

No. 10-949

FEB 23 2011

In The
Supreme Court of the United States

TROY DAVIS,

Petitioner,

v.

CARL HUMPHREY, WARDEN,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

**BRIEF IN OPPOSITION ON
BEHALF OF RESPONDENT**

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**CAPITAL CASE
QUESTION PRESENTED**

Should this court grant certiorari to review the circuit court's denial of a certificate of appealability when the circuit court had no jurisdiction over petitioner's "original" petition?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	3
DENIAL OF SPECIFIC CLAIMS SET OUT IN PETITION	4
REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI	6
I. CERTIORARI REVIEW FROM THE DE- DENIAL OF COA IS NOT AUTHORIZED.....	6
II. AS THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S ORIGINAL HABEAS PETITION FOLLOWING THE FACTUAL DEVELOPMENT AND FIND- INGS MADE BY THE DISTRICT COURT, CERTIORARI REVIEW FROM THE DENIAL OF COA IS NOT AU- THORIZED	7
A. The District Court Was Fact-Finder For This Court's Review Of The Orig- inal Writ	7
B. The AEDPA Precludes A Successive Petition Review Under The Procedural Posture Of This Case.....	9
CONCLUSION.....	19

TABLE OF AUTHORITIES

	Page
CASES	
<i>Davis v. Georgia</i> , 129 S.Ct. 397 (2008)	2
<i>Davis v. Georgia</i> , 510 U.S. 950 (1993)	1
<i>Davis v. State</i> , 263 Ga. 5 (1993)	1
<i>Davis v. State</i> , 283 Ga. 438 (2008)	2, 17
<i>Davis v. Terry</i> , 465 F.3d 1249 (11th Cir. 2006)	1
<i>Davis v. Terry</i> , 551 U.S. 1145 (2007).....	2
<i>Davis v. Terry</i> , 625 F.3d 716 (11th Cir. 2010)	12, 13
<i>Davis v. Turpin</i> , 273 Ga. 244 (2000)	1
<i>Davis v. Turpin</i> , 534 U.S. 842 (2001).....	1
<i>Ex parte Bollman</i> , 8 U.S. 75 (1807)	14
<i>Ex parte Hayes</i> , 414 U.S. 1327 (1973).....	16
<i>Felker v. Turpin</i> , 518 U.S. 651 (1996)	<i>passim</i>
<i>Herrera v. Collins</i> , 506 U.S. 390 (1993)	15
<i>House v. Bell</i> , 547 U.S. 518 (2006)	15
<i>In re Davis</i> , ___ U.S. ___, 130 S.Ct. 1 (2009)	3, 7
<i>In re Davis</i> , 565 F.3d 810 (11th Cir. 2009).....	<i>passim</i>
<i>In re Davis</i> , No. CV409-130, 2010 U.S. Dist. LEXIS 87340 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010)	18

TABLE OF AUTHORITIES – Continued

	Page
STATUTES	
28 U.S.C. § 1651	7
28 U.S.C. § 2241	<i>passim</i>
28 U.S.C. § 2244	<i>passim</i>
28 U.S.C. § 2253	16
28 U.S.C. § 2254	<i>passim</i>
RULES	
Fed.R.App.P. 22	15
Supreme Court Rule 20.4	7
CONSTITUTIONAL PROVISIONS	
Article III of the United States Constitution	7

**BRIEF IN OPPOSITION
ON BEHALF OF RESPONDENT**

PART ONE

STATEMENT OF THE CASE

A. State Proceedings

Petitioner, Troy Anthony Davis, was found guilty of malice murder, obstruction of a law enforcement officer, two counts of aggravated assault and possession of a firearm during the commission of a felony. Petitioner was sentenced to death for the murder of Officer MacPhail on August 30, 1991. On direct appeal, the Georgia Supreme Court affirmed Petitioner's convictions and death sentence. *Davis v. State*, 263 Ga. 5, 7, (1993). This Court denied certiorari review. *Davis v. Georgia*, 510 U.S. 950 (1993).

Petitioner filed a state habeas corpus petition on March 15, 1994. The state habeas court denied relief on September 9, 1997. The Georgia Supreme Court affirmed the denial of state habeas corpus relief on November 13, 2000 in *Davis v. Turpin*, 273 Ga. 244 (2000). This Court denied certiorari review. *Davis v. Turpin*, 534 U.S. 842 (2001).

