

The Final Order Denying Petition for Writ of Habeas Corpus ("Final Order"), issued by the District Court for the Southern District of Georgia (Moore, J.), is published at 2010 WL 3385081. Pet. App. 17a-165a. (Petitioner's Appendix is filed with Mr. Davis's Petition for Certiorari.)

JURISDICTION

The district court issued the Final Order on August 24, 2010, and Mr. Davis timely filed a notice of appeal to this Court on September 23, 2010. Pet. App. 15a. On November 11, 2010, Associate Justice

Clarence Thomas granted Mr. Davis's application to extend the time to file this Jurisdictional Statement until January 21, 2011. Case No. 10A476.

As explained in Mr. Davis's petition for certiorari, also filed today, the Court should grant certiorari and reverse the decision of the Eleventh Circuit (Pet. App. 1a), which held that it lacked jurisdiction to hear this appeal notwithstanding 28 U.S.C. §§ 1291, 2253, and Federal Rule of Appellate Procedure 22(a). However, if that petition is denied, this Court has the jurisdiction and authority to review the district court's final order under 28 U.S.C. §§ 1651 and 2241 and Article III of the U.S. Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Section 2101(b) of Title 28, United States Code, governs a direct appeal to the Supreme Court from the final order of a district court:

> (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, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

Section 2241 of Title 28, United States Code, addresses the power of the Supreme Court to grant or transfer a writ of habeas corpus:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions . . . .
>
> (b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it. . . .

Section 1651(b) of Title 28, United States Code, states:

> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

STATEMENT OF THE CASE

Since Mr. Davis's trial, evidence has surfaced that shows not only that Troy Davis is innocent, but that Sylvester "Redd" Coles murdered Officer Mark MacPhail. Seven of the prosecution's key witnesses against Mr. Davis have recanted or contradicted their stories at trial by affidavit or testimony at the evidentiary hearing. Police were caught on tape making threats to civilians during the investigation similar to those described by two recanting witnesses. Trial testimony from a recanted jailhouse informant

was so "obviously false" that the constitutional propriety of its use at trial is called into doubt. A police-sponsored crime scene reenactment explicitly suggested that Redd Coles was above suspicion to at least two additional witnesses. Moreover, new witnesses implicate Redd Coles as the man who murdered Officer MacPhail. An eyewitness, who knew Mr. Coles well and was undisputedly at the crime scene, identified Mr. Coles as the shooter. Mr. Coles has confessed on at least three separate occasions to friends and family and was not called by the Respondent to rebut those confessions. And a 2007 Georgia Bureau of Investigation ballistics report undercuts the prosecution's theory of motive at trial. In fact, little of the prosecution's case against Mr. Davis remains.

In *Herrera v. Collins*, 506 U.S. 390 (1993), a majority of the Court recognized without explicitly holding that the United States Constitution prohibits the execution of an actually innocent person. At least five justices assumed that the execution of an innocent person would be constitutionally intolerable, even if the erroneous conviction was the result of a trial free from constitutional error. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring, with whom Kennedy, J., joined) ("Regardless of the verbal formula employed . . . the execution of a legally and factually innocent person would be a constitutionally intolerable event."); *id*. at 430 (Blackmun, J., dissenting, with whom Souter and Stevens, JJ., joined) ("Nothing could be more contrary to contemporary standards of decency, [], or more shocking to the conscience, [], than to execute a person who is actually innocent.").

The Court left open the question of what standard to apply to free-standing innocence claims. *Id*. at 417 (opinion of the Court). The Court subsequently explained that "[i]n *Herrera*, it was not necessary to determine the appropriate standard of review because petitioner had failed to make 'a truly persuasive demonstration of actual innocence' under any reasonable standard." *Schlup v. Delo*, 513 U.S. 298, 316 n.32 (1995).

Unlike the petitioner in *Herrera*, Mr. Davis has proven his innocence by any reasonable standard. The contrast between the evidence presented by Mr. Davis and the evidence alleged in *Herrera* could not be more stark. Herrera pled guilty to one of the two murders for which he was convicted, left his bloody social security card at the scene of the murder and—when he was arrested—was found with the victim's blood on his clothes and a handwritten confession in his pocket. *Herrera*, 506 U.S. at 394-95. In an attempt to prove his innocence, Herrera offered only affidavits from family members and their associates attempting to show that his brother, who had died seven years earlier, had confessed to the crime. *Id*. at 396-97.

By contrast, Mr. Davis presented compelling evidence that the actual shooter—prosecution witness Sylvester "Redd" Coles—had the motive, weapon, and opportunity to commit the crime. Whereas Herrera's affidavits were from family members and friends, Mr. Davis's witnesses are unrelated bystanders with almost no ties to Mr. Davis or his family. Indeed, one of *Redd Coles's* family members testified at the evidentiary hearing that he saw Coles—not Mr. Davis—commit the murder. Whereas police recovered Herrera's social security card at the scene and the

victim's hair in Herrera's car, there is no physical evidence linking Mr. Davis to the murder of Officer MacPhail. In fact, the ballistics evidence upon which the prosecution's theory of motive relied was contradicted by the Georgia Bureau of Investigation in 2007. Finally, when Herrera was arrested, he was holding a letter in which he confessed to committing the crime. *Herrera*, 506 U.S. at 394-95. In stark contrast, it is Redd Coles who has repeatedly confessed to the murder of Officer MacPhail, as recounted by three witnesses who have no connection to Mr. Davis.

The most compelling evidence that distinguishes Mr. Davis's case from *Herrera* is the mounting proof that Redd Coles killed Officer MacPhail. The incident that led to Officer MacPhail's murder began as Redd Coles harassed a homeless man for a beer. Coles chased the homeless man into the Burger King parking lot where Officer MacPhail was working. Along the way, Coles threatened to shoot the homeless man while digging into the front of his pants. Moments later, the homeless man was pistol-whipped and cried out for help; Officer MacPhail responded and was shot dead with a .38 caliber revolver.

