Mr. Collins also claimed to have seen Mr. Coles with a chrome, long-barreled thirty-eight on the night of the shootings. (Id. at 1128-29.) He testified that, when they were at the pool room, Mr. Coles placed his weapon on the seat of Mr. Ellison's car. (Id. at 1129.) Prior to the MacPhail shooting, Mr. Collins took the firearm and placed it on the ground at the end of the pool room building because he did not want it in the vehicle. (Id.)

On cross-examination, Mr. Collins testified that he did not see Mr. Davis argue with anyone at the Cloverdale party, shoot at the vehicle, or even possess a firearm that evening. (Id. at 1139-43.) However, Mr. Collins admitted that he would not have been able to see a gun even if Mr. Davis was carrying one. (Id. at 1140.) Also, Mr. Collins testified that Mr. Coles knew that Mr. Collins placed his weapon next to the building. (Id. at 1148-49.)

Mr. Collins then reiterated that he and Mr. Davis passed in front of the Trust Company Bank building as they walked toward the Burger King parking lot. (Id. at 1151-52.) Mr. Collins could not recall Mr. Coles threatening to shoot anyone. (Id. at 1153.) He also claimed that he did not see anything that happened after Mr. Davis slapped the individual because he had turned to walk back to the pool room. (Id. at 1155-56.) Mr.

Collins did not recall Mr. Davis wearing a hat on the evening of the shootings. (Id. at 1158.)

Mr. Collins also reiterated that he was pressured to name Mr. Davis as the Cloverdale shooter. (Id. at 1142-43.) He stated that he was taken to the police station, told that he was a suspect, provided no opportunity to call an attorney, threatened with jail time, and questioned prior to his parents arrival. (Id. at 1143-45.) Mr. Collins was sixteen at the time and claimed that he told the police what they wanted to hear because he was scared and did not want to go to prison. (Id. at 1144-45.)

I. Valerie Coles Gordon

Ms. Gordon testified at the trial that, in the early hours of August 19, 1989, she was sitting on the porch of her Yamacraw neighborhood home when she heard some gunshots. (Id. at 1160-61.) Approximately fifteen to twenty minutes later, Ms. Gordon's brother, Mr. Coles, ran onto the porch. (Id. at 1161.) Mr. Coles immediately slumped over, gasping for breath, causing Ms. Gordon to think that he was hurt. (Id. at 1161-62.) Satisfied that he was uninjured, Ms. Gordon went into the house and laid out three shirts for Mr. Coles to change into. (Id. at 1162.) Ms. Gordon recalls Mr. Coles changing out of the yellow shirt he had been wearing into a blue, red, and white collared

shirt. (Id. at 1162-63.) After changing shirts, Mr. Coles left the yellow shirt on the banister. (Id. at 1163-64.)

A few minutes later, Mr. Davis came up to the porch, wearing dark shorts and no shirt. (Id. at 1164-65.) Mr. Coles stepped outside to speak with Mr. Davis, eventually handing him the yellow shirt that Mr. Coles had previously been wearing. (Id.) After handing the yellow shirt to Mr. Davis, Mr. Coles left. (Id. at 1165.) According to Ms. Gordon, Mr. Davis put the shirt on, but quickly took it off and left it by her front door. (Id.) She washed the shirt the next day, later giving it to the police. (Id. at 1165-66.)

On cross-examination, Ms. Gordon admitted that, after arriving on the porch, Mr. Coles stated that he thought someone was trying to kill him. (Id. at 1168.) Ms. Gordon also stated that, prior to Mr. Davis arriving, Mr. Blige came by the house. (Id. at 1171.) Mr. Blige appeared to argue with Mr. Coles, who told him to leave. (Id. at 1171-72.) Ms. Gordon never saw Mr. Davis with a firearm. (Id. at 1174.)

J. Michael Cooper

Mr. Cooper testified that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (Id. at 1179.) Mr. Wilds drove Mr. Cooper to the party, along with Messrs. Blige, Brown, and Gordon. (Id. at 1179-80.) The group arrived at approximately 10:30 p.m. and went to the backyard to

hang out by the pool. (Id. at 1181.) While at the party, Mr. Wilds argued with some gentlemen, who were across the street from the party, because the two groups were from rival neighborhoods. (Id. at 1182.) Mr. Cooper remembers seeing Mr. Davis in the area of the group arguing with Mr. Wilds. (Id. at 1182-83.)

Mr. Cooper returned to the pool area, but his group decided to leave and change their clothes because they had been splashed with water. (Id. at 1183.) They told some of the girls that they would be back and walked to Mr. Wilds car. (Id. at 1185.) As they were leaving, Mr. Cooper was in the front passenger seat, hanging out of the window speaking loudly to some girls. (Id. at 1185-86.) As they took a right turn, Mr. Cooper, now fully inside the vehicle, heard several gunshots. (Id. at 1186-87.) One struck Mr. Cooper in the right side of his jaw. (Id. at 1187.) Panicked, Mr. Wilds drove Mr. Cooper to the hospital. (Id.)

On cross-examination, Mr. Cooper admitted that he was intoxicated when he arrived at the party. (Id. at 1190.) He could remember neither how many men Mr. Wilds was arguing with nor whether Mr. Davis was actually a part of that group. (Id. at 1191.) However, Mr. Cooper was sure that Mr. Davis was in the vicinity of the argument. (Id. at 1191-92.) Mr. Cooper

testified that he had never met Mr. Davis, and could not think of a reason why Mr. Davis would shoot at him. (Id. at 1192.)

K. Benjamin Gordon

Mr. Gordon testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (Id. at 1194.) Mr. Wilds drove Mr. Gordon to the party, along with Messrs. Blige, Brown and Cooper. (Id. at 1195.) After parking down the street from the party, the group walked through the front yard to the pool in the backyard. (Id. at 1196.) There was not a group of individuals standing near the front of the house when they arrived and nobody spoke to them as they made their way to the backyard. (Id. at 1196.) However, the State confronted Mr. Gordon with his August 19, 1989 police statement, in which he recounted a group of young men asking Mr. Gordon's group if they were from the Yamacraw neighborhood. (Id. at 1196-97.) At trial, Mr. Gordon stated that he could not remember if that happened. (Id. at 1197.)

Once at the party, the group socialized by the pool for some time, speaking with girls before leaving the party because they were bored. (Id. at 1197.) As they were leaving, Mr. Gordon was sitting in the middle of the back seat next to Mr. Blige, who was hanging out of the window. (Id. at 1197-98.) As they were rounding the corner at the end of the block, someone

fired a weapon at the vehicle, one bullet striking Mr. Cooper. (Id. at 1198-99.)

At trial, Mr. Gordon denied seeing the individual who shot at the vehicle. (Id. at 1199-1200.) He was again confronted with his August 19, 1989 police statement, in which he described the shooter as wearing a white, batman t-shirt and dark color jeans. (Id. at 1199-1201.) He had also stated that, earlier at the party, he saw the shooter by the pool. (Id. at 1201) At trial, Mr. Gordon testified that he only told the police that he heard someone in a white, batman t-shirt with dark jeans had been the shooter, not that he actually saw someone wearing those clothes shoot at the car. (Id. at 1200.) Mr. Gordon explained that he did not remember telling the police the information in his statement, which he signed without reviewing. (Id. at 1201-02.)

On cross-examination, Mr. Gordon testified that he was a frightened sixteen-year old when he provided the August 19, 1989 police statement. (Id. at 1202-03.) He explained that he was questioned by the police without having either his parents or a lawyer present. (Id. at 1202.) Mr. Gordon reiterated that he did not see who shot at the vehicle. (Id. at 1203.)

L. Craig Young

Mr. Craig Young testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August

18, 1989, where he saw Mr. Davis. (Id. at 1207-08.) However, he neither saw Mr. Davis argue nor threaten anyone at the party. (Id. at 1209.) Likewise, Mr. Davis never confessed these actions to him. (Id. at 1209.) While Mr. Craig Young did testify that he heard the gunshots, he did not see the shooter. (Id.)

The State confronted Mr. Craig Young with his previous police statement. (Id. at 1211.) In the statement, he informed the police that Mr. Davis told him at the party that Mr. Davis had gotten into an argument with an individual named "Mike-Mike," but "Mike-Mike" did not give Mr. Davis a reason to start anything. (Id. at 1212-13.) According to the police statement, Mr. Davis joked that he should have "burned one of y'all." (Id. at 1213.) Also, Mr. Craig Young told the police that he observed Mr. Davis cursing at a group of girls who would not talk to Mr. Davis. (Id. at 1213.)

With respect to the police statement, Mr. Craig Young contended that he only repeated what the police told him to say. (Id. at 1212.) He stated that they were yelling at him and coaching him on what to put in his statement. (Id.) Also, Mr. Craig Young stated that he and Mr. Davis had been fighting prior to the questioning and thought the statement was a good way to get back at Mr. Davis. (Id. at 1211.) But now that Mr. Craig

Young was on the stand, he was not going to lie about what he saw that night. (Id.)

M. Eric Ellison

Mr. Ellison testified at the trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (Id. at 1215.) Mr. Ellison drove Messrs. Collins and Davis to the party. (Id.) Mr. Davis was wearing a white t-shirt with writing on it and dark colored shorts. (Id. at 1216-17.) After they arrived at the party, the three men went straight to the pool in the backyard. (Id. at 1217.) While Mr. Collins swam, Messrs. Ellison and Davis socialized by the pool. (Id.) Mr. Davis left the pool area after eating some food. (Id. at 1217-18.) Messrs. Ellison and Collins decided to leave the party after staying for approximately an hour to an hour and a half. (Id. at 1218.)

As they were walking through the front yard, Mr. Ellison observed an argument between two groups on opposite sides of the street. (Id.) He noticed Mr. Davis standing in the walkway leading to the home where the party was being held. (Id.) As Mr. Ellison was standing in the driveway, he heard shots down the street. (Id. at 1218-19.) Mr. Ellison did not know from where, or at what, the shots were fired. (Id. at 1219.) However, he recalled a vehicle heading in the direction of the

gunshots with an individual hanging out of its window. (Id. at 1219-20.)

As Mr. Ellison was walking back to his car, which was parked in the area the shots were fired from, Mr. Davis asked him for a ride back to the Yamacraw neighborhood. (Id. at 1220-21.) At trial, Mr. Ellison could not remember if Mr. Davis approached him from the direction of the gunshots. (Id. at 1221.) However, Mr. Ellison confirmed the truth of his police statement, which stated that Mr. Davis approached from the direction the shots were fired. (Id. at 1221-22.) After waiting for things to settle down, Mr. Ellison drove Messrs. Collins and Davis first to Mr. Ellison's house, where they picked up Mr. Sams, and then to Charlie Brown's pool room. (Id. 1221-23.)