Petitioner filed his application for federal habeas corpus relief on December 14, 2001. The federal district court denied Petitioner habeas corpus relief on May 13, 2004. The Eleventh Circuit affirmed the denial of federal habeas relief in *Davis v. Terry*, 465 F.3d 1249 (11th Cir. 2006). This Court denied

Petitioner's petition for a writ of certiorari on June 25, 2007. *Davis v. Terry*, 551 U.S. 1145 (2007).

On July 9, 2007, Petitioner filed an extraordinary motion for New Trial alleging that "this is a case of mistaken identity" and that "Red Coles – not Davis – murdered Officer MacPhail." The trial court denied Petitioner's extraordinary motion for new trial on July 13, 2007. The Georgia Supreme Court affirmed the findings of the trial court in *Davis v. State*, 283 Ga. 438, 448 (2008). This Court denied Petitioner's petition for a writ of certiorari seeking review of the Georgia Supreme Court's decision. *Davis v. Georgia*, ___ U.S. ___, 129 S.Ct. 397 (2008).

Subsequently, the Georgia Board of Pardons and Paroles denied Davis' application for clemency on September 12, 2008 after hearing testimony and after extensive review of Petitioner's "actual innocence" claim.

On October 22, 2008, Petitioner filed an application in the Eleventh Circuit Court of Appeals seeking permission to file a second or successive federal habeas petition pursuant to 28 U.S.C. § 2254, "raising for the first time a freestanding actual innocence claim." *In re Davis*, 565 F.3d 810, 813 (2009). Following briefing and oral argument, the Eleventh Circuit denied Petitioner leave to file a successive petition on April 16, 2009. *In re Davis*, 565 F.3d at 824.

As the denial of a certificate of appealability ("COA") is not appealable, on May 19, 2009, Petitioner Davis filed an original habeas corpus petition in this

Court asserting that “exceptional circumstances warrant the exercise of this Court’s jurisdiction” and asked this Court to transfer Petitioner’s case to the district court for an evidentiary hearing. This Court transferred the petition to the district court for that court to “receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of the trial establishes petitioner’s innocence.” *In re Davis*, ___ U.S. ___, 130 S.Ct. 1 (2009).

Accordingly, the district court conducted a hearing and the fact-finding directed by this Court and determined that Petitioner could not establish his claim of “actual innocence” under any standard of proof.



PART TWO

STATEMENT OF THE FACTS

At approximately 1:15 a.m. on August 19, 1989, Officer Mark MacPhail, a 27 year-old Savannah police officer, was fatally shot in the parking lot of the Burger King restaurant. In the hours immediately following the shooting, six eyewitnesses described Petitioner as the shooter.

After 18 years and following numerous post-conviction appeals, and with his execution imminent, Petitioner filed an “original” habeas petition with this Court alleging that he was “actually innocent.”

Although numerous courts had reviewed Petitioner's evidence and found it lacking as to his claim of "actual innocence," this Court did not decline to entertain the petition, but instead, transferred the case to the district court for factual findings. Following discovery and an extensive hearing, the district court found, as had all the courts and the state Parole Board before it, that Petitioner had overstated his evidence and had failed to prove his claim of "actual innocence." Petitioner then requested a certificate of appealability from the circuit court; however, that court found that it did not have jurisdiction over Petitioner's case and denied Petitioner's motion for a COA.

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**DENIAL OF SPECIFIC CLAIMS
SET OUT IN PETITION**

Petitioner's statements that he has been "stripped of intermediate review" and that his case will receive the "least amount of judicial oversight," (Petition, p. 4), is starkly contrasted by the record. Petitioner's "actual innocence" claim has been reviewed by the trial court, the Georgia Supreme Court, the state habeas court, the federal habeas court, the Eleventh Circuit Court of Appeals, the Georgia Board of Pardons and Paroles and most recently, at this Court's direction, extensively reviewed by the federal habeas court for a second time, allowing additional discovery and the development of facts allegedly supporting his claim of "actual innocence."