Days later Coles was forced to admit he was carrying a .38 revolver on the night Officer MacPhail was killed. As shown by taped police interrogations played at the evidentiary hearing, the police had evidence implicating Coles from the very beginning: in the first hours of the investigation the police obtained information that the shooter ran from the murder scene directly to Mr. Coles's sister's house. When it became clear that he would soon be a suspect, Coles approached the police with his attorney and accused Troy Davis. Coles did not tell the police about his gun; when police finally

questioned him about it days later, Coles claimed that he had lost the gun on the night of the shooting.

Although the murder weapon was never recovered, the police took Mr. Coles's word for the missing gun. The lead detective testified at the evidentiary hearing that Mr. Coles was never even considered a suspect. As a result, police never searched Mr. Coles's house and never showed his picture to witnesses. Instead, investigators and prosecutors brought Mr. Coles to a crime scene reenactment to play the part of an innocent bystander, signaling to other witnesses that Coles was above suspicion. Immediately after the reenactment, prosecution witnesses such as Harriet Murray and Larry Young changed their stories and identified Mr. Davis.[1]

At the June 2010 evidentiary hearing, Mr. Davis presented further compelling new evidence—evidence that was not previously before this Court when it issued its order transferring the case to the district court—that shows Redd Coles committed the murder. This evidence included a witness to the crime—a relative of Mr. Coles—who testified that Mr. Coles murder Officer MacPhail. Obviously, this dramatic testimony makes Mr. Davis's case for actual innocence even stronger than it was when this Court ordered the evidentiary hearing without the benefit of that evidence.

This new eyewitness testimony, however, is not the only new revelation from the evidentiary hearing. In addition, the district court found not only that a key witness against Mr. Davis perjured himself at the original trial, but also that all those present at trial, which included prosecutors, had to have known that

[1] *See infra* at II.E.

this witness was committing perjury when he testified. This factual finding of the district court not only diminishes the prosecution's case, it also constitutes a serious constitutional violation. *See Mooney v. Holohan,* 294 U.S. 103 (1935) (the presentation of testimony that the State knows to be false is inconsistent with the rudimentary demands of justice). When combined with the new eyewitness testimony, it clearly establishes that the compelling case Mr. Davis presented to this Court in 2009 is far stronger today.

Notwithstanding all the evidence, the district court—which evinced a clear hostility to Mr. Davis and his claims throughout the hearing—concluded that Mr. Davis had not met the standard for obtaining relief under *Herrera*. As shown below, this finding was based on a series of erroneous legal rulings as well as on a fundamental failure to assess the evidence properly and to make a predictive judgment as to what reasonable jurors would do if they heard all of the evidence that is now available.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. THE COURT SHOULD ADOPT A STANDARD FOR FREE-STANDING INNOCENCE CLAIMS THAT REFLECTS THE REALITY THAT CONSTITUTIONAL PROTECTIONS AT TRIAL OFTEN FAIL.

In *Herrera v. Collins*, the Court had no reason to pass on, and appropriately reserved, the question of what quantum of proof is necessary to establish a free-standing innocence claim; instead, the Court stated only that the standard would necessarily be "extraordinarily high." 506 U.S. at 426. The Court

reasoned that a high burden was appropriate because a criminal trial involves the "full panoply of protecttions" afforded by the Constitution, *Schlup*, 513 U.S. at 314-16, and that those constitutional protections at trial "have the effect of ensuring against the risk of convicting an innocent person." *See Herrera,* 506 U.S. at 398-99; *see also id*. at 420 (O'Connor, J., concurring in the opinion) ("Our society has a high degree of confidence in its criminal trials, in no small part because the Constitution offers unparalleled protections against convicting the innocent.").

In the 18 years since the Court decided *Herrera*, however, it has become clear that constitutional protections sometimes fail—and with disturbing frequency. At least 265 prisoners have been exonerated by post-trial DNA testing; only 15 of those exonerations had occurred when *Herrera* was decided.[2] We have learned from those failures. The cases most likely to result in the conviction of the innocent involve faulty eyewitness identification (75% of all exonerations), misleading forensic evidence (52%), or unreliable informant testimony (16%).[3] These factors poison the truth-seeking process, but do not necessarily render a trial unconstitutional. Moreover, there is no reason to believe that the same types of faulty evidence do not lead to erroneous convictions at similar rates in cases in which DNA evidence is not available. Instead, DNA exonerations are the proverbial canary in the coalmine—an indicator of the extent to which "fair" trials can be poisoned by

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[2] *See generally* Innocence Project website, *available at*: http://www.innocenceproject.org.

[3] *See id*.

untrustworthy evidence, especially faulty eyewitness identification and unreliable informant testimony.

In light of the growing realization that procedural constitutional protections are not always sufficient to protect the innocent from faulty convictions, this Court should adopt a standard that lower courts may use in evaluating free-standing innocence claims. The lack of an articulated standard for free-standing innocence claims implies that lower courts need not give such claims serious consideration. *See*, *e.g.*, *Moore v. Quarterman*, 534 F.3d 454, 465 n.19 (5th Cir. 2008) ("*Herrera* [] does not overrule previous holdings (nor draw them into doubt) that a claim of actual innocence based on newly discovered evidence fails to state a claim in federal habeas corpus."). As this case demonstrates, leaving the standard undefined leads to confusion among lower courts as to the importance of innocence in our system of justice.