After parking the car, the four men went inside the pool room. (Id. at 1223.) After playing several games of pool, Mr. Ellison was leaving the pool room when he heard gunshots. (Id. at 1223.) Mr. Ellison started to walk back to his car, where Mr. Sams was already in the backseat. (Id.) As Mr. Ellison neared his car, Mr. Collins arrived. (Id. at 1123-24.) Mr. Ellison told Mr. Collins to get in the car, and the three went to Mr. Ellison's home. (Id.) Mr. Ellison did not know what became of Mr. Davis after they arrived at the pool room. (Id. at 1224.)

On cross-examination, Mr. Ellison testified that he did not know who fired the shots at the Cloverdale party. (Id. at 1225.) Also, he did not see Mr. Davis carrying a firearm that night. (Id.)

N. Kevin McQueen

Mr. McQueen testified at trial that Mr. Davis confessed to shooting Officer MacPhail. (Id. at 1231-32.) The alleged confession occurred while the two were waiting to play basketball in the Chatham County Jail. (Id. at 1230.) According to Mr. McQueen, Mr. Davis asked Mr. McQueen if he knew why Mr. Davis was in jail. (Id.) Mr. McQueen responded that everyone knew why Mr. Davis was in jail. (Id.) Mr. Davis explained that he got into an argument at a party in Cloverdale, which resulted in an exchange of gunfire. (Id. at 1230-31.) After he left the party, Mr. Davis went to his girlfriend's house, located in the Yamacraw neighborhood. (Id. at 1231.) Later, Mr. Davis left his girlfriend's house and walked to the Burger King to eat breakfast. (Id.) While Mr. Davis and a friend were on their way into the restaurant, Mr. Davis noticed someone who owed him drug money. (Id.) As he started arguing with the debtor, a police officer approached. (Id.) Afraid that the officer would connect him with the earlier Cloverdale shooting, Mr. Davis shot the officer first in the face and again as the wounded officer was trying to get up. (Id. at 1231-32.)

On cross-examination, Mr. McQueen admitted that he had seen a story about the shooting on the news and heard about it from other inmates. (Id. at 1239.) Mr. McQueen was not sure what weapon Mr. Davis used to shoot the officer, but recalled that Mr. Davis's friend had a rifle in the trunk of his car. (Id. at 1240.) Mr. McQueen denied having any arguments with Mr. Davis prior to either of them being placed in jail. (Id. at 1241.) Also, Mr. McQueen denied hoping to gain any advantage by testifying on behalf of the State, claiming that he had already been sentenced for his crimes. (Id. at 1242-43.)

O. Jeffery Sapp

Mr. Sapp testified at trial that, on the afternoon of August 19, 1989, he was walking through the Cloverdale neighborhood when he approached Mr. Davis, who was riding a bicycle. (Id. at 1249-50.) Mr. Sapp stopped Mr. Davis and asked him about the shooting at the Cloverdale party. (Id. at 1250.) Mr. Davis denied any knowledge of that shooting but began to discuss the MacPhail shooting. (Id.) Mr. Davis said that Mr. Coles was arguing with an individual, who said something to Mr. Davis that prompted him to hit the individual with a pistol. (Id. at 1250-51.) After Mr. Davis struck the man, a police officer ran toward him and told him to freeze. (Id. at 1251.) When the officer reached for his firearm, Mr. Davis shot him in self-defense. (Id. at 1251-52.)

Mr. Sapp also testified that he fabricated a portion of his police statement and Recorder's Court testimony. (Id. at 1253-55.) Specifically, Mr. Sapp stated that, contrary to his prior statements, Mr. Davis never told him that he had to go back and finish the job because the officer got a good look at Mr. Davis's face. (Id.)

On cross-examination, Mr. Sapp testified that his conversation with Mr. Davis took place at approximately 2:00 to 3:00 p.m. (Id. at 1258.) Mr. Sapp recalled that he did not believe Mr. Davis when he confessed to shooting the officer. (Id. at 1260.) Also, Mr. Sapp explained that his false statements were made for revenge due to a recent feud between he and Mr. Davis. (Id. at 1261-62.)

P. Joseph Washington[8]

Mr. Washington, who was incarcerated for armed robbery at the time of trial, testified that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (Id. at 1339-40.) Mr. Washington was unsure what time he arrived at the party. (Id. at 1340.) Mr. Washington recalled seeing Mr. Davis at the Cloverdale party, but not Mr. Coles. (Id. at 1343.) At some point, Mr. Washington left the party to meet a

[8] The following witnesses are the relevant witnesses from Mr. Davis's defense at trial.

friend named "Wally" in the Yamacraw neighborhood, with whom he planned to return to the party. (Id. at 1340-41.)

Some girls from the party drove Mr. Washington to Yamacraw, dropping him off on the corner of the Burger King property. (Id. at 1341-42.) There, he observed three people arguing while he was waiting for Wally. (Id. at 1342.) Mr. Washington recognized one of the individuals as Mr. Coles. (Id. at 1342-43.) As the argument continued, Mr. Washington saw Mr. Coles hit one of the individuals. (Id. at 1343.) After the assault, a police officer approached the group. (Id.) While Mr. Coles was backing up, he fired a gun at the officer. (Id.) After the shooting, Mr. Washington returned to the party. (Id. at 1344.) Mr. Washington explained that he did not mention observing the incident in the Burger King parking lot in his police statement concerning the Cloverdale shooting because he did not want to get involved. (Id.) In addition, Mr. Washington testified that Mr. Coles has a lighter complexion than Mr. Davis. (Id. at 1345.)

On cross-examination, Mr. Washington contended that he was at the Cloverdale party for both the earlier shooting involving Mr. Cooper and a later shooting involving Sherman Coleman.[9] (Id.

[9] A second shooting occurred at the Cloverdale party at approximately 1:04 a.m. on August 19, 1989. (Resp. Ex. 30 at 642.) In this shooting, Lamar Brown shot at the party from the window of Mr. Wilds's car as it was passing the party, striking

at 1345-46.) Also, Mr. Washington testified that he did not remember what time he left the Cloverdale party, how long he waited in the Burger King parking lot, or how long he stayed at the party when he returned. (Id. at 1345-48.) Finally, he could not remember Wally's last name. (Id. at 1347.)

Q. Tayna Johnson

Ms. Johnson testified at trial that she was at home when she heard gunshots in the early hours of August 19, 1989. (Id. at 1358.) Looking outside, she noticed police lights. (Id.) When she felt it was safe, she walked toward the police lights with her friend, Gail Dunham. (Id. at 1358-59.) As she was walking toward the Burger King, Ms. Johnson was approached by Mr. Coles and an individual named Terry. (Id. at 1359.) Mr. Coles asked if they could walk with the two down the street. (Id. at 1359.) Ms. Johnson agreed, and the group headed toward the Burger King and the police lights. (Id.)

As they approached the Burger King, Mr. Coles did not want to walk into the parking lot. (Id. at 1359-60.) After visiting the Burger King, Ms. Johnson and Mr. Coles walked back to Ms.

Sherman Coleman in the leg. (Id.) Important to Mr. Washington's credibility is the fact that he claims to be present at both the MacPhail shooting, which occurred at approximately 1:09 a.m., see supra Background Part I, and the Coleman shooting, which occurred at approximately 1:04 a.m. Worse still, is Mr. Washington's testimony that he observed the Coleman shooting after he returned from observing the MacPhail shooting. (Trial Transcript at 1348.)

Johnson's mother's home. (Id. at 1360.) While they were at the house, Mr. Coles asked Ms. Johnson to return to the Burger King and look for police. (Id.) Ms. Johnson returned to the Burger King, spoke with the police, and reported back to Mr. Coles. (Id.)

Ms. Johnson recalls that Mr. Coles was acting very nervous, especially after she informed him that the police were investigating the Burger King shooting. (Id. at 1361.) Also, Ms. Johnson stated that Mr. Coles was wearing a white shirt that evening. (Id. at 1362.) Ms. Johnson also attended the Cloverdale party, where she saw Mr. Coles and Mr. Davis. (Id. at 1364.) She testified that she did not see Mr. Davis argue with anyone while he was at the party. (Id. at 1365.)

On cross-examination, Ms. Johnson admitted that Mr. Coles appeared not to know what happened at the Burger King when he asked her to go and look around. (Id. at 1366.) Also, Ms. Johnson stated that she only saw Mr. Davis on a few occasions while he was at the party, but that she would have heard if he had gotten into an argument. (Id. at 1368-69.)

R. Jeffery Sams

Mr. Sams testified at trial that he attended a party in the Cloverdale neighborhood on the evening of August 18, 1989. (Id. at 1373.) Mr. Sams stayed at the party for fifteen to twenty

minutes, then left to take his car home. (Id. at 1373-74.) He saw Mr. Davis at the party. (Id. at 1374.)

After driving his car home, Mr. Sams was walking back to the party when he came upon a vehicle driven by Mr. Ellison. (Id.) Messrs. Collins and Davis were also in the automobile. (Id. at 1374-75.) Mr. Sams joined the group, which then went to Charlie Brown's pool room. (Id. at 1375.) Mr. Sams went inside the pool room for five or ten minutes, then returned to the vehicle to listen to music. (Id. at 1376.) He remembers seeing both Mr. Davis and Mr. Coles inside the pool room. (Id. at 1376.)

While he was sitting in Mr. Ellison's car, Mr. Coles placed a firearm on the front seat. (Id. at 1377.) Almost immediately, Mr. Collins took the weapon and walked toward the side of the pool room. (Id. at 1378.) Soon after, Mr. Sams fell asleep, not waking until after Mr. Ellison drove away from the pool room. (Id. at 1379.) Mr. Sams did not recall seeing Mr. Davis with a gun that night. (Id. at 1379-81.)

On cross-examination, Mr. Sams described the firearm Mr. Coles placed on the front seat as real shiny. (Id. at 1382.) Mr. Sams reiterated that he had never seen Mr. Davis with a firearm. (Id. at 1384.) Finally, Mr. Sams admitted that it was possible for Mr. Davis to have a weapon in the waistline of his pants without it being noticed. (Id.)

S. Virginia Davis

Virginia Davis, Mr. Davis's mother, testified at trial that Mr. Davis went to a party in Cloverdale on the evening of August 18, 1989. (Id. at 1386-87.) He left for the party with Messrs. Ellison, Collins, and Sams. (Id. at 1387.) Ms. Davis also testified that when she woke Mr. Davis for breakfast on the morning of August 19, 1989, he was not acting nervous or in any way out of the ordinary. (Id. at 1388-89.) After breakfast, Mr. Davis stayed at home all day. (Id. at 1389.) Ms. Davis never saw Mr. Davis talking to Mr. Sapp that afternoon. (Id.)