Contrary to Petitioner's assertions that "most of the eyewitnesses recanted their trial testimony," (Petition, p. 5), the federal district court found, and the facts establish, that the new evidence presented by Petitioner "does not change the balance of proof from trial," as four of the seven "recantations" "were not credible or not true recantations" and two others "were presented under suspicious circumstances with Mr. Davis intentionally preventing the validity of the recantation from being challenged in open court through cross-examination." (Petitioner's Appendix, p. 160a-161a). The court found one affidavit was a true recantation, but of minimal value as that witness's trial testimony was not strong for the State. *Id.*

As to Petitioner's claim that his "secondhand confessions were exposed as fabrications," (Petition, p. 5), the district court found that Jeffrey Sapp's recantation of Petitioner's confession was "valueless" as it was not credible and the truth of his trial testimony was corroborated by other evidence. (Petitioner's Appendix, 131a). As to McQueen's recantation, the district court reviewed all of Mr. McQueen's testimony and found that Mr. McQueen's testimony was a recantation. (Petitioner's Appendix, p. 129a). However, the district court found that a jury would not have found Mr. McQueen's initial trial testimony persuasive and, accordingly, the latter recantation was not entitled to the weight Petitioner would like to impart to it. *Id.* at 129a-130a.

Petitioner asserts that evidence incriminating Red Coles is “overwhelming.” (Petition, p. 5). In direct contrast, the district court found and the record shows that “while Mr. Davis’s new evidence cast some additional, minimal doubt on his conviction, it is largely smoke and mirrors. The vast majority of the evidence at trial remains intact, and the new evidence is largely not credible or lacking in probative value.” (Petitioner’s Appendix, p. 163a).

Benjamin Gordon is not “a new eyewitness” that “emerged in 2010.” (Petition, p. 5). Benjamin Gordon testified at trial and has presented ever-evolving testimony throughout the post-conviction proceedings by giving affidavits in 2003 and 2008. It is true that Gordon did not claim until 2008, 17 years after the trial, that he actually saw “a person” shoot Officer MacPhail, but that he could not identify the shooter; and it was not until the federal hearing in 2010 that Gordon actually claimed, not only to see the shooter, but was able to identify the shooter as Red Coles.



PART THREE

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. CERTIORARI REVIEW FROM THE DENIAL OF COA IS NOT AUTHORIZED.

28 U.S.C. § 2244(b)(3)(E) states:

The grant or denial of an authorization by a court of appeals to file a second or successive

application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

Certiorari review should be denied.

II. AS THIS COURT HAS JURISDICTION TO REVIEW PETITIONER'S ORIGINAL HABEAS PETITION FOLLOWING THE FACTUAL DEVELOPMENT AND FINDINGS MADE BY THE DISTRICT COURT, CERTIORARI REVIEW FROM THE DENIAL OF COA IS NOT AUTHORIZED.

A. The District Court Was Fact-Finder For This Court's Review Of The Original Writ

In 2009, Petitioner filed an "original" petition with this Court, asking the Court to invoke its jurisdiction under 28 U.S.C. §§ 2241, 2254(a), 1651(a), Article III of the United States Constitution and Supreme Court Rule 20.4 as to his claim of "actual innocence." This Court reviewed the original petition and ordered:

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

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

Notably, while invoking a portion of the language of 28 U.S.C. § 2241, the Court did not “decline to entertain” the application for writ of habeas corpus. 28 U.S.C. § 2241(b). This obvious absence indicates that the Court transferred the case to the district court to perform a fact-finding role to aid in this Court’s resolution of the original petition. Further, the district court was not instructed to make any legal conclusions as to a burden of proof for “actual innocence” claims or to address the cognizability of a freestanding “actual innocence” claim in a habeas proceeding. Thus, following the factual findings made by the district court, the petition is back before this Court.

The district court’s view of its role certainly supports this conclusion. Following its factual findings, the district court noted that it was functioning “as a magistrate for the Supreme Court, which suggests appeal [of the district court’s findings] would be directly to the Supreme Court.” (Petitioner’s Appendix 18a, n.1). Accordingly, now that the district court has performed its fact-finding role pursuant to the transfer by this Court, the original petition is back before this Court for assessment in light of that development. Accordingly, jurisdiction is properly before this Court and not the Eleventh Circuit. Certiorari review should be denied.