The district court correctly noted that "the cognizability of freestanding claims of actual innocence is an open question" and acknowledged that this Court has debated, but not determined, the appropriate burden of proof for such a claim. Pet. App. 91a. The district court decided this open question by borrowing the "clear and convincing evidence" standard applicable to claims of capital sentencing error from *Sawyer v. Whitley*, 505 U.S. 333 (1992), and applying it to Mr. Davis's innocence claim. Pet. App. 117a.

In *Schlup*, the Court held that *Sawyer's* "clear and convincing" standard was not appropriate for innocence claims accompanied by an allegation of constitutional error. *Schlup*, 513 U.S. at 327. The Court recognized that "the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence," and that there is a "*significant difference*

between the injustice that results from an erroneous conviction and the injustice that results from an erroneous sentence." 513 U.S. at 325, 326 n.44 (emphasis added). Instead, the Court adopted the lower "more likely than not" standard, holding that to establish the requisite probability for an innocence claim accompanied by an allegation of constitutional error, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Id*. at 327. Because the Court denied certiorari on Schlup's *Herrera* claim, its holding did not address the applicable standard for a free-standing innocence claim. *See id*. at 315 n.31

In *House v. Bell*, 547 U.S. 518 (2006), the Court shed some light on the appropriate burden for free-standing innocence claims. The Court held that a free-standing innocence claim "requires more convincing proof of innocence than [] *Schlup's*" more-likely-than-not standard, but the Court did not decide precisely how much more proof would be required. 547 U.S. at 555.

Mr. Davis's claim is not one of mere sentencing error; he asserts that he is innocent of the crime, and any standard fashioned to evaluate innocence must take into account that significant distinction. *See Schlup*, 513 U.S. at 325. Moreover, the standard for a free-standing innocence claim should also account for what society has learned since *Herrera* was decided: the safeguards of our constitution have not been sufficient to ensure against the risk of a wrongful conviction, and a lack of Constitutional error means little in a case that involves eyewitness identifications, unreliable informants, and misleading forensic evidence. Thus, while the standard required

for a free-standing innocence claim may be somewhat greater than *Schlup's* "more likely than not" standard, it should be lower than *Sawyer's* "clear and convincing" showing.

II. MR. DAVIS ESTABLISHED HIS INNOCENCE TO THE REQUISITE DEGREE TO RENDER HIS EXECUTION UNCONSTITUTIONAL.

The evidence, new and old, establishes that Mr. Davis is innocent by any reasonable standard. In *House v. Bell*, the Supreme Court explained that a federal habeas judge deciding an innocence claim must make a "probabilistic determination about what reasonable, properly instructed jurors would do." 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329).[4] The inquiry does not turn on "the district court's independent judgment" or upon "discrete findings regarding disputed points of fact." *Id*. at 539-40. 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 determination includes a "holistic" assessment of the impact of evidence pointing to the other suspects, *see id*. at 539-40, confessions from the alternative suspect, *id*. at 549, "the credibility of the witnesses presented at trial," *id*. at 539, and the significance of new physical evidence (or lack thereof) when the new evidence disproves the prosecution's theory of motive at trial, *id*. at 540, 547. Indeed, the Court in *House* reversed the district court's denial of

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[4] Importantly, the Court in *House* examined both of petitioner's *Schlup* and *Herrera* claims and, while it rejected the petitioner's *Herrera* claim, it applied the same analysis. *See* 547 U.S. at 555.

habeas relief because the lower court did not clearly assess the cumulative impact of the evidence on a reasonable jury. *Id*. at 538-39.

Here, the district court failed to assess accurately and cumulatively the impact of (A) unequivocal testimony from a new eyewitness identifying Redd Coles as the shooter; (B) confessions from Coles similar to those relied upon by the Court in *House*; (C) the "obviously false" testimony of a jailhouse informant; (D) recantations of prosecution witnesses who provided the bulk of evidence against Mr. Davis at trial; (E) the lack of credibility of the witnesses who testified at Mr. Davis's trial; and (F) the significance of new ballistics evidence that contradicted the prosecution's theory of motive at trial.

A. The District Court Erroneously Concluded that a Jury Would Have Given No Weight to Eyewitness Testimony Identifying Redd Coles as the Shooter.

Since this Court reviewed Mr. Davis's petition in 2009 and concluded that it was "sufficiently exceptional" to warrant transfer to the district court, *In re Davis*, 130 S. Ct. 1, 1 (2009) (Stevens, J., concurring), dramatic new evidence has surfaced that directly implicates Redd Coles. Benjamin Gordon, a relative of Coles, testified that he witnessed Coles murder Officer MacPhail.

At the hearing, Mr. Gordon testified unequivocally that he was near the scene when Officer MacPhail was murdered, that he knew Mr. Coles well, and that he unmistakably saw Mr. Coles shoot Officer MacPhail. Mr. Gordon recounted precise 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 Coles ran to his sister's house—who was also Mr. Gordon's aunt—shortly after the shooting. *See* E. Hr'g Tr. vol. 1 at 193-95.

Tellingly, Respondent's own witnesses confirm that Mr. Gordon was in view of the Burger King parking lot when Officer MacPhail was killed. Detective Whitcomb and Sergeant Sweeney interviewed Lamar Brown only hours after the shooting. Detective Whitcomb and Sergeant Sweeney agreed that Mr. Brown's statement indicated that both Mr. Gordon and Mr. Brown were near the Burger King parking lot at the time of the shooting and that Mr. 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* E. Hr'g Tr. vol. 1 at 279, 281.