On cross-examination, Ms. Davis stated that Mr. Davis never left her sight from 10:00 a.m. to 4:00 p.m. on August 19, 1989. (Id. at 1395-96.) She also testified that she would have known if Mr. Davis left the property. (Id. at 1399.) Finally, Ms. Davis recalled that Mr. Davis was wearing blue shorts and a multi-colored shirt when he left for the Cloverdale party. (Id. at 1411-12.)

T. Troy Davis

At trial, Mr. Davis took the stand in his own defense. (Id. at 1415.) He testified that he arrived at the Cloverdale party between 10:00 and 10:15 p.m. wearing a pink and purple polo shirt. (Id. at 1416, 1418.) After socializing in the backyard for approximately twenty-five to thirty minutes, Mr. Davis decided to leave the party. (Id. at 1417.) As he was

walking, Mr. Davis observed a car speeding down the street. (Id.) The vehicle was rounding the corner at the end of the block when he heard a gunshot. (Id. at 1417-18.) He did not see who fired the gun. (Id. at 1418.)

When Mr. Davis returned home, he changed shirts because his shirt had gotten wet at the party. (Id. at 1418.) Mr. Davis never stated what color shirt he was wearing after he changed clothes. Mr. Davis then went for a ride with Messrs. Collins and Ellison. (Id.) While they were driving, they picked up Mr. Sams, whom they passed walking on the side of the road. (Id. at 1418-19.) The group first drove back by the Cloverdale party, then decided to shoot pool at Charlie Brown's pool room. (Id. at 1419.)

Mr. Davis was waiting to play a game of pool when Mr. Collins told him that Mr. Coles was outside arguing with someone. (Id. at 1420.) After going outside, Mr. Davis decided to follow the arguing pair. (Id. at 1421.) As he neared Mr. Coles, Mr. Davis figured out that Mr. Coles wanted the man to give him some of his beer. (Id.) Mr. Davis told Mr. Coles to just leave the man alone, but Mr. Coles told him to "shut the hell up." (Id. at 1421-22.) Joined by Mr. Collins, Mr. Davis continued following Mr. Coles to see what would happen. (Id. at 1422.)

Mr. Davis, along with Mr. Collins, cut through the back of the Trust Company Bank property on their way to the Burger King parking lot. (Id. at 1422.) As Mr. Coles was about to cross Fahm Street toward the Burger King parking lot, Mr. Davis overheard Mr. Coles threaten to take the life of the man with whom Mr. Coles was arguing. (Id. at 1422-23.) Mr. Davis caught up with Mr. Coles and the individual in the middle of the Burger King parking lot. (Id. at 1423.) According to Mr. Davis, he again pleaded with Mr. Coles to leave the man alone, but was told to shut up. (Id.)

Mr. Davis testified that the individual turned to Mr. Davis and told him to tell Mr. Coles to back off. (Id.) While the individual was focused on Mr. Davis, Mr. Coles slapped him in the head. (Id.) Mr. Davis stated that, after Mr. Coles slapped the individual, Mr. Davis shook his head and started walking away. (Id.) As he was walking, Mr. Davis observed Mr. Collins running, prompting Mr. Davis to start jogging away from the Burger King. (Id.) Looking over his shoulder, Mr. Davis saw a police officer entering the Burger King parking lot. (Id.) When Mr. Davis was crossing back over Fahm Street, toward the Trust Company Bank property, he heard a single gunshot, which caused him to run even faster. (Id. at 1424.) Mr. Davis was running past Charlie Brown's when he heard a few more gunshots. (Id.) As Mr. Davis was entering the Yamacraw neighborhood, Mr.

Coles ran past him. (Id.) Thinking Mr. Coles had been shot, Mr. Davis asked him if he was alright, but Mr. Coles continued running and did not respond. (Id.) Mr. Davis then walked home to the Cloverdale neighborhood, arriving sometime before 2:00 a.m. (Id. at 1425.) Mr. Davis testified that he never looked back to see who was firing the weapon. (Id. at 1424.)

According to Mr. Davis, he slept until his mother woke him the next morning. (Id. at 1426.) After he awoke, Mr. Davis showered, ate breakfast, and started performing his weekend chores. (Id. at 1426-27.) Mr. Davis testified that he only saw his neighbor, Ms. Shelley Sams, that afternoon. (Id. at 1427.) He denied both speaking to Mr. Sapp or riding a bicycle in the neighborhood. (Id. at 1431.)

Mr. Davis testified that, at the time of the shooting, he weighed approximately one-hundred and seventy-five pounds. (Id. at 1433.) He denied ever having a fade-away haircut. (Id.) Comparing himself to Mr. Coles, Mr. Davis stated that he was the same height, a little bigger, and had a darker complexion. (Id. at 1434.) While he recognized Mr. McQueen from jail, Mr. Davis denied ever playing basketball or speaking with Mr. McQueen. (Id.)

On cross-examination, Mr. Davis testified that, at the Cloverdale party, he never noticed a group of individuals from Yamacraw talking to girls. (Id. at 1437-39.) He stated that he

recognized only five or six people at the party. (Id. at 1439.) Mr. Davis denied shooting at Mr. Wilds's vehicle. (Id. at 1440.) Regarding the events in the Burger King parking lot, Mr. Davis stated that he approached the Burger King parking lot from behind the Trust Company Bank building because he thought it was faster, not because he wanted to approach the man Mr. Coles was arguing with without being seen. (Id. at 1446-48.) Also, Mr. Davis reiterated that it was Mr. Coles who slapped Mr. Young. (Id. at 1451.) He denied shooting the police officer, seeing Mr. Coles at his sister's house later that evening, or speaking to Mr. McQueen while imprisoned in the Chatham County Jail. (Id. at 1453, 1456, 1458-59.)

IV. SUBSEQUENT PROCEEDINGS

A. Motion for New Trial

After he was convicted, Mr. Davis filed a Motion for New Trial. (Doc. 14, Ex. 28.) On February 18, 1992, a hearing on the motion was held in Chatham County Superior Court. (Id.) On March 16, 1992, the court denied Mr. Davis's motion. (Doc. 21 at 15.)

B. Direct Appeal

Mr. Davis appealed his conviction directly to the Georgia Supreme Court. Davis v. State, 263 Ga. 5, 426 S.E.2d 844 (1993). After oral argument, the Georgia Supreme Court unanimously affirmed Mr. Davis's convictions and capital

sentence. Id. On November 1, 1993, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. (Doc. 15, Attach. 12.)

C. State Habeas Proceedings

On March 15, 1994, Mr. Davis filed a petition for a writ of habeas corpus in the Georgia Superior Court. (Doc. 15, Attach. 15.) An evidentiary hearing was held on December 16, 1996. (Doc. 16, Attachs. 3-10.) During the hearing, Mr. Davis submitted six affidavits purporting to establish his innocence.[10] (Id., Attach. 3 at 3.) On September 5, 1997, the court denied the petition after reviewing the entire record, including the innocence affidavits. (Doc. 17, Attach. 6.)

Mr. Davis appealed the denial of his habeas petition to the Georgia Supreme Court. Davis v. Turpin, 273 Ga. 244, 539 S.E.2d 129 (2000). In his application for certificate of probable cause to appeal, Mr. Davis argued that the failure to present additional evidence of innocence was ineffective assistance of counsel and that the new evidence undermined confidence in the guilty verdict. (Doc. 17, Attach. 8 at 88-96.) However, the Georgia Supreme Court declined to hear this question on appeal.

[10] The six affidavits were from Joseph Washington, Tonya Johnson, Kevin McQueen, Joseph Blige, April Hester, and Lamar Brown. (Doc. 21, App'x 1.) Mr. Davis submitted twenty-seven additional affidavits relating to his other claims, such as ineffective assistance of counsel and the unconstitutionality of the death penalty. (Doc 16, Attachs. 5-10.)

(See id., Attach. 11.) Ultimately, the court affirmed the denial of Mr. Davis's state habeas petition. Davis, 273 Ga. at 249, 539 S.E.2d at 134. On October 1, 2001, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. (Doc. 17, Attach. 25.)

D. Federal Habeas Proceedings

On December 14, 2001, Mr. Davis filed a petition for writ of habeas corpus in federal district court. (Id., Attach. 26.) In support of his petition, Mr. Davis submitted between sixteen and nineteen new innocence affidavits,[11] along with the six innocence affidavits he submitted as part of his state habeas petition. (Compare Doc. 3, Ex. 1, with Doc. 21, Ex. 1.) On March 10, 2003, the district court denied Mr. Davis's request for an evidentiary hearing, which asked the court to receive live testimony from the affiants. (Doc. 17, Attach. 47.) Ultimately, the district court denied Mr. Davis's petition on May 13, 2004. (Doc. 18, Attach. 5.) In denying the petition, the district court did not directly address Mr. Davis's claims

[11] It is not clear how each new affidavit is best characterized. However, the additional substantive affidavits were given by: Monty Holmes, Dorothy Ferrell, Harriett Murray, Larry Young, Antoine Williams, Anthony Hargrove, Shirley Riley, Darold Taylor, Gary Hargrove, Abdus-Salam Karim, Anita Dunham Saddler, Jeffrey Sapp, Michael Cooper, Benjamin Gordon, April Hester Hutchinson, Peggie Grant, Darrell Collins, James Riley, and Daniel Kinsman. (Doc. 3 Ex. 1; Doc. 21, Ex. 1.)

of innocence, instead finding Mr. Davis's claims of constitutional error without merit.[12] (Id. at 65.)

On September 26, 2006, the Eleventh Circuit Court of Appeals affirmed the district court's decision. Davis v. Terry, 465 F.3d 1249 (11th Cir. 2006). The Eleventh Circuit did not recognize Mr. Davis's claim as a substantive one based on actual innocence. Id. at 1251. Rather, that court identified Mr. Davis as "argu[ing] that his constitutional claims of an unfair trial must be considered, even though they are otherwise procedurally defaulted, because he has made the requisite showing of actual innocence." Id. The Eleventh Circuit concluded that the question of Mr. Davis's innocence was immaterial to its inquiry because he conceded that the district court considered his claims of constitutional error even though they had been procedurally defaulted. Id. at 1252-53. Therefore, the Eleventh Circuit only addressed the issue of

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[12] In addressing any claim of actual innocence raised by Mr. Davis, the district court concluded that

> [A] federal court looks, under the miscarriage of justice exception, to colorable claims of actual innocence for "permission" to address questions of constitutional impropriety asserted in procedurally defaulted claims. If a federal court is satisfied that no constitutional error occurred, however, the "actual innocence" gateway need not be implemented. Ultimately, the state habeas court's analysis serves as assurance that no constitutional deficiencies exist in this case so as to merit habeas corpus relief.

