

IN THE
United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

IN RE: TROY ANTHONY DAVIS,
Petitioner

**BRIEF OF *AMICI CURIAE* THE INNOCENCE PROJECT AND
INNOCENCE NETWORK IN SUPPORT OF APPLICATION
FOR PERMISSION TO FILE A SECOND PETITION FOR
WRIT OF *HABEAS CORPUS* IN THE DISTRICT COURT IN
SUPPORT OF PETITIONER**

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**IN THE UNITED STATES COURT OF APPEALS
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IN RE: TROY ANTHONY DAVIS,)
Petitioner.)
)
)
_____)

CASE NO. 08-16009-P

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STATEMENT REGARDING ORAL ARGUMENT

Counsel for *Amici Curiae* The Innocence Project and Innocence Network request oral argument pursuant to Federal Rule of Appellate Procedure 34.

INTEREST OF *AMICI CURIAE*

The Innocence Project is a nonprofit legal clinic and resource center that provides legal services to indigent prisoners for whom post-conviction DNA testing of evidence can yield conclusive proof of innocence. The Project pioneered the post-conviction DNA litigation model that has to date exonerated 223 innocent persons, and served as counsel or provided critical assistance in a majority of these cases. The Innocence Network (“the Network”) is an association of 48 organizations that, like the Innocence Project, are committed to improving the criminal justice system to reduce instances of miscarriages of justice.

STATEMENT OF ISSUES

Whether Troy Davis may be executed if he can establish actual innocence under 28 U.S.C. § 2244(b)(2)(B)(ii) but cannot satisfy his burden under § 2244(b)(2)(B)(i)?

SUMMARY OF ARGUMENT

Troy Davis was convicted of murder and sentenced to die 17 years ago solely on the basis of witness testimony, unaccompanied by corroborating physical or scientific evidence. Almost all of the trial witnesses have since admitted in affidavits that their testimony at trial was either false (and coerced by the police) or inaccurate. And three additional witnesses have come forward and sworn in affidavits that another man -- the prosecution’s star witness and the only witness at trial who claimed to have seen the entire incident -- confessed to them that he was

the one who shot the victim. Despite Davis' repeated proffers of this overwhelming evidence of innocence -- which taken together eviscerates the proof at trial on which Davis' conviction and death sentence depend -- no court has conducted a hearing to determine if these twelve witnesses are credible. If they are truthful, Georgia is about to execute an innocent man and let the guilty man get away with murder.

The execution of an innocent man is a fundamental miscarriage of justice and, according to Justice O'Connor and at least five other Justices, a constitutionally intolerable event. And because executing an innocent is intolerable, a *habeas corpus* petition based on credible evidence of actual innocence may not be procedurally barred for failure to exercise due diligence or for any other procedural reason. The only remaining question is: "Is this new testimony about Davis' innocence truthful?" And the only way to determine that is for a court to conduct a hearing at which it can view the witnesses and make a threshold assessment of their credibility. The steadfast failure of Georgia's courts and state officials to hold such a hearing is both inexcusable and unconstitutional.

In a sharply divided opinion, the Georgia Supreme Court refused to grant Davis a hearing to assess his innocence evidence because Davis could not prove *by extrinsic evidence* and *before* the hearing that the original trial testimony implicating Davis was "purest fabrication." By adopting this arbitrary standard,

the Georgia Supreme Court effectively precluded Davis -- and anyone similarly situated -- from asserting a claim of actual innocence on the basis of testimonial evidence alone. The Georgia court then compounded its procedural error by refusing to assess the impact on Davis' conviction of the entire body of new evidence, instead assessing each of the affidavits as if the other innocence evidence did not exist. Ironically, the court then compared each individual affidavit against the entire body of trial evidence. The decision conflicts with the instructions of the United States Supreme Court on how innocence evidence should be assessed.

Amici curiae, the Innocence Project and Innocence Network, have helped establish that eyewitness testimony is often unreliable and has indisputably led to wrongful convictions. To date, 223 people who served more than 2,500 combined years in prison have been exonerated by DNA evidence -- and the vast majority of these exonerees were convicted on the basis of testimony of the very sort that Davis' proffered affidavits expose as false. See "Know the Cases," The Innocence Project, at <http://www.innocenceproject.org/know/>. But DNA testing is available in only a small number of criminal cases. The constitutional prohibition against executing the innocent requires that prisoners facing sentences of death be able to rely on other credible evidence -- including recantations and new testimony -- to prove that they are, in fact, innocent. And because recantation evidence is admittedly suspect, the only way to assess its value (absent corroborating extrinsic

evidence) is to assess the credibility of the testifying witness in a live hearing.