Mr. Gordon had no motive to testify on behalf of Mr. Davis and had every reason to avoid identifying Redd Coles. Mr. Gordon was a relative of Mr. Coles and testified that he has known Mr. Coles his entire life. (E. Hr'g Tr. vol. 1 at 184-85). Conversely, Mr. Gordon scarcely knew Mr. Davis. (E. Hr'g Tr. vol. 1 at 183-84). Mr. Gordon explained that he avoided identifying Mr. Coles earlier because—knowing of Mr. Coles's reputation for violence—he feared that his testimony placed him and his family in "danger" since he was in prison and his wife and children were "on the outside" where he could not protect them. Mr. Gordon explained, however, that even though he feared "retaliation" from Mr. Coles, he decided to identify Mr. Coles because it was "the truth" and his failure to tell the whole truth before had become a "burden." (E. Hr'g Tr. vol. 1 at 206-07).

The district court never assessed the impact of Mr. Gordon's testimony on a reasonable jury. Instead, the court made the independent judgment that Mr. Gordon was not credible because he had not previously revealed that he saw Mr. Coles shoot Officer MacPhail in an affidavit he executed in 2008. Mr. Gordon's 2008 affidavit went only so far as to reveal that Mr. Coles had confessed to the crime. The court explained, "[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." Pet. App. 152a. The impact of testimony from Benjamin Gordon—who had little connection to Mr. Davis, was related to Mr. Coles, and was present at the scene—cannot be ignored merely because Mr. Gordon initially feared the consequences of telling the whole truth in 2008.

The district court ignored 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. An unequivocal eyewitness identification by a relative who could unmistakably recognize Mr. Coles was more likely to provoke ire from Mr. Coles than testimony that Mr. Coles made a remorseful admission—especially since Coles obviously knew that he had confessed to Mr. Gordon but may not have known that Mr. Gordon saw him commit murder.

B. The District Court Gave Mr. Coles's Confessions No Weight Based on a Legally Incorrect and Inconsistently Applied Hearsay Determination.

The district court was required to consider "all of the evidence" in conducting an actual innocence inquiry. "[T]he district court is not bound by the rules of admissibility that would govern at trial," and it should instead "consider the probative force of relevant evidence that was either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327-28; *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.").

As this Court emphasized in *House*, evidence that a third party has confessed guilt to persons who are not connected to the petitioner can be of "most importance" in assessing a claim of actual innocence. *House,* 547 U.S. at 549. The district court, however, refused to admit or credit the testimony of multiple witnesses that Mr. Coles confessed to the crime, characterizing the evidence as inadmissible hearsay. The district court's hostility toward that evidence is particularly difficult to understand in view of that court's decision, prior to the hearing, denying the Respondent's motion in limine seeking to exclude Mr. Davis's affidavit testimony on the basis that it was inadmissible hearsay. In denying that motion, the district court correctly noted that the hearsay rule "is of little moment when a reviewing Court passes on the question of actual innocence." Pet. App. 167a

(citing *Schlup*, 513 U.S. at 298, 327-28). "[T]he 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.'" Pet. App. 167a (quoting *House*, 547 U.S. at 538).

Inexplicably, the district court deviated from this understanding during the evidentiary hearing when Mr. Davis attempted to call Quiana Glover to testify about a confession she witnessed. Ms. Glover had previously submitted an affidavit in which she recounted a confession given by Redd Coles. Ms. Glover, who has no connection to Mr. Davis other than her testimony in this case, described how Mr. Coles, whom she had known since childhood, confessed, in an agitated state, to shooting the officer.

Rather than observing Ms. Glover's demeanor and allowing her to be tested through cross-examination, the district court refused to allow Ms. Glover's testimony because Mr. Davis had not first called Mr. Coles as a witness. That ruling cannot be squared with this Court's edict in *Schlup* that all evidence should be considered in determining the merits of an actual innocence claim.

There is no support in the law of evidence for the district court's ruling that the admissibility of Mr. Coles's confessions hinged upon whether Mr. Davis first called Mr. Coles to the stand to deny those confessions. If the Respondent wanted to call Mr. Coles as a rebuttal witness, he was certainly free to do so, but nothing in this Court's rulings regarding the admissibility of hearsay in actual innocence determinations requires Mr. Davis to call *Respondent's* rebuttal witnesses for him.

The district court's exclusion of confession testimony stands in stark contrast to the treatment this Court afforded similar evidence in *House*. 547 U.S. at 549-50. The Court considered the confessions of the alternative suspect, William Muncey, despite the fact that strict adherence to the rules of evidence might have precluded his testimony.[5] In granting relief, the *House* Court recognized "[o]f most importance is the testimony of [two independent witnesses] that . . . Mr. Muncey had confessed to the crime." *Id.* at 549. This Court also noted that, as is the case with Mr. Coles, Mr. Muncey's confessions were remorseful, *see id.* at 550, and that "[t]he confession evidence here involves an alleged spontaneous statement recounted by two eyewitnesses with no evident motive to lie." *Id.* at 552. The same circumstances exist here. Thus, the district court's exclusion of confession evidence is not supportable.

The district court compounded its error by failing to give due consideration to the other confession evidence presented at the hearing. The district court failed, for example, to account for the fact that three different individuals would have testified that Mr. Coles admitted to murdering the police officer. At no

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[5] Under the Federal Rules of Evidence, out-of-court statements introduced to prove the truth of the matter asserted may be introduced as substantive evidence only in limited circumstances, such as where an individual testifies at trial contrary to a prior inconsistent statement made under oath, *see* Fed. R. Evid. 801(d)(1)(A), or where an otherwise unavailable witness makes a statement against his interest. *See* Fed. R. Evid. 804(b)(3). The confessions in *House* were not given under oath, and Mr. Muncey, who was called as a state rebuttal witness, plainly was available. *See* 547 U.S. at 552 (describing Mr. Muncey's testimony during the habeas hearing). No other hearsay exception appeared to apply to Mr. Muncey's testimony.

point does the district court make any attempt to assess the impact that such similar, corroborating testimony might have had on reasonable jurors, particularly given the other evidence in the record implicating Mr. Coles.