(Doc. 18, Attach. 5 at 65.) (citations omitted)).

whether Mr. Davis's claims of constitutional error failed as a matter of law, not whether he established a substantive claim of actual innocence. Id. at 1253. On June 25, 2007, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. Davis v. Terry, 551 U.S. 1145 (2007).

E. Extraordinary Motion for New Trial

On July 9, 2007, Mr. Davis failed an extraordinary motion for new trial in Chatham County Superior Court. (Doc. 19 Attachs. 4-5.) In the motion, Mr. Davis directly argued that he was innocent and that new evidence showed Mr. Coles murdered Officer MacPhail. (Id., Attach. 4 at 1-2.) In support of his claim, Mr. Davis presented twenty-six innocence affidavits, the bulk of which were the same affidavits Mr. Davis presented in his state and federal habeas petitions. (Id., Table of Appendices at 41-42.) On July 13, 2007, the court denied Mr. Davis's motion, concluding that, under Georgia law, the affidavits submitted by Mr. Davis failed to meet the burden required for a new trial.[13] (Id., Attach. 16 at 3-6.)

[13] The state court applied the following six part standard for determining whether the affidavits submitted by Mr. Davis warranted a new trial:

> "(1) [T]hat the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the

On August 3, 2007, the Georgia Supreme Court granted Mr. Davis's application for a discretionary appeal. Davis v. State, 282 Ga. 368, 651 S.E.2d 10 (2007). After reviewing the innocence affidavits, a divided court affirmed the denial of Mr. Davis's motion, finding the strength of the innocence affidavits insufficient to overturn the jury's verdict. Davis v. State, 283 Ga. 438, 447, 660 S.E.2d 354, 362-63 (2008). The three justices in the minority reasoned that, the trial court should at least "conduct a hearing, to weigh the credibility of Davis's new evidence, and to exercise its discretion in determining if the new evidence would create the probability of a different outcome if a new trial were held." Id. at 450, 660 S.E.2d at 365 (Sears, J., dissenting). On October 14, 2008, the Supreme Court of the United States denied Mr. Davis's petition for writ of certiorari. (Doc. 20, Attach. 16.)

F. Georgia State Board of Pardons and Paroles

Following the denial of his extraordinary motion for new trial, Mr. Davis submitted an application for executive clemency with the Georgia State Board of Pardons and Paroles. (Doc. 20,

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> witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness."

(Doc. 19, Attach. 16 at 2 (quoting Drake v. State, 248 Ga. 891, 894, 287 S.E.2d 180, 182 (1992)).)

Attach. 7 at 1.) In reviewing Mr. Davis's case, the Board allowed Mr. Davis's attorneys "to present every witness they desired to support their allegation that there is doubt as to Davis' guilt." (Id., Attach. 13 at 1.) In addition, the Board reviewed "the voluminous trial transcript, the police investigation report and the initial statements of all witnesses." (Id.) Finally, the Board retested some of the physical evidence in the case and interviewed Mr. Davis. (Id.) Following their exhaustive review, the Board concluded that Mr. Davis's showing was insufficient to warrant clemency. (Id.)

G. Application to File Second Habeas Petition

On October 22, 2008, Mr. Davis submitted an application to file a second habeas petition to the Eleventh Circuit. In re Davis, 565 F.3d 810 (11th Cir. 2009). In his application, Mr. Davis argued that his execution would be unconstitutional under the Eighth and Fourteenth Amendments because he is actually innocent of the crime of murder. Id. at 813. In denying the application, a divided Eleventh Circuit panel, relying solely on the affidavit of Benjamin Gordon, concluded that

> Davis has not even come close to making a prima facie showing that his [] claim relies on facts (i) that could not have been discovered previously through the exercise of due diligence, and (ii) that if proven, would "establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."

Id. at 824 (quoting 28 U.S.C. § 2244(b)(2)(B)). The dissenter would have granted Mr. Davis's application, reasoning that "where a defendant who can make a viable claim of actual innocence is facing execution, the fundamental miscarriage of justice exception should apply and AEDPA's procedural bars should not prohibit the filing of a second or successive habeas petition." Id. at 831 (Barkett, J., dissenting).

H. Petition for Writ of Habeas Corpus filed in the Supreme Court of the United States

On May 19, 2009, Mr. Davis filed a Petition for Writ of Habeas Corpus within the original jurisdiction of the United States Supreme Court. (Doc. 2.) In the petition, Mr. Davis again argued that his execution would be unconstitutional under both the Eighth and Fourteenth Amendments. (Id. at 28.) On August 17, 2009, the Supreme Court transferred Mr. Davis's petition to this Court with instructions to "receive testimony and make findings of fact as to whether evidence that could not have been obtained at the time of trial clearly establishes [Mr. Davis's] innocence." Davis, 130 S. Ct. at 1. As instructed, this Court held a hearing on June 24, 2010, allowing Mr. Davis to present live witnesses and other evidence supporting his claim of innocence. (Docs. 78, 82, 83.) In addition, the Court directed the parties to brief several issues relating to the

cognizability of and appropriate evidentiary burden for a claim for actual innocence.[14] (Doc. 77 at 1-2.)

ANALYSIS

The Court begins its analysis by considering the cognizability of a freestanding claim of actual innocence. Concluding that the claim is cognizable, the Court then determines the appropriate burden of proof andfrontyar whether Mr. Davis has met that burden.

I. COGNIZABILITY OF FREESTANDING CLAIMS OF ACTUAL INNOCENCE

The Supreme Court recently reiterated that the cognizability of freestanding claims of actual innocence is an open question. Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. ___, 129 S. Ct. 2308, 2321 (2009) ("Osborne also obliquely relies on an asserted federal constitutional right to be released upon proof of 'actual innocence.' Whether such a federal right exists is an open question."). While the cognizability of a freestanding claim of actual innocence is an open question, it is not a novel one. The Court considers the present state of the law prior to considering the underlying constitutional question.[15]

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[14] The Court discusses the evidence proffered at this proceeding in the analysis section.

[15] The State of Georgia concedes that it would be unconstitutional to execute an innocent man (Doc. 79 at 2), apparently abandoning its initial arguments to the contrary (see Doc. 21 at 56-62). However, the State now urges this Court to

A. Background Case Law

i. Herrera v. Collins

The Supreme Court has discussed the cognizability of a freestanding claim of actual innocence at length only once. See Herrera v. Collins, 506 U.S. 390 (1993). In Herrera, petitioner Leonel Torres Herrera was sentenced to death for the murder of two police officers—Carrisalez and Rucker. 506 U.S. at 394-95. After multiple unsuccessful appeals and collateral attacks, Herrera asserted a freestanding claim of actual innocence in a second federal habeas petition. Id. at 397-98. The district court stayed the execution to hear the claim, but that stay was vacated by the Fifth Circuit Court of Appeals, which held that freestanding claims of actual innocence were not cognizable. Id. Herrera successfully petitioned the Supreme Court for certiorari. Id. at 398.

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dodge the cognizability issue by finding Mr. Davis's claim insufficient on its merits. (Doc. 79 at 2.) When courts find a Herrera claim insufficient after lengthy factfinding regarding innocence, it is usually because the extensive factfinding was already necessary to determine a Schlup claim, and the Herrera claim can be resolved by reference to the Schlup determination. See House v. Bell, 547 U.S. 518 (2006). By contrast, this Court has already expended significant resources taking in evidence specifically regarding Mr. Davis's Herrera claim. It will have to expend even more resources to review the evidence and determine the merits of the Herrera claim, which is not facially insufficient even though it fails upon close examination. The expenditure of those resources can, and should, be avoided if this claim is not cognizable. Accordingly, the Court declines to dodge the question that is squarely before it.

The factual resolution of the case was as clear as the underlying constitutional question was muddled. And, it was the facts around which the majority congealed. As Justice O'Connor explained, "[d]ispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word." Id. at 419 (O'Connor, J., concurring); see also id. at 429 (White, J., concurring); id. at 418-19 (majority opinion) ("[Herrera's] showing of innocence falls far short of that which would have to be made in order to trigger the sort of constitutional claim which we have assumed, arguendo, to exist."). Ultimately, the Court rejected Herrera's claim on the merits by assuming, without deciding, the cognizability of the freestanding claim of actual innocence. Id. at 417-19.

Herrera's guilt was obvious both because of the overwhelming evidence presented at his trial and the weakness of his new evidence of innocence. The proof of guilt at Herrera's trial[16] was ironclad, consisting of physical evidence, Herrera's handwritten confession, and positive eyewitness identifications.[17] Id. Herrera's newly discovered proof of

[16] Herrera was tried for the murder of Carrisalez. Herrera, 506 U.S. at 395. He later pled guilty to the murder of Rucker. Id. at 394.

[17] There were two identifications of Herrera, one by Carrisalez's partner and the other by Carrisalez himself, who survived for several days after the shooting. Herrera, 506 U.S. at 394. Herrera's social security card was found at the scene of Rucker's murder, and Rucker's blood and hair were found on

innocence consisted of four dubious affidavits implicating his deceased brother as the murderer. Id. at 396-97. The affidavits were internally inconsistent, composed largely of hearsay, and pointed to a conveniently dead suspect. Id. at 417-19. When the affidavits were "considered in light of the proof of petitioner's guilt at trial," they fell far short of proving that a jury would have found reasonable doubt. Id. at 418. That is, the affidavits did not shift the balance of proof in Herrera's case. See id. at 418 ("That proof, even when considered alongside petitioner's belated affidavits, points strongly to petitioner's guilt.").

Because the Supreme Court simply assumed that freestanding claims of actual innocence were cognizable, it became unnecessary for the court to state a concrete position on the issue. Indeed, four Justices provided only suggestive dicta on either side of the question. See id. at 419 (O'Connor, J., concurring); see also id. at 429 (White, J., concurring); id. at 398-417 (majority opinion). Two Justices expressly stated that the constitution does not recognize the claim. Id. at 427-29 ("There is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered

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Herrera's car, jeans, and wallet. Id. at 394. In addition, Herrera was carrying a handwritten confession when he was arrested. Id. at 394-95.

evidence of innocence brought forward after conviction.") (Scalia, J., dissenting). Three others explicitly recognized such a claim. Id. at 430-31 (Blackmun, J., dissenting) ("We really are being asked to decide whether the Constitution forbids the execution of a person who has been validly convicted and sentenced but who, nonetheless, can prove his innocence with newly discovered evidence. Despite the State of Texas' astonishing protestation to the contrary, I do not see how the answer can be anything but 'yes.' " (internal citation omitted)). In short, two justices denied the existence of the claim, three recognized it, and four stated no express opinion, causing the question of the cognizability of freestanding claims of actual innocence to remain open. See Osborne, 129 S. Ct. at 2321.