Unless a writ of *habeas corpus* is granted by this Court, Davis' unusually compelling proffer of innocence will never be tested and an innocent man may be executed.

ARGUMENT

I. Recent Exonerations of Defendants Convicted in Reliance on Eyewitness and Other Testimony Compel a Hearing for Davis

The *Columbia Law Review* recently published a comprehensive study of the first 200 exonerations obtained as a result of post-conviction DNA testing. Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55 (2008) ("Columbia Study"). Critically for Davis' case, the Columbia Study illustrates that eyewitness and informant testimony is often unreliable and that DNA testing has been successfully used to confirm previously un-credited recantations. According to the Columbia Study, the vast majority -- 158 out of 200 or over 75% -- of the wrongful convictions were based in whole or part on eyewitness misidentification. *Id.* at 76-77. About 28% of those convicted on the basis of eyewitness testimony had raised constitutional challenges to that testimony, all unsuccessfully. *Id.* Almost 12% of the exonerations and over 40% of those in capital cases involved jailhouse informants. Three exonerees were convicted at trials where the actual killer testified against them. *Id.* at 87.

Frank Lee Smith's case is particularly troubling as he spent 14 years on

death row and died from cancer before being exonerated in November 2000. *See* The Innocence Project, at <http://www.innocenceproject.org/content/265> (last visited November 12, 2008) (profiling Smith's case). Smith's 1986 conviction for rape and murder was based on misidentification by the victim's two neighbors and mother. *See Smith v. State*, 515 So.2d 182, 183 (Fla. 1987). At a 1998 evidentiary hearing, granted on the basis of Smith's new evidence, the neighbor who was the principal eyewitness against Smith recanted her trial identification of Smith as the man she saw outside the victim's house shortly before the murder.

In 1999, Clarence Elkins was sentenced to life in prison for murder, attempted murder and rape. Elkins' mother-in-law and niece were the victims of the crimes, and Elkins was convicted -- wrongly -- largely because his niece identified him as the attacker. Three years later she recanted her testimony, but Elkin's petition for post-conviction relief on the basis of the recantation was denied. *See State v. Elkins*, No. 21380, 2003 WL 22015409 (Ohio Ct. App. Aug. 9, 2003). Elkins was exonerated when DNA evidence identified someone else as the actual perpetrator. *See* <http://www.innocenceproject.org/Content/92.php> (last visited November 12, 2008) (profiling Elkins' case).

These real-world events palpably demonstrate why the multiple compelling affidavits of recantation and new evidence repeatedly proffered by Davis should trigger an evidentiary hearing at which his claim of innocence can be assessed.

II. The Georgia Supreme Court Unconstitutionally Denied a Hearing to Test Evidence of Actual Innocence in a Capital Case

The Georgia Supreme Court's reasons for denying Davis a hearing to assess his claim of innocence conflicts with the United States Supreme Court's view on how evidence of innocence must be assessed. The Court's decision in *Schlup v. Delo*, 513 U.S. 298 (1995), emphasized that a determination of actual innocence must be made "in light of *all* the evidence." *Id.* at 328 (citations omitted) (emphasis added). "[A]ll the evidence," was intended to include categories of evidence not normally considered by judges, including "evidence tenably claimed to have been wrongly excluded or to have become available only after the trial." *Id.* "[A]ll the evidence" also included all *forms* of evidence, including all reliable evidence "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Id.* at 324. Moreover, the Court acknowledged that "newly presented evidence" of actual innocence "may indeed call into question the credibility of the witnesses presented at trial," thus requiring that the *habeas* court "make some credibility assessments." *Id.* at 330.