Even on an individual level, the district court failed to address the substance of the claims made by each of the confession witnesses. During the hearing, Benjamin Gordon not only identified Mr. Coles as the shooter but also testified that Mr. Coles tearfully confessed to the crime. (E. Hr'g Tr. vol. 1 at 203-04). Rather than evaluating Mr. Gordon's testimony in light of the record evidence, the district court instead speculated that Mr. Coles may have confessed falsely to the crime because "he believed that his reputation as a dangerous individual would be enhanced if he took credit for murdering Officer McPhail." Pet. App. 147a. The district court's explanation has no support in the record. Rather it directly contradicts the description provided by Mr. Gordon, who depicted Mr. Coles as someone who cried about what he had done, not someone who bragged about it for the purpose of enhancing his reputation. (E. Hr'g Tr. vol. 1 at 203-04).

The district court should have evaluated the impact the confession evidence might have on a reasonable juror by examining whether such confessions could be deemed credible in light of all the record evidence, including whether the confessor had an opportunity to commit the crime, *see House*, 547 U.S. at 550-51, whether the witness who heard the confession has any apparent motive to lie, *see id*. at 552, and what pressure, if any, was exerted on the person making the confession, *id*. Had the district court

conducted such a holistic inquiry, it would have reached a different conclusion.

To make matters worse, the district court's evidentiary rulings appeared to operate only to Mr. Davis's detriment. For example, the district court permitted an assistant district attorney to present forensic evidence. The attorney presenting this testimony admitted that he did not perform the tests or even "claim to understand the tests" performed by the State's forensic lab because, as he acknowledged, he is "not a scientist." (E. Hr'g Tr. vol. 2 at 458-59). When Mr. Davis objected to the presentation of this hearsay testimony through a plainly incompetent witness, the district court flatly overruled Mr. Davis's objection. Quoting from this Court's decision in *Schlup*, the district court explained that "[i]t is clear that the district court is not bound by the rules of admissibility that will govern at trial." E. Hr'g Tr. vol. 2 at 463-64. This ruling came just hours after the district court prevented Ms. Glover from taking the stand on Mr. Davis's behalf.

In short, the district court failed to consider important evidence bearing on the actual innocence of Mr. Davis. The district court's disparate treatment of Mr. Davis during the hearing and its failure to consider the impact of the new evidence in light of the entire record requires appellate review and reversal.

C. The District Court Failed to Appreciate the Significance of Kevin McQueen's "Obviously False" Trial Testimony.

At trial, Kevin McQueen testified that Mr. Davis had confessed to him while Mr. Davis was awaiting trial at the Chatham County jail. Mr. McQueen's account of Mr. Davis's confession differed markedly

from established facts. According to Mr. McQueen, who had been a "snitch" in other cases, the shooting occurred after Mr. Davis went to the Burger King to eat breakfast while visiting his girlfriend when he allegedly encountered a man who owed him money. No other witness testified to facts even remotely resembling Mr. McQueen's version of events.

At the 2010 evidentiary hearing, Mr. McQueen credibly recanted his outlandish trial testimony, explaining that he made it up from jailhouse rumors and news reports. The district court credited the recantation, finding Mr. McQueen's trial testimony to be "clearly fabricated" and "patently false." Pet. App. 129a, 130a n.60, 144a. Because of the "obvious false nature of the trial testimony," the district court found that Mr. McQueen's recantation "only minimally reduces the State's showing at trial" and gave it little or no weight. *Id*.

First, the district court failed to appreciate the prominent role Mr. McQueen's false testimony played in Mr. Davis's case. Immediately before the jury began its deliberations, it heard the State argue that "there's not a reason on earth to doubt [McQueen's] word. There was nothing, no reason why he had to be here, except that we subpoenaed him when we learned what he had to say." Trial Tr. 1501. Indeed, Mr. McQueen was one of only two witnesses mentioned by the Georgia Supreme Court when it upheld Mr. Davis's conviction on direct appeal. *See Davis v. State,* 426 S.E.2d 844, 846 (Ga. 1993) (referencing only the testimony of Kevin McQueen and Jeffrey Sapp).

Second, the district court's findings demonstrate a clear constitutional violation. The Fourteenth Amendment prohibits a State from using evidence that it "knew or should have known" to be false. *See Mooney v. Holohan,* 294 U.S. 103 (1935); *see also United States v. Bagley*, 473 U.S. 667, 680 n.9 (1985); *United States v. Agurs*, 427 U.S. 97, 103, and n.8 (1976) (citing cases); *Giglio v. United States*, 405 U.S. 150, 153-154 (1972); *Napue v. Illinois*, 360 U.S. 264 (1959) (failure of State to correct testimony known to be false violates due process).

The district court explicitly credited Mr. McQueen's recantation at the hearing and found that Mr. McQueen's trial testimony was so "obviously false" that the perjury was "apparent *to all* at the time of trial." Pet. App. 130a & n.60 (emphasis added). Despite knowing the content of Mr. McQueen's "obviously false" testimony prior to trial,[6] the prosecutors called Mr. McQueen as a witness and then touted his credibility during closing argument. Trial Tr. 1501.

Since the knowing use of perjured testimony involves "a corruption of the truth-seeking function of the trial process," *see Bagley*, 473 U.S. at 680, the standard of materiality is lower than the requirement imposed for state suppressed evidence announced in *Brady v. Maryland*, 373 U.S. 83 (1963). Unless the perjured testimony was "harmless beyond a reasonable doubt," a conviction involving the knowing use of false testimony must be set aside; in other words, if "there is any reasonable likelihood" the State-sponsored false testimony could have affected

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[6] McQueen's testimony was substantially similar to a statement he gave to police investigators prior to trial.

the judgment of the jury, the conviction must be reversed. *See Bagley*, 473 U.S. at` 680 n.9 (1985) (*quoting Napue v. Illinois*, 360 U.S. at 271 and *Chapman v. California*, 386 U.S. 18 (1967)).