While the actual holding of Herrera was narrow, the opinion contains broad, sweeping dicta that sheds some light on considerations relevant to the cognizability of freestanding actual innocence claims. First, those justices doubting or disagreeing with the cognizability of the claim set out several concerns regarding recognizing this right.[18] Herrera, 506 U.S.

[18] One of the Herrera concerns, that "the passage of time only diminishes the reliability of criminal adjudications," 506 U.S. at 403, has been significantly eroded since Herrera was decided. While it remains true that the reliability of witness testimony will decrease with time as memory fades, the vastly increased importance of forensic science has created an opposite force.

at 400-04, 411-18. Second, Justices O'Connor and Kennedy, in their concurrence, provided dicta suggesting that they supported the cognizability of the claim and, when paired with the dissents, suggests that a majority of the Herrera court believed that the execution of the innocent violated the Constitution. Id. at 419 (O'Connor, J., concurring). Ultimately, while the dicta of Herrera is meaningful, the most important aspect of Herrera is the question it left unanswered: Are freestanding

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Unlike memory, scientific ability improves with time. While forensic science has always played some role in the consideration of cases, the use of scientific evidence has become pervasive since Herrera. Compare Learned Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901), with Kenworthey Bilz, The Fall of the Confession Era, 97 J. Crim. L. & Criminology 367, 379 (2005) ("The science of DNA testing did not hit the mainstream of criminal investigations until the 1990's in this country, and [] this evidence has come to play an increasingly integral part in prosecutions . . . ."), and Paul C. Giannelli, Ake v. Oklahoma: The Right to Expert Assistance in a Post-Daubert, Post-DNA World, 89 Cornell L. Rev. 1305 (2004). Where it is science that allows for increased accuracy, and the new science occurs post-trial, it can be fairly said that the accuracy of the guilt determination increases with time. Examples of such advances include DNA fingerprinting and new knowledge in the science of arson. See Brandon L. Garrett, Judging Innocence, 108 Colum. L. Rev. 55, 56 (2008); David Grann, Trial by Fire: Did Texas Execute an Innocent Man?, The New Yorker (Sept. 7, 2009), available at http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann?currentPage=all (discussing advances in arson detection science that disproved various forensics associated with arson detection such as the importance of V-shaped burn marks, certain puddle configurations, and low burns on walls and floors). However, in this case, none of the reasons why forensic science would cause an adjudication to become less reliable over time are present.

claims of actual innocence cognizable? Osborne, 129 S. Ct. at 2321.

ii. Schlup v. Delo and House v. Bell

Herrera's progeny address the question only obliquely. See, e.g., House v. Bell, 547 U.S. 518 (2006); Schlup v. Delo, 513 U.S. 298 (1995). In Schlup v. Delo, Herrera was discussed, but only to contrast its hypothetical freestanding claim of actual innocence to the long-recognized exception to procedural default for a miscarriage of justice. Schlup, 513 U.S. at 315-16. House v. Bell also briefly touched on the question of freestanding claims of actual innocence, assuming that such a claim would exist, but finding that the petitioner had not made a sufficient showing to require consideration of the claim. 547 U.S. at 554-55. Neither case answered the ultimate question of whether there is a right of the innocent to be released upon a showing of actual innocence. As noted above, that question remains open. See Osborne, 129 S. Ct. at 2321. The Court now considers that question.

B. Eighth Amendment

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and

unusual punishments inflicted."[19] U.S. Const. amend. VII. "The Eighth Amendment stands to assure that the State's power to punish is 'exercised within the limits of civilized standards.' " Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion) (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion)). The scope of the Amendment is not static. Its reach is defined by looking beyond historical conceptions to "the evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 101. " 'This is because [t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.' " Graham v. Florida, 560 U.S. ___, 130 S. Ct. 2011, 2021 (2010) (quoting Kennedy v. Louisiana, 554 U.S. ___, 128 S. Ct. 2641, 2649 (2008)) (alterations in original).

Recently, the Supreme Court has clarified its Eighth Amendment jurisprudence. See Graham, 130 S. Ct. 2011. In Graham, the Supreme Court divided its Eighth Amendment cases into two classifications: (1) those that "challenge[d] the length of term-of-years sentences given all the circumstances in a particular case" and (2) those "in which the Court implements

[19] The Eighth Amendment is applicable to the states through the Fourteenth Amendment. See Kennedy v. Louisiana, 544 U.S. ___, 128 S. Ct. 2641, 2649 (2008).

the proportionality standard by certain categorical restrictions on the death penalty." Id. at 2021-22. The Supreme Court then went further and divided this latter grouping into two subsets, one focusing on the nature of the offense and the other on the characteristics of the offender.[20] Id. at 2022. That latter subset turns on the culpability of a defendant with a certain characteristic[21] that significantly diminishes the offender's culpability. See Roper v. Simmons, 543 U.S. 551, 568 (2005). As a result of the diminished culpability, the justifications for imposing the death penalty are no longer applicable, rendering the imposition of the death penalty unconstitutional.[22]

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[20] This latter division does not affect the applicable analysis; both subsets apply the approach stemming from Trop, 356 U.S. 86 (plurality opinion). Compare Kennedy, 128 S. Ct. at 2649 (applying Trop analysis to an Eighth Amendment challenge to the punishment of death for child rape), with Roper v. Simmons, 543 U.S. 551, 560-61 (2005) (applying Trop analysis to an Eighth Amendment challenge to the execution of minors).

[21] In addition to personal characteristics, a defendant's culpability is based on the nature of his conduct. See generally Irizarry v. United States, 553 U.S. 708 (2008).

[22] Moreover, where the state attempts to punish an individual who has no culpability at all, the Eighth Amendment prohibits the imposition of any punishment. Robinson v. California, 370 U.S. 660, 667 (1962). As the Supreme Court explained:

> We hold that a state law which imprisons a person thus afflicted [with an addiction to narcotics] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the

See id. ("Capital punishment must be limited to those offenders . . . whose extreme culpability makes them 'the most deserving of execution.' " (quoting Atkins v. Virginia, 536 U.S. 304, 319 (2002))); see Atkins, 536 U.S. at 323.

This Eighth Amendment challenge calls into question the permissibility of capital punishment[23] based upon a characteristic of the offender: a total lack of culpability, which is demonstrated through a showing of factual innocence based upon evidence discovered subsequent to a full and fair trial.[24] Graham held that challenges grounded in individual

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> abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.

Id.

[23] The Supreme Court has stated that the open question underlying this case extends beyond the capital context. See Osborne, 129 S. Ct. at 2321. However, in Herrera, the assumed right was contingent upon the fact that the case was a capital one. 506 U.S. at 417 ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional . . . ." (emphasis added)). It is unclear whether that distinction remains good law. See Graham, 130 S. Ct. at 2046 ("Today's decision eviscerates that distinction. 'Death is different' no longer.") (Thomas, J., dissenting). Regardless, the present case is a capital one, so the Court limits its consideration to capital cases based upon the definition of the assumed right in Herrera.

[24] Abstract conceptualizations of this challenge may be clarified by a simple hypothetical. A defendant is convicted of the murder of his child after a full and fair trial, and he is then sentenced to death. Ten years later, the defendant discovers the "murdered" child has been safely living on a remote island, conclusively disproving defendant's guilt. The defendant then

culpability are to be considered using the Trop analysis. 130 S. Ct. at 2021-22. Therefore, the Court applies the Trop analysis here.[25]

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goes before the state with his living child, but is denied relief and the state prepares to move forward with his execution. The challenge under these circumstances is whether, in spite of the truly persuasive proof of innocence, the state may proceed with the execution without violating the Eighth Amendment of the United States Constitution.

At one time, such a hypothetical would draw the objection that this factual scenario could never occur because any serious showing of innocence would result in state relief by clemency or state judicial process. This is, the state would always admit its mistake and rectify it. While it remains the case that state officials denying relief under such circumstances would be an extreme rarity, events since Herrera shatter the notion of a perfect "fail safe" system for truly persuasive proof of innocence. See, e.g., Watkins v. Miller, 92 F. Supp. 2d 824, 836 (S.D. Ind. 2000) ("In an effort to keep Jerry Watkins in prison, the state has clung to this theoretical possibility. A close look at this possibility shows it is farfetched, both as a matter of science and in terms of the overall evidence in the case. The theoretical possibility is also completely inconsistent with the theory of the case that the prosecution presented to the jury."); cf. Brandon L. Garrett, Exoneree Post-Conviction Data, http://www.law.virginia.edu/pdf/faculty/garrett/judging_innocence/exonerees_postconviction_dna_testing.pdf (showing that of 225 DNA exonerations, prosecutors opposed vacating the conviction in 22 cases (9.8%)).

[25] In reality, the closest cousin of this case is Robinson v. California, 370 U.S. 660 (1962), holding that any punishment is disproportionate where the convict has no culpability. Robinson analyzed the case using a common sense approach that does not accord with either test recognized in Graham. 130 S. Ct. at 2021-23. Presumably, because Robinson turned on an issue of culpability, if the case were reheard today it would be analyzed under Trop. See Graham, 130 S. Ct. at 2022-23. Accordingly, while common sense and long-held historical views proscribe the punishment of the innocent, see Patterson v. New York, 432 U.S. 197, 208 (1977) (" '[I]t is far worse to convict an innocent man than to let a guilty man go free.' " (quoting In re Winship, 397 U.S. 358, 372 (1970))); Winship, 397 U.S. at 364 ("It is critical that the moral force of the criminal law not be diluted

When addressing categorical challenges under Trop, the proper approach is a two step inquiry. First, a court "considers 'objective indicia of society's standards, as expressed in legislative enactments and state practice' to determine whether there is a national consensus against the sentencing practice at issue." Id. at 2022 (quoting Roper, 543 U.S. at 572). Second, a court must independently determine whether the punishment in question violates the constitution based upon precedent and the court's " 'understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose.' " Id. at 2022 (quoting Kennedy, 128 S. Ct. at 2650). The societal consensus presently at issue is whether it would be cruel to allow the execution on an individual who can clearly establish his innocence of the crime of conviction based on evidence discovered subsequent to a full and fair trial.

i. Objective Indicia of Societal Standards

"The analysis begins with objective indicia of national consensus." Id. at 2023. The Supreme Court has "emphasized that legislation is the 'clearest and most reliable objective evidence of contemporary values.' " Atkins, 536 U.S. at 323

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by a standard of proof that leaves people in doubt whether innocent men are being condemned."); Coffin v. United States, 156 U.S. 432, 455-56 (1895); Alexander Volokh, nGuilty Men, 146 U. Pa. L. Rev. 173 (1997) (tracing the concept of the paramount importance of innocence as far back as ancient Greece), this Court will go beyond common sense and tradition in this case, and into the deeper analysis required under Graham.