How the Court applied these criteria in *Schlup* is highly instructive here. The district court had denied Schlup a hearing on the basis of affidavits of modified and new witness testimony, and the court of appeals had affirmed. The Supreme Court conceded that the statements contained within the new affidavits "may, of course, be unreliable," but reversed, finding that "if they are true . . . then

it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Id.* at 331. Accordingly, the Court determined that "further proceedings are necessary," and "given the fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses," the case needed to be remanded to the district court. *Id.* at 332. On remand -- following a three-day evidentiary hearing at which, among others, eleven former inmates testified to Schlup's innocence and explained that they had earlier been afraid to testify -- the same district judge who had earlier denied Schlup a hearing found the witnesses credible "in spite of their criminal histories" and held that Schlup was "probably innocent." *Schlup v. Delo*, 912 F. Supp. 448 (E.D. Mo. 1995); see Stuart Taylor, "Probably Innocent, Almost Executed," LEGAL TIMES (Jan. 1, 1996).

Moreover, in *House v. Bell*, 547 U.S. 518 (2006), the Supreme Court mandated consideration of *all* the evidence that might tend to establish innocence. In *House*, the Supreme Court overturned a district court's *factual* findings made following a hearing on the *Schlup* claim because the district court had failed to engage in the "holistic judgment about all the evidence" that was required when evaluating a claim of actual innocence. *Id.* at 539 (internal quotation marks omitted). In conducting its own analysis, the Supreme Court emphasized that it was evaluating the new evidence in light of "all the evidence." *Id.* at 547.

Critically for Davis' case, the Court noted that specific items of new evidence might not have been sufficient to warrant relief when considered individually, but -- taken "in combination" -- sufficed to establish that "no reasonable juror viewing the record evidence as a whole would lack reasonable doubt." *Id.* at 552, 554; *see also id.* at 548 (noting that other evidence considered singly might not be enough but for the presence of "more" new evidence).

A. The Georgia Decision Bars Almost All Recantation Evidence from Consideration in a Claim for Actual Innocence

Davis presented affidavits from seven of the nine witnesses who had either identified him as the shooter or testified that he had confessed to the crime. The Georgia Supreme Court dismissed each of these affidavits as lacking sufficient materiality because they failed to demonstrate that the witness's trial testimony had been "the purest fabrication." *Davis v. Georgia*, 660 S.E.2d 354, 358-61 (Ga. 2008). Given that at least two affiants swore that they had *entirely fabricated* their trial testimony, *see id.* at 358-59, to reach this outcome the Georgia court necessarily defined, *sub silentio*, "purest fabrication" to require "extrinsic proof that the witness' testimony was physically impossible" and that "the trial court [be] able to determine the truth of the matter without having to take into account the witness' credibility," *id.* at 358 (citing *Fugitt v. State*, 307 S.E.2d 471 (Ga. 1983),

in which the purported eyewitness was later shown to have been incarcerated elsewhere at the time of crime).¹

The “purest fabrication” standard as interpreted by the majority of the Georgia Supreme Court would eliminate *all* evidence of recantation except in the rare case where the state had prosecuted its trial witnesses for perjury. *See Davis*, 660 S.E.2d at 358. As the dissenting justices of the Georgia Supreme Court recognized, this position is illogical -- and unconstitutional. While stringent scrutiny of recantation evidence is warranted by its inherently suspect nature, *id.* at 363-64 (Sears, C.J., dissenting), a “categorical rule that new evidence in the form of recanted testimony can never be considered, no matter how trustworthy it might appear,” corrupts the principle behind the rule: “[i]f recantation testimony, either alone or supported by other evidence, shows convincingly that prior trial testimony was false, it simply defies all logic and morality to hold that it must be disregarded categorically.” *Id.* By excluding an entire category of evidence without regard to

¹ As support for the “purest fabrication” standard, the Georgia Supreme Court also cited *Drake v. State*, 287 S.E.2d 180 (Ga. 1982). After the Georgia Supreme Court upheld the denial of Drake’s extraordinary motion for new trial without a hearing, he sought federal *habeas* relief. On the strength of the recantations offered at the evidentiary hearing held by the federal *habeas* court, Drake was pardoned by the Georgia Board of Pardons and Paroles. *See* David Kaplan, *Death Row Dilemma*, NAT’L L. J. 35 (Jan. 25, 1988). He is one of at least three death row inmates to be exonerated exclusively on the basis of recantation testimony found credible after a hearing. *See State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003); *Ex parte Adams*, 768 S.W.2d 281 (Tex. Ct. App. 1989).

its merit or its bearing on the ultimate question of Davis' actual innocence, the Georgia Supreme Court disregarded the Supreme Court's mandate that "all the evidence" of actual innocence must be considered. *See Schlup*, 513 U.S. at 330, 332 (a *habeas* court reviewing a claim of actual innocence "may have to make some credibility assessments," which may require an evidentiary hearing.)