**B. The AEDPA Precludes A Successive
Petition Review Under The Procedural
Posture Of This Case**

This is the first case, subsequent to the enactment of the AEDPA,¹ in which this Court has exercised this discretionary transfer power. However, in transferring Petitioner's habeas petition, this Court did not state under what statute or authority it was transferring the petition or what authority the district court had to entertain the original habeas petition. However, the limitations placed on the lower courts by the AEDPA, further support the conclusion that this Court transferred the case to the district court for fact-finding for this Court's resolution of the petition, not as a newly filed petition in the district court under authority of §§ 2241 or 2254.

For the district court to review Petitioner's petition under its own authority would require it to operate within the bounds of § 2254 and § 2244; and Congress made clear in enacting the AEDPA, contrary to Petitioner's argument, that the district court has no jurisdiction to review successive petitions for habeas corpus. The *only* exception allowing a district court to review a successive petition is set out in 28 U.S.C. § 2244, which requires authorization by the circuit court. 28 U.S.C. § 2244(b)(3). A petitioner may only file a successive habeas petition if the circuit court grants him authorization. *Id.*

¹ Antiterrorism and Effective Death Penalty Act of 1996.

Significantly, in 2009, in denying Petitioner's request to file a successive federal habeas petition, the Eleventh Circuit reviewed Petitioner's "actual innocence" claims under the § 2244 gatekeeping provisions and found Petitioner had not met the exception to authorize a successive petition, holding:

[T]he statute reads, a claim brought in a successive petition must be dismissed unless "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." 28 U.S.C. § 2244(b)(2)(B)(i). Davis concedes that almost all of the factual predicate for his claim could have been discovered previously, and in fact, was discovered previously. Davis possessed the "factual predicate" for his Herrera "claim" during his first federal habeas corpus proceeding, could have presented the claim, but chose not to do so.

In re Davis, 565 F.3d at 820.

The Eleventh Circuit further held that Petitioner had not met the requirement of establishing his "actual innocence by clear and convincing evidence *and* another constitutional violation" to obtain a successive or second petition. *Id.* at 824. Thus, the Eleventh Circuit expressly denied Petitioner authorization in 2009 to file a successive petition to again raise his "actual innocence" claim. *In re Davis*, 565 F.3d 810. Petitioner did not have authority and the district court did not have jurisdiction under the AEDPA to review Petitioner's habeas petition on its

“merits.” Therefore, in order not to violate the provisions of the AEDPA, this Court transferred the petition to the district court for the district court to operate as fact-finder for this Court.

Furthermore, the AEDPA prohibits a petition for writ of certiorari to this Court to appeal from the denial of successive authorization. § 2244(b)(3)(E). To circumvent this gatekeeping procedure, Petitioner submitted an original petition for habeas corpus relief to this Court asking the Court to exercise its original habeas jurisdiction as contemplated in *Felker v. Turpin*, 518 U.S. 651, 661 (1996).

In *Felker*, this Court held, “Although § 2244(b)(3)(E) precludes us from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court, it makes no mention of our authority to hear habeas petitions filed as original matters in this Court.” 518 U.S. at 661. On that basis, the Court found that the AEDPA did not bar consideration of an original habeas petition. However, because the Court denied Felker’s request for an original writ, the Court did not address the procedures, and whether or how such a petition would be transferred and litigated in the lower courts without violating statutory authority. Moreover, unless this Court transferred the case specifically for fact-findings for this Court’s own resolution of the petition, after which the case would be transferred directly back to this Court, the transfer of the case to the district court to start a new

round of review in the district and circuit courts would violate the AEDPA.

The district court found accordingly in determining its jurisdiction and the appealability of its findings. As the Eleventh Circuit had already declined Petitioner's request to file a successive petition in the district court, the district court properly concluded in its denial of Petitioner's new habeas petition that this Court had exercised its original jurisdiction when it transferred the case. The district court held that if it "were operating within the confines of its appellate jurisdiction, 'it would have been unable to entertain the petition because [Davis] had not obtained leave to file a second or successive petition.'" *Davis v. Terry*, 625 F.3d 716, 718-719 (11th Cir. 2010), quoting Dist. Court Order at 2, *citing Felker v. Turpin*, 518 U.S. at 661. The Eleventh Circuit agreed with the jurisdictional findings of the district court, holding:

The district court denied his first federal habeas petition, this court affirmed on appeal, and the Supreme Court denied review. Davis was prohibited from filing a second or successive habeas petition absent an order from this court authorizing such a filing. 28 U.S.C. § 2244(b). We denied his request for leave to file a successive petition, and there was no further review authorized by law. 28 U.S.C. § 2244(b)(3)(E). Therefore, Davis filed a habeas petition pursuant to the Supreme Court's original jurisdiction. If this court granted Davis's request for a COA and reviewed the district court's order at this

juncture, as Davis requests, we would effectively be restoring his remedies in federal court, in complete contradiction to the express intent of Congress. In effect, we would be nullifying our previous decision denying Davis leave to file a successive habeas petition. We decline to do that.

Davis v. Terry, 625 F.3d 716, 719 (11th Cir. 2010).

As Petitioner’s claim of “actual innocence” was not authorized by the circuit court, and was expressly denied, the district court had no authority of its own to review the habeas petition and could not be “required” to review the petition. If acting under statutory authority, the district court could have only dismissed Petitioner’s successive petition, and this Court could not have mandated a review by the district court. Accordingly, in keeping with the provisions of the AEPDA and under the Court’s authority to entertain original writs, this Court transferred the original petition to the district court for that court to act as this Court’s fact-finder. To hold otherwise would mean that this Court transferred the case to the district court for the commencement of another round of review in the district and circuit courts, thereby contravening the statutory and the jurisdictional restrictions upon the district court.

Petitioner argues that § 2241(b) allows this Court to grant successive federal habeas petitions. The language in § 2241(b) upon which Petitioner relies, and would have this Court consider in isolation, predates the enactment in 1996 of the gatekeeping

provision for “successive” petitions. Further, nothing in § 2241(b) authorizes this Court to grant a “successive” petition. To the contrary, the statute as amended in 1996 expressly states that authorization must be obtained from the circuit court and there is no appeal to this Court from the denial of that authorization. That was the point of the decision in *Felker*.

Petitioner further argues that § 2244 does not apply “after the successive petition has been adjudicated.” (Jurisdictional Statement, p. 14). However, Petitioner was not authorized by the circuit court, the only court that can confer jurisdiction over a successive petition to a district court, to file a successive petition.

Petitioner also argues that the transfer of his original petition falls under the appellate jurisdiction of the Court and therefore that appellate jurisdiction *requires* Petitioner to appeal to the circuit court before appealing to the Supreme Court. Case law does indicate that the Court is exercising its appellate jurisdiction in transferring the case to the district court. *Felker*, 518 U.S. at 667 n.1 (Souter, J., concurring). However, nothing in § 2241 confers appellate jurisdiction on any circuit court. Moreover, contrary to Petitioner’s implications, an original habeas petition, as any other habeas petition, would be appellate in nature as it is filed to review a decision or judgment below. See *Ex parte Bollman*, 8 U.S. 75 (1807). Merely being “appellate” in nature does not require the case to return through all the intermediate courts for review.

Further, supporting the argument that the case transfers directly back to this Court is that, by statute, if this Court *declined* review and transferred the case to the district court, Petitioner would have had to establish that the state courts' adjudication of the "actual innocence" claim was based on an unreasonable determination of the facts or was contrary to, or an unreasonable application of, clearly established precedent of this Court. § 2254(d). Without question, there is no precedent of this Court establishing that "actual innocence" claims are even cognizable in habeas actions;² and thus, there is no "clearly established" federal precedent as to the standard of proof for an "actual innocence" claim in a habeas proceeding. Accordingly, to mandate a direct appeal to the Eleventh Circuit to review claims with no established federal precedent is a waste of judicial resources and an act of futility.

Petitioner argues that Fed.R.App.P. 22(a) supports his position that his appeal is governed by § 2253. Fed.R.App.P. 22(a) notes that, if a habeas petition is improperly filed in the circuit court, that circuit court may transfer the petition to the district court, and appeals therefrom are under § 2253. However, Fed.R.App.P. 22(a) does not address original habeas petitions properly filed in this Court and thereafter, outside the mandates of the AEDPA,

² See *House v. Bell*, 547 U.S. 518, 554-55 (2006); *Herrera v. Collins*, 506 U.S. 390 (1993).

transferring those petitions to the district court and ordering the taking of evidence and issuing a ruling by the district court.