Mr. McQueen's testimony was not "harmless beyond a reasonable doubt." Since Mr. McQueen's "obviously false" testimony figured prominently in the prosecution's case and closing argument, as well as the decision of the state supreme court to upheld the jury's verdict, the false testimony likely also figured prominently in the jury's verdict.

If the Court notes probable jurisdiction, Mr. Davis intends to pursue his constitutional due process claim. As a consequence, the adjudication of Mr. Davis's innocence claim would turn on the standard announced in *Schlup v. Delo*, 513 U.S. 298 (1995). In *Schlup*, the Court held that the writ of habeas corpus is an "equitable remedy" that utilizes a "qualified application of the doctrine of res judicata." *Schlup,* 513 U.S. at 319, 324. As a result, the Court held that a court must reach the merits of an otherwise procedurally defaulted constitutional claim if the petitioner can show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id*. at 327. The Court recognized that a showing of "more likely than not" imposes a lower burden of proof than either a standard of "clear and convincing," *id*. at 327, or the requisite standard for a free-standing innocence claim, *id*. at 316. As described, *infra*, Mr. Davis has made that showing.

Mr. Davis was diligent in raising a similar Fourteenth Amendment claim regarding Mr. McQueen's testimony in his first habeas petition, but the lower courts denied him the benefit of an evidentiary hearing to develop testimony to support that claim. It was not until this Court transferred Mr. Davis's petition to the district court for an evidentiary hearing that a federal judge was able to finally hear the credible recantation of Kevin McQueen and properly evaluate the constitutional claim raised by Mr. McQueen's perjured trial testimony.

D. The District Court Did Not Assess the Effect That the Recantation Evidence Would Have Had on a Reasonable Jury.

The district court disregarded tape-recorded threats and explicit recantation testimony without assessing the impact such evidence would have had on a reasonable jury.

First, a reasonable jury would have given great weight to Antoine Williams's recantation of his identification of Mr. Davis at trial. Instead, the district court ignored that recantation. Mr. Williams was a disinterested bystander in the parking lot on the night of the shooting. At trial, Mr. Williams was asked to identify the person he saw that night, and Mr. Williams did not "qualify" that statement; he pointed at the only African-American in the well of the court, Mr. Davis.

During the evidentiary hearing, however, Mr. Williams recanted his in-court identification by acknowledging that when he made this identification, he did not know whether the defendant (Mr. Davis) was the person who shot Officer MacPhail. (E. Hr'g

Tr. vol. 1 at 12, 16). Mr. Williams even explained that he "felt like it was [his] duty" to identify Mr. Davis at trial because the prosecution "came and got [him] all the way from New York." (E. Hr'g Tr. vol. 1 at 16). Contrary to the district 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* E. Hr'g Tr. vol. 1 at 18-19.

The district court refused to credit Mr. Williams's testimony as a "recantation" because Mr. Williams did not specifically describe his prior testimony as false, even though Mr. Williams's description of events was fundamentally inconsistent with the testimony he provided at trial. A reasonable juror would have found Mr. Williams's evidentiary hearing testimony persuasive.

Second, the district court failed to consider the impact that the recantation testimony of Jeffrey Sapp and Darrell Collins would have had on reasonable jurors. Both witnesses testified that their statements implicating Mr. Davis were the result of police threats. At the evidentiary hearing, Mr. Davis introduced similar taped threats made to another witness by police during the investigation.

Jeffrey Sapp testified at trial that Mr. Davis confessed to Officer McPhail's shooting. At the evidentiary hearing, Mr. Sapp testified that his trial testimony was not true and was the product of police suggestion and threats. *See* E. Hr'g Tr. vol. 1 at 54-60. Likewise, Mr. Collins—sixteen years old at the time of the shooting—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. *See* E. Hr'g Tr. vol. 1 at 94-96.

Despite the predictable denials by police witnesses, these recantations were corroborated by audio tape evidence of Savannah police officers threatening another potential witness, Michael Wilds. Mr. Davis introduced a tape recording from the night Officer MacPhail was killed in which detectives exclaimed "this is not an ordinary crime," and threatened to label Michael Wilds as a "snitch" and lock him up in Chatham County jail. E. Hr'g Tr. vol. 1 at 242-44; *see also* Pet's EH Exh. 21-B. The interrogating officer then warned Wilds about the consequences of being labeled a snitch while in county jail, implying that Wilds would be harmed. Much like the threats recounted by Mr. Collins's testimony, the officers also threatened to charge Mr. Wilds's brother as an accessory.

These recorded threats are similar to the threats recounted by Mr. Sapp and Mr. Collins during their unrecorded police interrogations, and a reasonable jury would have taken proof of these tactics into account in assessing the credibility of Mr. Sapp's and Mr. Collins's testimony. The district court, however, made no mention of this recorded threat in its 172-page Final Order. Pet. App. 17a-165a.

E. The District Court Failed to Assess the Credibility of Witnesses Presented at Mr. Davis's Trial Who Did Not Testify at the Evidentiary Hearing.

The Court has repeatedly held that an innocence determination requires "consideration of 'the credibility of the witnesses presented at trial,'" if new evidence so requires. *House*, 547 U.S. at 538-39 (quoting *Schlup*, 513 U.S. at 330). A reasonable jury would likely have given the trial testimony of Dorothy Ferrell, Harriet Murray, and Larry Young little

weight because of their lack of credibility at trial and the contradictory testimony delivered by live witnesses at the evidentiary hearing.