B. The Georgia Supreme Court's Item-by-Item Analysis of the Proffered Innocence Evidence Is Improper

The Georgia Supreme Court failed to engage in the "holistic" review required by the Supreme Court, in which a court analyzes the totality of evidence, both new and old, admissible and inadmissible. Moreover, the court failed to review the evidence in a manner consistent with the trial record. Instead, the Georgia Supreme Court weighed the materiality of *each* item of new evidence individually against *all* the evidence against Davis at trial. Only through this sleight of hand could it dismiss as immaterial (1) the six recantations of trial witnesses against Davis; (2) new testimony of three witnesses that Coles had confessed; (3) testimony regarding Coles's possession of the murder weapon; and (4) eyewitness accounts suggesting Coles, not Davis, was the shooter. *See Davis*, 660 S.E.2d at *passim*. Notably, that there are so many recantations in this case is explained by the new allegations that the original trial testimony was coerced by the police. *See Pet'r's Brief* at 16-19. As the dissenting justices observed, "the collective effect of all of Davis' new testimony, *if* it were to be found credible by

the trial court in a hearing, would show the probability that a new jury would find reasonable doubt of Davis's guilt." *Davis*, 660 S.E.2d at 364-65.

The Georgia Supreme Court also failed to recognize that Davis' protestations of innocence and claims of wrongful testimony at trial are not a last-minute, abusive tactic; he took the stand at trial and, as the State of Georgia has ironically acknowledged in opposing a recent effort by Davis to obtain relief, "Petitioner made such a challenge [to the eyewitness testimony] the centerpiece of his trial defense." Brief of Respondent the State of Georgia at 36-37, *Davis v. Georgia*, No. 08-66 (U.S. Aug. 14, 2008). Yet despite Davis having become armed post-conviction with affidavits that devastate almost all of the testimony he first challenged at trial, the Georgia court refused to afford him a hearing at which his rare and compelling proof of innocence can be tested.

III. The Procedural Requirements of 28 U.S.C. § 2244(b)(2)(B)(i) Cannot Bar Relief for Actual Innocence

At the very core of the criminal justice system is the belief that the "quintessential miscarriage of justice is the execution of a person who is entirely innocent." *Schlup*, 513 U.S. at 324-25. This core value is recognized in the Supreme Court's decisions in *Schlup* and *House*, which squarely stand for the proposition that a defendant who can demonstrate -- based on reliable new evidence -- that he is actually innocent may not be procedurally barred from seeking a writ of *habeas corpus*. As the Eleventh Circuit has recognized:

The threshold for a freestanding actual innocence claim is higher than the showing of actual innocence required to invoke the fundamental miscarriage of justice exception to the procedural default doctrine. As a result, if a petitioner in fact has a freestanding actual innocence claim, he would be entitled to have all his procedural defaults excused as a matter of course under the fundamental miscarriage of justice exception.

See Mize v. Hall, 532 F.3d 1184, 1195 n.9 (11th Cir. 2008); *see also Arthur v. Allen*, 452 F.3d 1234, 1248 (11th Cir. 2006); *United States v. Barrett*, 178 F.3d 34, 53 (1st Cir. 1999).

In *Schlup*, as in this case, the petitioner sought a second writ of *habeas corpus*. The district court did not conduct an evidentiary hearing on the issue and declined to reach the merits of the petition. *Schlup*, 513 U.S. at 301. After the court of appeals affirmed, the Supreme Court granted *certiorari* to consider whether the standard applied by the lower courts provided “adequate protection against the fundamental miscarriage of justice that would result from the execution of a person who is actually innocent.” *Id.* In *Schlup*, absent the claim of actual innocence, the procedurally barred assertions of ineffective assistance of counsel and prosecutorial misconduct on their own would have been insufficient to allow a court to reach the merits of the barred constitutional claims. *Id.* at 316. The Court explained, however, that to the extent claims of actual innocence pose a threat to scarce judicial resources or principles of finality or comity, such concerns are outweighed by the interest of avoiding executing an innocent person. *Id.* at 316.