Moreover, if the district court was acting in the fact-finding role, akin to a special master or a magistrate for this Court, the order of the district court would not constitute a “final order” under § 2253. Instead the district court’s order is a recommendation to this Court, given the instructions to the district court to hold a hearing and make findings of fact. Thus, § 2253 would not apply to Petitioner’s case.

Likewise, in *Ex parte Hayes*, 414 U.S. 1327 (1973), cited by Petitioner, this Court transferred Hayes’s habeas action to the district court after resolving a question solely surrounding jurisdiction. Determining that proper jurisdiction lay with the district court, not with this Court, this Court transferred the case to the court that had jurisdiction over his case. *Id.* at 1328. Accordingly, as the district court was the proper venue for him to raise his habeas claim, that appeal properly progressed through the circuit court. *Hayes* is distinguishable from Petitioner’s case as this Court transferred Hayes’s petition, not to allow him another chance to develop facts to support his claim as in this case, but because Hayes wrongly believed the district court did not have jurisdiction to entertain his habeas.

Petitioner argues that he is entitled to review by the circuit court because, if not, unlike other habeas petitioners, he will not have three levels of review

and asserts that the “exceptional” habeas cases “will be entitled to the least amount of oversight.” (Petition, p. 4). This argument carries little weight in light of the procedural posture of this case in which, in addition to his state and federal habeas proceedings, Petitioner was afforded numerous other post-conviction proceedings to review the “newly discovered evidence.” Namely, Petitioner had an extraordinary motion for new trial in which the trial court “exhaustively reviewed each submitted affidavit and considered in great detail the relevant trial testimony, if any, corresponding to each.” *In re Davis*, 565 F.3d at 814. Petitioner also was afforded a “painstaking” review of the evidence and his “actual innocence” claim by the Georgia Supreme Court, who reviewed the affidavits and upheld the denial of Petitioner’s extraordinary motion for new trial. *See id.* at 815 (citing *Davis v. State*, 283 Ga. 438, 660 S.E.2d 354 (2008)). Additionally, the Georgia Board of Pardons and Paroles “spent a year studying and considering the case” and gave Petitioner’s attorneys the opportunity to present any evidence they chose to support the allegation of “actual innocence,” which it found “[a]fter an exhaustive review of all available information regarding the Troy Davis case and after considering all possible reasons for granting clemency, the Board . . . determined that clemency is not warranted.” Likewise, in denying Petitioner’s request for leave to file a successive petition in the district court, the Eleventh Circuit “took the unusual step” of staying Petitioner’s execution, and ordering briefing and oral arguments of both parties. *In re Davis*, 565 F.3d

at 813. The Eleventh Circuit reviewed the affidavits along with the entire record and held “Our review of the record is wholly consonant with the repeated conclusions of the state courts and the Board of Pardons and Paroles.” *Id.* at 825.

Only after these extensive post-conviction reviews did Petitioner make his present request that this Court exercise its original habeas jurisdiction to transfer his case to the district court for a full evidentiary hearing on his claim of “actual innocence.”³ Not surprisingly, like every other court and the clemency board that has reviewed the evidence, the district court also determined that Petitioner’s case was “largely smoke and mirrors” and that “the vast majority of the evidence at trial remains intact and the new evidence is largely not credible or lacking in probative value.” *In re Davis*, No. CV409-130, 2010 U.S. Dist. LEXIS 87340, 2010 WL 3385081, *1, 61 (S.D. Ga. Aug. 24, 2010). Petitioner has had extensive analysis of his claims, far beyond “three levels” of review.

As this Court transferred Petitioner’s original habeas petition to the district court specifically for an evidentiary hearing and fact-findings, and as the district court followed those directives and has returned its findings to this Court, this Court maintains jurisdiction of Petitioner’s original habeas

³ Thus, Petitioner has already been granted the relief he sought from this Court. He merely does not agree with the outcome.

petition. Thus, the Eleventh Circuit properly determined that it did not have jurisdiction over this Court's original petition, and certiorari review is not warranted and should be denied.

◆

CONCLUSION

WHEREFORE, for all the above and foregoing reasons, Respondent respectfully prays that the Court deny the petition for a writ of certiorari to review the circuit court's decision to deny a certificate of appealability.

Respectfully submitted,

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