Reasonable jurors would find that Harriet Murray's identification of Mr. Davis at trial deserves no weight. (Ms. Murray died in 2007 and was thus unavailable to testify at the evidentiary hearing.). Ms. Murray's identification of Mr. Davis as the shooter at trial is belied by her pre-trial testimony. It is undisputed that Redd Coles was the only person arguing with Larry Young prior to the shooting. Ms. Murray initially testified at the preliminary hearing that the person "arguing" with Larry Young (*i.e.*, Redd Coles) was wearing a white shirt, *see* Prelim. Hr'g Tr. at 69, and that the person in the white shirt threatened to shoot Mr. Young, pistol-whipped him, and then shot Officer MacPhail. *Id.* at 70-71, 58, 61-63. Two weeks after the shooting, Ms. Murray expressed no doubt about her memory as to who was wearing the white shirt. *Id.* at 91.

Two years later at trial, Ms. Murray reversed the shirt colors, but consistently testified that the man arguing with Mr. Young (*i.e.*, Redd Coles) threatened to shoot Mr. Young while digging into the front of his pants for a gun. *See* Trial Tr. at 845, 861. At the June 2010 evidentiary hearing, Detective Fagerstrom told the district court that it was clear to him that on the night of the shooting Ms. Murray stated that the shooter was the person who had threatened Larry Young (*i.e.*, Redd Coles). *See* E. Hr'g Tr. vol. 2 at 297-99.

Moreover, Ms. Murray identified Mr. Davis's photograph by process of elimination only after police strongly suggested that Mr. Coles was not the shooter. Ms. Murray identified Mr. Davis immediately after a crime scene reenactment in which police and prosecutors recruited Mr. Coles to play the role of the innocent bystander. The array contained no photo of Mr. Coles, and Ms. Murray explained that she picked Mr. Davis after the reenactment because "[h]e was the only [one] left." (Pet's EH Exh. 32-V at 2). Thus, Ms. Murray's identification of Mr. Davis post-reenactment would be given little weight by reasonable jurors, especially in light of her contradictory initial statements describing Mr. Coles as the shooter.

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 a.m. In truth, Ms. Ferrell was only able to identify Mr. Davis after ten days of media coverage, in which she saw him paraded in front of cameras in handcuffs. In light of the inherent incredibility of her testimony, the fact that Ms. Ferrell recanted her 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's guilt today.

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 for 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 0.08. *See* Pet's EH Exh. 32-B. Moreover, Mr. Young was never able to identify Mr. Davis as his assailant.

In fact, as the police had to admit, Mr. Young misidentified Mr. Davis. At the evidentiary hearing on cross-examination, Detective Ramsey, who was in charge of the investigation of the MacPhail shooting, conceded that Mr. Young could not distinguish between Mr. Davis and Mr. Coles. Mr. Young was shown a photo array that included Mr. Davis (but not Redd Coles) and was asked to identify the man with whom he was arguing on the night of the assault. (E. Hr'g Tr. vol. 2 at 376-78). Mr. Young selected Mr. Davis's photo, but, as Detective Ramsey recounted, Mr. Young reversed his identification when he saw Redd Coles in the waiting room of the police station. *Id.* at 377-78. Mr. Young immediately clarified that it was Redd Coles, not Mr. Davis, with whom he had been arguing before he was assaulted.

As a result, Mr. Young's post-trial affidavit admitting that he could not honestly remember "what different people were wearing . . . [and] just couldn't tell who did what," is more consistent with the record than Mr. Young's trial testimony in which he hesitantly expressed an opinion that he did not think it was Mr. Coles who assaulted him. *See* Pet's EH Exh. 17; Trial Tr. at 811-12.

F. The District Court Disregarded the Significance of Mr. Davis's New Ballistics Evidence.

Physical evidence not presented at trial can be incredibly important in assessing whether reasonable jurors would have reasonable doubt, especially when the new physical evidence undercuts the prosecution's asserted motive for the crime. *See House,* 547 U.S. at 540-41 (finding that a jury would have given "great weight" to new evidence that undercuts the motive advanced in the prosecution's closing argument).

The district court failed to assess the probative value Mr. Davis's new ballistics evidence would have had on a reasonable jury. According to the district court, neither the ballistics evidence nor evidence of Mr. Davis's innocence of the Cloverdale shooting were relevant to Mr. Davis's innocence or guilt of the MacPhail murder. Pet. App. 157a-158a. This determination is erroneous because the new ballistics evidence undercuts the State's theory at trial that Mr. Davis's motive to shoot Officer MacPhail was to avoid being arrested for the Cloverdale shooting. In other words, the two shootings were inexorably linked at Mr. Davis's trial.[7] Nevertheless, the district court mistakenly concluded that exculpatory evidence relating to the Cloverdale shooting would have had

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[7] *See Davis v. State,* 426 S.E.2d 844, 846 (Ga. 1993) (On direct review, the Georgia Supreme Court concluded that "all the offenses were connected; they occurred the same evening; the same gun was involved; . . . and there was some evidence that one reason [Mr. Davis] shot the officer was because he was afraid he had been seen in the [Cloverdale] area where the first assault had occurred.").

no effect on the jury's determination of Mr. Davis's innocence.

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." (Trial Tr. at 1552-53) (emphasis added). The State concocted a motive by arguing that Mr. Davis, "using the same gun, [shot] Michael Cooper and murder[ed] Officer MacPhail," based on expert testimony at trial 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." (Trial Tr. at 1502) (emphasis added).

In 2007, the Georgia Bureau of Investigation (hereinafter "GBI") finally retested those bullets. The GBI concluded 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." *See id.*; Pet's EH Exh. 31. Without the State's "same gun" theory, a reasonable jury would likely have disregarded the State's argument that Mr. Davis had a motive to shoot Officer MacPhail. (Trial Tr. at 1502).