The *Schlup* Court distinguished the case before it -- where a claim of innocence opened the gateway for otherwise barred constitutional claims -- from *Herrera v. Collins*, 506 U.S. 390 (1993), where the only *habeas* claim was actual innocence. *Schlup*, 513 U.S. at 315-16. That distinction, however, is relevant only to the standard of review to be applied to the proffered evidence of actual innocence, not to whether a procedural fault can wholly prevent a standalone claim of innocence from warranting a hearing no matter how compelling the proof supporting it. While the Supreme Court has not finally determined the standard of review to apply to a standalone *Herrera* innocence claim, this Court need not reach that question. Davis' overwhelming proffer of twelve witnesses whose affidavits effectively negate the entirety of the proof the State offered against him at trial satisfies any conceivable standard of review necessary to trigger a hearing. *See* Pet'r's Br. at 12-26.

The underlying principle in *Schlup* is that a credible claim of innocence based on new reliable evidence *mandates habeas* relief on the basis of otherwise barred constitutional claims. *See Schlup*, 513 U.S. at 344 (Scalia, J., dissenting) ("Today, however, the Court obliquely but unmistakably pronounces that a successive or abusive petition *must* be entertained and may *not* be dismissed so long as the petitioner makes a sufficiently persuasive showing that a 'fundamental miscarriage of justice' has occurred."). *Schlup*'s logic leads inevitably to the

conclusion that the abhorrence of executing an innocent person trumps procedural and comity interests that otherwise preclude successive or abusive *habeas* petitions.

This abhorrence of executing an innocent person may be rooted in the Constitution itself. *Herrera*, 506 U.S. at 419 (O'Connor, J., concurring) (“the execution of a legally and factually innocent person would be a constitutionally intolerable event”). In *Herrera*, the Court was confronted with a claim of actual innocence without a claim of constitutional violations at trial. In that case, the Court assumed for the sake of argument, “that if a prisoner were to make an exceptionally strong showing of actual innocence, the execution could not go forward,” but denied the petition because the Court found that Herrera failed to make a persuasive demonstration of actual innocence. *Id.* at 420. Nonetheless, at least five of the Justices concluded that the execution of an innocent individual, standing alone, could be a violation of the Constitution under the Eighth Amendment.²

Based on this precedent, 28 U.S.C. § 2244(b)(2)(B)(i) cannot be applied to bar Davis’ petition. As amended, the statute would plainly bar the claim at issue in

² It is clear from *Schlup* and this Court’s prior decision that the issue remains open. *See Schlup*, 513 U.S. at 329 n.47 (“The standard that we apply today, therefore, will not foreclose the application of factual innocence to the analysis of such [*Herrera*] claims.”); *Davis v. Terry*, 465 F.3d 1249, 1251 n.1 (11th Cir. 2006) (“The viability of this [*Herrera*] claim remains an open question as the Court did not reach it”).

Schlup, but there can be no argument that the amendment somehow invalidated that decision. The analysis that led the *Schlup* Court to order the lower court to conduct an evidentiary hearing on Schlup's successive petition warrants the same outcome here. Indeed, the *Schlup* majority -- as the dissent noted -- did not find it necessary even to mention the relevant provision of the predecessor statute. *See Schlup*, 513 U.S. at 343 (Scalia, J., dissenting). Moreover, if execution of an innocent person is itself fundamentally unjust or unconstitutional, it inevitably follows that a *Herrera*-type claim may not be procedurally barred in the face of compelling proffered evidence of innocence.

CONCLUSION

For all the foregoing reasons, Davis has made a sufficient showing to warrant an evidentiary hearing on his claim of actual innocence in a second *habeas* petition in the district court.

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel hereby certifies that this brief is typed in 14-point Times New Roman and complies with the type-volume limitation of the rule, containing 3614 words, excluding those sections of the brief that do not count towards that limitation, in accordance with Rule 32(a)(7)(B), as determined by the word processing system used to prepare this brief.

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November 12, 2008

CERTIFICATE OF SERVICE

This is to certify that I have this day caused a true and correct copy of the foregoing BRIEF OF THE INNOCENCE PROJECT AND INNOCENCE NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER to be served via Federal Express upon the following:

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