(quoting Penry v. Lynaugh, 492 U.S. 302, 331 (1989)). While the inability of the state to punish an innocent person has long been recognized,[26] recent state legislation demonstrates increasing consternation with the execution[27] of innocent

[26] It has long been established that the constitution prohibits states from punishing the innocent. See, e.g., Herrera, 506 U.S. at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); United States v. U.S. Coin & Currency, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing."); Robinson, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.") Calder v. Bull, 3 U.S. 386, 388 (1798) ("The Legislature may . . . declare new crimes . . . but they cannot change innocence into guilt; or punish innocence as a crime . . . .").

[27] Despite considering this right in the context of capital punishment, the Court looks to the laws of all fifty states regarding the permissibility of post-conviction exoneration to determine societal consensus. Because laws pertaining to the conviction of the innocent usually extend beyond capital convictions, see, e.g., Ariz. Rev. Stat. Ann. § 13-4240 (2000); S.C. Code. Ann. § 17-28-30 (2008), the Court has indulged in the assumption that for states without the death penalty, their existing practices regarding post-conviction exoneration would also extend into the capital context were such punishment available. Had the Court limited its review of state law to only those states with the death penalty; it would have found that, of the thirty-five states with the death penalty, only Oklahoma provides no avenues to secure evidence of innocence in the post-conviction setting. See Death Penalty Information Center, States With and Without the Death Penalty, http://www.deathpenaltyinfo.org/states-and-without-death-penalty. That is, 97.1% of states with a death penalty provide some avenue through which to seek evidence necessary to prove innocence subsequent to a conviction. Whether one limits the inquiry to states with capital punishment, or considers all fifty states, the consensus regarding punishment of the innocent remains constant.

convicts. Since Herrera, forty-seven states[28] and the District of Columbia have enacted statutes designed to help innocent convicts prove that their convictions were erroneous.[29] In so doing, the statutes themselves recognize that their protections will be used to disprove erroneous jury verdicts and avoid

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[28] The three states that have not enacted modern reforms to ensure that convicts are actually innocent are Massachusetts, Alaska, and Oklahoma. Of these three, only Oklahoma utilizes the death penalty. See Roper, 543 U.S. at 1201; Okla. Stat. tit. 21, § 701.10 (2002).

[29] The baseline protection enacted involves DNA testing. However, multiple states have enacted laws that allow for additional factfinding procedures regarding the innocence of the convicted, including fingerprint analysis and other additional forensic testing. Ala. Code § 15-18-200 (2009); Ariz. Rev. Stat. Ann. § 13-4240 (2000); Ark. Code Ann. § 16-112-202 (2001); Cal. Penal Code § 1405 (West 2001); Colo. Rev. Stat. § 18-1-413 (2004); Conn. Gen. Stat. § 54-102kk (2003); Del. Code Ann. tit. 11, § 4504 (2000); D.C. Code § 22-4133 (2002); Fla. Stat. § 925.11 (2006); Ga. Code Ann. § 5-5-41 (2003); Haw. Rev. Stat. § 844D-123 (2005); Idaho Code Ann. § 19-4902 (2010); 725 Ill. Comp. Stat. 5/116-3 (2003); Ind. Code § 35-38-7-5 (2003); Iowa Code § 81.10 (2005); Kan. Stat. Ann. § 21-2512 (2001); Ky. Rev. Stat. Ann. § 422.285 (West 2002); La. Code Crim. Proc. Ann. art. 926.1 (2001); Me. Rev. Stat. tit. 15, § 2137 (2001); Md. Code Ann., Crim. Proc. § 8-201 (West 2001); Mich. Comp. Laws § 770.16 (2000); Minn. Stat. § 590.01 (1999); Miss. Code Ann. § 99-39-5 (1995); Mo. Rev. Stat § 547.035; Mont. Code Ann. § 46-21-110 (2003); Neb. Rev. Stat. § 29-4120 (2001); Nev. Rev. Stat. § 176.0918 (2003); N.H. Rev. Stat. Ann. § 651-D:2 (2004); N.J. Stat. Ann. § 2A:84A-32a (West 2001); N.M. Stat. Ann. § 31-1A-2 (2003); N.Y. Crim. Pro. Law § 440.30(1-a) (McKinney 1994); N.C. Gen. Stat. § 15A-269 (2001); N.D. Cent. Code § 29-32.1-15 (2005); Ohio Rev. Code Ann. § 2953.72 (West 2010); Or. Rev. Stat. § 138.690 (2001); 42 Pa. Cons. Stat. § 9543.1 (2002); R.I. Gen. Laws § 10-9.1-12 (2002); S.C. Code Ann. § 17-28-30 (2008); S.D. Codified Laws § 23-5B-1 (2009); Tenn. Code Ann. § 40-30-304 (2001); Tex. Code Crim. Proc. Ann. art. 64.01 (West 2001); Utah Code Ann. § 78B-9-301 (West 2008); Vt. Stat. Ann. tit. 13, § 5561 (2007); Va. Code Ann. § 19.2-327.1 (2001); Wash. Rev. Code § 10.73.170 (2000); W. Va. Code § 15-2B-14 (2004); Wis. Stat. § 974.07 (2001); Wyo. Stat. Ann. § 7-12-303 (2008).

punishment of the innocent.[30] Indeed, if states were not concerned with preventing punishment of the wrongfully convicted, it would be difficult to understand why they would allow validly convicted persons avenues with which to secure evidence of their innocence. Moreover, over the course of American history several states have gone further to avoid executing the innocent, adopting over-inclusive solutions by

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[30] Ala. Code § 15-18-200(e)(3) (2009); Ariz. Rev. Stat. Ann. § 13-4240(B)(1) (2000); Ark. Code Ann. § 16-112-202(6)(B) (2001); Cal. Penal Code § 1405(e)(4)-(5) (West 2001); Colo. Rev. Stat. § 18-1-413(1)(a) (2004); Conn. Gen. Stat. § 54-102kk(b)(4) (2003); Del. Code Ann. tit. 11, § 4504(a)(5) (2000); D.C. Code § 22-4135 (2002); Fla. Stat. § 925.11(1)(a) (2006); Ga. Code Ann. § 5-5-41(c)(3)(C) (2003); Haw. Rev. Stat. § 844D-123(b)(1) (2005); Idaho Code Ann. § 19-4902(e)(1) (2010); 725 Ill. Comp. Stat. 5/122-1 (2003); Ind. Code §§ 35-38-7-8(4), 35-38-7-19 (2004); Iowa Code § 81.10(7)(e) (2005); Kan. Stat. Ann. § 21-2512(c) (2001); Ky. Rev. Stat. Ann. § 422.285(3)(a) (West 2002); La. Code Crim. Proc. Ann. art. 926.1(B)(1) (2001); Me. Rev. Stat. tit. 15, § 2138(10)(C)(1) (2001); Md. Code. Ann., Crim. Proc. § 8-301 (West 2009); Minn. Stat. § 590.01(1)(2) (1999); Miss. Code Ann. § 99-39-5(1)(e) (1995); Mo. Rev. Stat § 547.037 (2001) Mont. Code Ann. § 46-21-110(1)(c) (2003); Neb. Rev. Stat. §§ 29-4119, 29-4120(5) (2001); Nev. Rev. Stat. §§ 176.515(3), 176.0918 (3)(b) (2003); N.H. Rev. Stat. Ann. § 651-D:2(I)(b) (2004); N.J. Stat. Ann. § 2A:84A-32a(1)(b) (West 2001); N.M. Stat. Ann. § 31-1A-2(A) (2003); N.Y. Crim. Pro. Law § 440.30(1-a) (McKinney 1994); N.C. Gen. Stat. § 15A-269(b)(2) (2001); N.D. Cent. Code Ann. §§ 29-32.1-01(1)(e), 29-32.1-15(1) (2005); Ohio Rev. Code Ann. § 2953.71(L) (West 2010); Or. Rev. Stat. § 138.692(1)(a)(A)(ii) (2001); 42 Pa. Cons. Stat. § 9543.1(2)(i) (2002); R.I. Gen. Laws § 10-9.1-11(a)(4) (2002); S.C. Code Ann. § 17-28-30(A), (B) (2008); S.D. Codified Laws §§ 23-5B-1(9)(b), 23-5B-16 (2009); Tenn. Code Ann. § 40-30-304(4) (2001); Tex. Code Crim. Proc. Ann. art. 64.04 (West 2001); Utah Code Ann. § 78B-9-402 (West 2008); Vt. Stat. Ann. tit. 13, § 5561(a)(1) (2007); Va. Code Ann. § 19.2-327.2 (2001); Wash. Rev. Code § 10.73.170(3) (2000); W. Va. Code § 15-2B-14(b)(1) (2004); Wis. Stat. § 974.07(7)(a)(1) (2001); Wyo. Stat. Ann. § 7-12-303(c)(ix) (2008).

abolishing the death penalty or requiring absolute certainty as to guilt.[31]

The states, then, are showing an increased concern for protecting legally convicted individuals whom are shown to be factually innocent subsequent to a trial.[32] This consensus is shown mostly through enacting statutes that allow convicts to seek evidence of their innocence after a valid adjudication of guilt and occasionally through the adoption of over-inclusive solutions to avoid executing the innocent. Accordingly, the Court concludes that objective indicia of societal standards

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[31] This concern has been raised twice in the past three years with the repeal of the death penalty in New Mexico and severe limitation of the death penalty in Maryland. Statement of Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty (2009), http://www.deathpenaltyinfo.org/documents/Richardsonstatement.pdf; Maryland Commission on Capital Punishment, Final Report 18-19 (2008), available at http://www.goccp.maryland.gov/capital-punishment/documents/death-penalty-commission-final-report.pdf. It also appears that protecting the innocent from execution was a motivating factor in some popular historical movements to abolish capital punishment in the states, including Michigan's abolition of capital punishment in 1846, Rhode Island's abolition of the death penalty in 1852, and Maine's abolition of the death penalty in 1876. See Hugo Adam Bedau & Michael L. Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 76 (1987).