The district court specifically declined to address this evidence, claiming that the Cloverdale shooting and the ballistics evidence "is not relevant to Mr. Davis's guilt of the MacPhail murder." *See* Pet. App. 157a; *see also id.* at 157a n.99, 151a n.92 (expressing no view regarding Petitioner's conviction for the Cloverdale assault, because "that issue is not before [the district court]."). That holding is clear error because the prosecution argued so vehemently at trial that Mr. Davis's motive for shooting Officer MacPhail was that he also committed the Cloverdale shooting with the same gun. Reasonable jurists would likely give great weight to evidence disproving the State's theory of motive. *See, e.g.*, *House*, 547 U.S. at 540. ("When identity is in question, motive is key.").

III. IF THE COURT OF APPEALS IS BARRED FROM CONSIDERING MR. DAVIS'S APPEAL, THIS COURT SHOULD EXERCISE APPELLATE JURISDICTION TO REVIEW THE DISTRICT COURT'S FINAL ORDER.

Precisely because this case is exceptional and unprecedented, the jurisdictional path for Mr. Davis's appeal is unsettled. Mr. Davis contends in the accompanying petition for certiorari that the court of appeals erred in ruling that it was jurisdictionally barred from reviewing the district court's decision. However, in light of the unique posture of this case, and to ensure that his ability to obtain appellate review is protected, Mr. Davis alternatively seeks

direct appellate review of the district court's decision in this Court.[8]

If "authorized by law," this Court may conduct direct review of a district court's decision. 28 U.S.C. § 2101(b); Sup. Ct. R. 18. Four federal judges have unanimously agreed that Mr. Davis's appeal lies exclusively in this Court. *See* Pet. App. 11a ("Any review of [the District] 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."); Pet. App. 10a ("[R]eview of [the District Court's] order denying Petitioner relief is to be had by the Supreme Court alone . . . ."); Pet. App. 4a ("We agree with the district court's reasoning."); Pet. App. 6a (Barkett, J., concurring) (Mr. Davis's "appeal from the district court's order lies in the Supreme Court, not this Court."). Thus, Mr. Davis's appeal to this Court may be considered "authorized by law" as expressed by the Southern District of Georgia and the Court of Appeals for the Eleventh Circuit.

The Court may also directly review the district court's Final Order insofar as Judge Moore was acting as a Magistrate Judge or a Special Master for this Court, as Judge Moore understood his role to be. Pet. App. 17a n.1, 18a ("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."). If Judge Moore is correct, then the Court has jurisdiction to review the district court's Final Order. *See generally South*

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[8] Mr. Davis filed concurrent notices of appeal on September 23, 2010, to this Court and to the Eleventh Circuit Court of Appeals. Pet. App. 15a, 12a.

Carolina v. North Carolina, 130 S. Ct. 854 (2010) (reversing, in part, legal and factual decisions made by Special Master).

Alternatively, the Court may issue a common law writ of certiorari or a writ of habeas corpus under 28 U.S.C. §§ 1651 or 2241 to review the district court's decision. The Court's power to grant an extraordinary writ like common law certiorari or habeas corpus is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). An extraordinary writ can issue upon a showing

> [1] that the writ will be in aid of the Court's appellate jurisdiction, [2] that exceptional circumstances warrant the exercise of the Court's discretionary powers, and [3] that adequate relief cannot be obtained in any other form or from any other court.

Sup. Ct. R. 20(1).

Mr. Davis's appeal satisfies each of these criteria. First, the writ of habeas corpus—the relief Mr. Davis ultimately seeks from this Court—and the writ of certiorari fit within the Court's appellate jurisdiction. "When the object is to revise a judicial proceeding the *mode* is wholly unimportant, and a writ of *habeas corpus*, mandamus, certificate of division, writ of error, appeal, or *certiorari* may be used, if the legislature so determine." *Ex parte Yerger*, 75 U.S. 85, 91 (1869); *see also Felker v. Turpin*, 518 U.S. 651, 661-62 (1996); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 100-01 (1807) (the Court's habeas jurisdiction is "clearly *appellate*").

Second, the "sufficiently exceptional" circumstances of Mr. Davis's innocence claim again warrant the exercise of the Court's jurisdiction. *In re Davis*, 130 S. Ct. 1 (2009) (Stevens, J., concurring). Mr. Davis's innocence claim is even stronger than it was in 2009 when the Court transferred Mr. Davis's petition to the district court. As explained above, a new eyewitness, Benjamin Gordon, emerged in 2010 to testify that he watched as Redd Coles murdered Officer MacPhail. Benjamin Gordon is a relative of Redd Coles, and contemporaneous police records corroborate that Mr. Gordon was present at the scene. Mr. Davis's extraordinary case continues to grow.

Third, Mr. Davis cannot seek relief from any other court. On November 5, 2010, the court of appeals held that it was jurisdictionally barred from considering Mr. Davis's appeal. Pet. App. 1a. If the Court does not grant Mr. Davis's concurrently-filed petition for certiorari and reverse the Eleventh Circuit's dismissal, no other court is available to grant relief and no other form of relief is available.

A common law writ of certiorari under § 1651 "has been employed to bring before the Court for review, in exceptional circumstances, otherwise nonappealable orders." Eugene Gressman et al., Supreme Court Practice 654 (9th ed. 2007). *See United States Alkali Export Ass'n v. United States*, 325 U.S. 196 (1945); *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212 (1945). This may be such a case.

CONCLUSION

Unless the Court grants Mr. Davis's petition for certiorari filed herewith, the Court should note probable jurisdiction.

Respectfully submitted,

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