[32] While these enactments show near unanimous consensus among the states, Mr. Davis goes further by offering other evidence that the Court finds too general to be helpful in its inquiry. For example, while it is true that the overall number of death sentences in America is declining (see Doc. 80 at 10-11), there is no way to know whether this decline is caused by accuracy concerns, decreased societal support for the death penalty, newfound prosecutorial restraint in seeking imposition of the death penalty, or some other unknown reason.

indicates a consensus that the execution of innocent convicts should be prohibited, whether that innocence is proved before or after trial. Indeed, the national consensus among the states appears nearly unanimous on this score.

ii. Precedent and Understanding

While national consensus is important, the task of interpreting the Constitution, including the Eighth Amendment, remains in the hands of federal courts. Graham, 130 S. Ct. at 2026. "The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." Id. This inquiry also considers whether the practice at issue serves "legitimate penological goals." Id.; Roper, 543 U.S. at 571-72. And, a court must consider prior precedent and understanding of the Eighth Amendment. Kennedy, 128 S. Ct. at 2658.

a. Punishment, Innocence, and the Requirement that the Convict Kill

The Court begins with prior precedent regarding innocence and punishment. If there is a principle more firmly embedded in the fabric of the American legal system than that which proscribes punishment of the innocent, it is unknown to this Court. It is well established that the punishment of the innocent or those otherwise without culpability is at odds with

the constitution, including the Eighth Amendment.[33] E.g., Herrera, 506 U.S. at 419 (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution."); U.S. Coin & Currency, 401 U.S. at 726 (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing . . . ."); Robinson, 370 U.S. at 667 ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."); Thompson v. City of Louisville, 362 U.S. 199, 206 (1960) ("[I]t is a violation of due process to convict and punish a man without evidence of his guilt."); Mooney v. Holohan, 294 U.S. 103, 113 (1935) (holding that where defendant asserted his innocence and a wrongful

[33] The Court does not understand the dicta in Herrera to dispute this foundational legal principle. Rather, the dicta in Herrera questions whether the right of the innocent not to be punished can be asserted in the post-trial context, specifically in the context of federal habeas. See Herrera, 506 U.S. at 400-02. While not all constitutional violations pertaining to criminal rights may be asserted post-trial, see Stone v. Powell, 428 U.S. 465, 486 (1976), it appears that the cruel and unusual punishment clause maintains its vitality in the habeas context, see Ford v. Wainwright, 477 U.S. 399, 411-12 (1986). Moreover, to the extent that the objection regarding the reach of habeas is historical, it bears noting that much of the modern reach of habeas corpus is beyond historical conceptions of habeas corpus, see Harlan Grant Cohen, "Undead" Wartime Cases: Stare Decisis and the Lessons of History, 84 Tul. L. Rev. 957 (2010), and cursory reviews of habeas corpus history generally referenced by courts do not even begin to do justice to the complicated question of what historical figures would have understood habeas to reach, see Paul D. Halliday & G. Edward White, The Suspension Clause: English Text, Imperial Contexts, and American Implications, 94 Va. L.R. 575 (2008).

conviction due to perjured testimony and improperly suppressed evidence, habeas courts must hear the claim); Calder, 3 U.S. at 388 ("The Legislature may . . . declare new crimes . . . but they cannot change innocence into guilt; or punish innocence as a crime . . . ."). Further, "[t]he Court has recognized that defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers." Graham, 130 S. Ct. at 2027. Indeed,

> if a person sentenced to death in fact killed, attempted to kill, or intended to kill, the Eighth Amendment itself is not violated by his or her execution regardless of who makes the determination of the requisite culpability; by the same token, if a person sentenced to death lacks the requisite culpability; the Eighth Amendment violation can be adequately remedied by any court that has the power to find the facts and vacate the sentence.

Cabana v. Bullock, 474 U.S. 376, 386 (1986), abrogated on other grounds by Pope v. Illinois, 481 U.S. 497, 503 n.7 (1987). That is, to justify the imposition of the death penalty, the condemned must have killed. While these precedents refer to a crime of conviction rather than an individualized assessment of guilt, the motivating concern would remain the same: each defendant sentenced to death must have engaged in conduct giving rise to the requisite culpability. It is unclear why a patently erroneous, but fair, criminal adjudication would change the

transcendental fact that one who has not actually murdered cannot be executed.

b. Legitimate Penological Goals

"[C]apital punishment is excessive when . . . it does not fulfill the two distinct social purposes served by the death penalty: retribution and deterrence of capital crimes." Kennedy, 128 S. Ct. at 2661. The Court considers whether executing innocent convicts furthers these goals.[34]

Punishment deters crime by affecting the relevant cost–benefit analysis of the potential criminal. Roper, 543 U.S. at 561-62; Thompson v. Oklahoma, 487 U.S. 815, 837 (1988) (plurality opinion). Because deterrence functions by altering the incentive structure surrounding the potential criminal's cost–benefit analysis, " 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation.' " Enmund v. Florida, 458 U.S. 782, 799 (1982) (quoting Fisher v. United States, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting)). For this reason, the court has found deterrence wanting where the individual in question was not capable of a sufficient cost–benefit analysis due to a lack of mental sophistication or lack of an opportunity to engage in

[34] While this analysis may appear axiomatic, the Court nonetheless considers whether any penological goal is served in executing those who can demonstrate their innocence, as per the analysis required under Graham.

the requisite calculus. Roper, 543 U.S. at 571-72; Atkins, 536 U.S. at 319-20; Enmund, 458 U.S. at 799-800 ("[T]here is no basis in experience for the notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself."). Because the innocent convict never murders, he never engages in the requisite cost–benefit analysis and therefore lacks the opportunity to be deterred. Stated differently, deterrence is not served in the case of the innocent convict because there is no conduct to deter. Accordingly, deterrence does not justify executing the "actually" innocent.

Retribution is also not furthered by executing the innocent. Retribution can be understood as either an attempt to express the community's moral outrage or to restore balance for the wrong to the victim.[35] Roper, 543 U.S. at 571. "The heart of the retribution rationale is that a criminal sentence must be

[35] While retribution and revenge overlap, they are not the same. Retribution aims to restore a harmonious balance to society; revenge sates individual desires. Retribution restores balance by providing a wrongdoer with his just deserts. Graham, 130 S. Ct. at 2028, Enmund, 458 U.S. at 801. However, balance is restored only with accuracy; a mislaid blow, no matter how swift, only increases the moral imbalance by imposing additional unjustified suffering. Revenge, meanwhile, requires only that another suffer as much as the victim. It desires swiftness, but requires minimal accuracy. Revenge may be derived from either the deserving party or a simple scapegoat. When retribution is taken against the correct party, both revenge and retribution may be had, but neither should be mistaken for the other.

directly related to the personal culpability of the criminal offender." Tison v. Arizona, 481 U.S. 137, 149 (1987). Individuals may lack the requisite culpability for retribution through capital punishment where diminished mental function erodes culpability, Roper, 543 U.S. at 572, or where their actions are not sufficiently evil, Enmund, 458 U.S. at 801. As the Supreme Court explained when considering the death penalty for felony murder:

> For purposes of imposing the death penalty, Enmund's criminal culpability must be limited to his participation in the robbery, and his punishment must be tailored to his personal responsibility and moral guilt. Putting Enmund to death to avenge two killings that he did not commit and had no intention of committing or causing does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts. This is the judgment of most of the legislatures that have recently addressed the matter, and we have no reason to disagree with that judgment for purposes of construing and applying the Eighth Amendment.

Id. at 801. If a person who commits a robbery that results in felony murder lacks the requisite culpability for retribution through capital punishment, one who commits no crime surely lacks the culpability to justify capital punishment on the basis of retribution. Accordingly, neither retribution nor deterrence is served by the execution of the innocent.

iii. Conclusion

The consensus among the states appears to be that a truly persuasive demonstration of innocence subsequent to trial

renders punishment unconstitutional. Prior precedent and understanding of the Eighth Amendment accords with this consensus. Moreover, executions of the "actually" innocent do not serve any legitimate penological purpose. Accordingly, the execution of those who can make a truly persuasive demonstration of innocence fails each step of the Graham analysis. It can be said, then, that executing the "actually" innocent violates the cruel and unusual punishment clause of the Eighth Amendment of the United States Constitution.[36]

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[36] It bears noting that this constitutional right will have little effect on the finality of state judgments. First, the right will not lengthen the present process because, presumably, it is subject to all the normal rules regarding when constitutional violations may be raised in habeas petitions. Second, the present system already allows habeas petitioners to assert their innocence subsequent to a trial, it simply requires the claim of innocence be coupled with another constitutional violation or a showing of due diligence. See 28 U.S.C. § 2244(b)(2)(B)(ii); House, 547 U.S. 518; Schlup, 513 U.S. 298. Because trials are not a perfect science, a defendant with a strong case of innocence will always find a "constitutional violation" that he can attach to his innocence claim, allowing him to challenge his conviction. See, e.g., Goldman v. Winn, 565 F. Supp. 2d 200 (D. Mass. 2008); Wilson v. Vaughn, 304 F. Supp. 2d 652 (E.D. Pa. 2004), rev'd, 533 F.3d 208 (3d Cir. 2008) (illustrating that an innocent defendant will find marginal constitutional violations to attach to a persuasive claim of innocence). One would not expect any real change in the number or frequency of habeas petitions because all claims of innocence are likely already being made under present law. Third, once one acknowledges that innocent mistakes are made and discovered—as one must in light of DNA exonerations over the past twenty years—it becomes apparent that the present system does more harm to societal respect for the criminal justice system and its judgments than a system that allows for the assertion of innocent, but clear, mistake. As a practical matter, by forcing mistakenly convicted individuals to tether those claims to

II. BURDEN OF PROOF

Having recognized the claim, the Court must determine the burden of proof to apply. In Herrera, the Supreme Court explained:

> [B]ecause of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high.

506 U.S. at 417 (emphasis added). This language was later elaborated on in House when the Supreme Court explained that "[t]he sequence of the Court's decisions in Herrera and Schlup—first leaving unresolved the status of freestanding claims and then establishing the gateway standard—implies at the least that Herrera requires more convincing proof of innocence than Schlup." House, 547 U.S. at 555. The Supreme Court has also stated:

> The meaning of actual innocence as formulated by Sawyer, and Carrier does not merely require a showing

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constitutional mistake, the system suffers twice—once for its mistake and again for the "error" that was manufactured to allow the claim of innocence to be heard. Finally, even if this right does implicate a state's interest in finality of judgment, it is difficult to imagine that a state's finality interest can actually override an innocent individual's interest in not being punished. Cf. Patterson, 432 U.S. at 208 (" '[I]t is far worse to convict an innocent man than to let a guilty man go free.' " (quoting Winship, 397 U.S. at 372)); Winship, 397 U.S. at 364 ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

> that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty. It is not the district court's independent judgment as to whether reasonable doubt exists that the standard addresses; rather the standard requires the district court to make a probabilistic determination about what reasonable, properly instructed jurors would do. Thus, a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.

Schlup, 513 U.S. at 329 (emphasis added). Accordingly, it is clear that the standard must be (1) extraordinarily high, (2) more demanding than Schlup, and (3) crafted from the perspective of a reasonable juror.

Mr. Davis contends that the proper burden of proof is to require a showing of "a clear probability that any reasonable juror would have reasonable doubt about his guilt." (Doc. 27 at 30 (emphasis omitted).) Arguing before this Court, Mr. Davis clarified "clear probability" to mean a sixty percent chance. (Evidentiary Hearing Transcript at 513.) Based on Justice White's lone concurrence in Herrera and the dissent in House, the State argues that the standard should be that "no rational trier of fact could find proof of guilt beyond a reasonable doubt."[37] (Doc. 21 at 51-52 (quotations and alterations in original omitted).)

[37] This is essentially the same burden of proof applicable to a claim under Jackson v. Virginia, 443 U.S. 307, 318-19 (1979)

Schlup offers a guiding principle for crafting the appropriate burden of proof: " 'a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " Schlup, 513 U.S. at 325 (quoting Winship, 397 U.S. at 369 (Harlan, J., concurring)). This suggests that the burden should be directly related to how much confidence can be placed in a jury verdict in a given situation. Conceptually, there are three general reasons why a jury might reach an erroneous verdict: (1) a constitutional error led a jury to consider something inappropriate or caused patently important evidence to be withheld, (2) a jury heard a set of facts that was complete at the time of trial but later found to be incomplete based on evidence that surfaced subsequent to the trial, and (3) a jury made an innocent mistake based upon the evidence before it. Said differently, the totality of the evidence heard by the jury vis-à-vis the understanding of that evidence at the time of habeas can be described three ways: (1) corrupted, (2) incomplete, or (3) complete.

("[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."), which sets forth the burden for showing that the evidence at trial was insufficient to establish guilt beyond a reasonable doubt.

The highest degree of confidence can be placed in a jury verdict when the jury heard the complete body of relevant evidence. This scenario has already given rise to a standard of review on habeas. When a petitioner challenges the sufficiency of the evidence at his trial, Jackson v. Virginia asks whether, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 318-19 (1979). Because there should be more confidence in a jury verdict rendered after a jury has heard a complete body of evidence, the Court concludes that this standard—the one proffered by the State—is too high.

The lowest degree of confidence in a jury verdict would presumably occur when the jury hears a corrupted body of evidence. Because the procedural protections in place to protect the innocent from conviction have been breached, confidence in the result of the trial is generally undermined. Accordingly, the Supreme Court has adopted a relatively low burden of proof in these cases, requiring a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327. As the Supreme Court has already explained,

this burden of proof is too low for this case.[38] House, 547 U.S. at 555.

This case, which argues that the evidence heard at trial was incomplete[39] in some key manner, falls in the middle. It requires a burden higher than House, but lower than Jackson. In Schlup, the Supreme Court discussed three standards: the "more likely than not"[40] standard adopted by Schlup, the "no rational trier of fact" standard from Jackson, and the "clear and convincing"[41] standard in Sawyer. Schlup, 513 U.S. at 327-30.

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[38] While Mr. Davis asserts that Schlup equates to a fifty-one percent chance, and his standard requires a sixty percent likelihood, the Court does not see any meaningful difference between those two standards. Even if this nine percent difference is meaningful, proof to a sixty percent certainty is not an "extraordinarily high" burden of proof. For example, if one were to receive sixty percent of his paycheck each month, he would not say that he was receiving an extraordinarily high portion of his paycheck. Accordingly, the Court rejects Mr. Davis's proposed standard as inconsistent with existing law. See Herrera, 506 U.S. at 417.

[39] The Court finds it fair to characterize recantation evidence or new scientific evidence as evidence that bears on the completeness of the body of evidence at trial. While the new evidence may change the manner in which the prior evidence is interpreted and the ultimate outcome of the case, it does not nullify the existence of the prior evidence.

[40] This standard was originally announced in Murray v. Carrier, 477 U.S. 478, 496 (1986), and adopted as the appropriate standard for gateway claims of actual innocence in Schlup, 513 U.S. at 327-32.

[41] Sawyer v. Whitley, 505 U.S. 333 (1992) set the standard of proof for showing "actual innocence" in the context of an erroneous jury verdict with respect to the sentencing phase of a capital trial. The Sawyer standard requires a petitioner to show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him

The Supreme Court has already explained that the showing of "more likely than not" imposes a lower burden of proof than the "clear and convincing" standard required under Sawyer. Schlup, 513 U.S. at 327. And, in the same opinion, it implied that the Sawyer standard was not quite as high as that of Jackson, which required a "binary response" as to whether "the trier of fact has power as a matter of law or it does not." Schlup, 513 U.S. at 330. While Sawyer is a factually distinct case,[42] it represents the only standard for considering actual innocence endorsed by the Supreme Court that falls in between Schlup and Jackson and appears to meet the "extraordinarily high" requirement of Herrera. Accordingly, the Court will borrow the "clear and convincing" language of Sawyer for this context. Mr. Davis must show by clear and convincing evidence that no reasonable juror would have convicted him in the light of the new evidence.[43]

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eligible for the death penalty under [State] law." 505 U.S. at 348.

[42] Sawyer applies in the context where one is "actually innocent of the death penalty." Schlup, 513 U.S. at 323 (internal quotations omitted). The Court has not borrowed this standard because it considers the question in this case analogous to the question of whether Mr. Davis is innocent of the death penalty. Rather, the Court has borrowed it because, based upon other Supreme Court case law, it is the only language that appears to accord with the other requirements for crafting a burden of proof in this case.

[43] The Court believes this standard to be appropriate because it comports with the high level of respect society has for jury verdicts rendered subsequent to an uncorrupted process, while

III. APPLICATION OF FACTS TO LAW

The Court now considers whether Mr. Davis has shown, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the evidence he has presented since trial.[44] Mr. Davis's post-trial evidence can be categorized by purpose: evidence that diminishes the State's initial showing of guilt and evidence that tends to prove innocence. The Court first considers each piece of evidence individually and then considers it holistically.

A. AEDPA and Factual Deference

Even in the context of an original habeas petition, the Anti-Terrorism and Effective Death Penalty Act ("AEDPA")

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acknowledging that even the best efforts of society may occasionally yield results that later prove clearly incorrect.

[44] In the case currently before this Court, Mr. Davis's guilt was proven at trial beyond a reasonable doubt, but not to a mathematical certainty. However, Mr. Davis does not challenge his conviction based on residual doubt. Nor can he, as such a challenge appears foreclosed by Supreme Court precedent. Cf. Oregon v. Guzek, 546 U.S. 517 (2006) (doubting that there is a right to even introduce mitigation evidence regarding residual doubt much less a mandate that elimination of all residual doubt is required prior to the imposition of the death penalty). If state prosecutors in Georgia are comfortable seeking the death penalty in cases of heinous crimes where their proof creates less than an absolute certainty of guilt, and the people of Georgia, through their validly enacted laws allow such a system knowing that it may occasionally result in the erroneous imposition of punishment, Guzek suggests that the Constitution will not interfere. Regardless, this question is not before the Court and will not be considered further. The Court considers only whether Mr. Davis has satisfied the requirements for establishing a freestanding claim of actual innocence as defined above.

requires deference to prior state court factual determinations.[45] 28 U.S.C. § 2254(d)(2), (e)(1); Felker v. Turpin, 518 U.S. 651,

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[45] The State contends that language in the transfer order requires 28 U.S.C. § 2244(b) to be applied. (Doc. 21 at 37, 62-63.) The Court disagrees. The transfer order required this Court to determine "whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." Davis, 130 S. Ct. at 1 (emphasis added). Section 2244(b)(2)(B) bars a Court from considering a claim unless its factual predicate could not be discovered through the exercise of "due diligence" and there is a showing of innocence. Section 2244(b)(2)(B)'s due diligence requirement addresses the availability of a claim at all stages of litigation, including prior collateral review, not simply its availability at trial. See In re Magwood, 113 F.3d 1544, 1548 (11th Cir. 1997). Accordingly, the language requiring this Court to consider the availability of evidence only post-trial does not track § 2244(b). And, as this Court has already explained, the Supreme Court's order actually implies that § 2244(b) is inapplicable. (Doc. 11 at 3 n.3.)

There are at least two reasons why these bars may not be applicable. First, applying these bars in the Supreme Court's original jurisdiction creates an oddity that allows the decision of a district court to bind the Supreme Court or limit its jurisdiction based on implied repeal of jurisdiction under AEDPA. Cf. McCleskey v. Zant, 499 U.S. 467, 479-81 (1991) (discussing the history of § 2244(b) and res judiciata); Rodriguez v. United States, 480 U.S. 522, 524 (1987) (implied repeals of jurisdiction are disfavored). Second, § 2244(b) likely binds only lower courts. The Supreme Court has already suggested that § 2244(b) does not bind it but only "informs" its jurisdiction. Felker v. Turpin, 518 U.S. 651, 662-63 (1996). This reading accords with both the structure of the bill, see 28 U.S.C. § 2244 (b) (specifically referencing circuit and district courts in § (b)(3), (4) respectively, and requiring each type of court to apply different burdens of proof to § (b)(1), (2), a structure that avoids the creation of duplicative text that would otherwise be required to reprint § (b)(1), (2) under § (b)(3), (4)), and AEDPA's legislative history, see 141 Cong. Rec. S7596-02 (daily ed. May 26, 1995) (statement of Senator Orrin Hatch) ("[W]e restrict the filing of repetitive petitions by requiring that any second petition be approved for filing in the district court by the court of appeals. A repetitive petition would only be permitted in two circumstances: One, if

662 (1996) ("Our authority to grant habeas relief to state prisoners is limited by § 2254 . . . ."). 28 U.S.C. § 2254(d)(2)[46] requires federal courts to defer to state court adjudications unless the state adjudication was based on an unreasonable determination of the facts. 28 U.S.C. § 2254(e)(1)[47] requires federal courts to defer to state court factual determinations unless they are disproven by clear and convincing evidence.[48] These two sections provide independent

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it raises the claim based on a new rule of constitutional law that is retroactively applicable; or, two, if it is based on newly discovered evidence that could not have been discovered through due diligence in time to present the claim in the first petition and that, if proven, would show by a clear and convincing evidence that the defendant was innocent." (emphasis added)).

[46] 28 U.S.C. § 2254(d)(2) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[47] 28 U.S.C. § 2254(e)(1) provides:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

[48] It bears noting that § 2254 (e)(1) deference is often inapplicable in this case. First, the State concedes this deference is inapplicable to witnesses who testified at the federal hearing, even if these witnesses' affidavits were

standards of deference that courts must be careful not to merge.[49] Miller-El v. Cockrell, 537 U.S. 322, 341-42 (2003).

The application of 28 U.S.C. § 2254(d)(2) and (e)(1) is especially convoluted in this case because this Court held an evidentiary hearing while the state court did not. The Eleventh Circuit has explained the problem created by AEDPA deference under these circumstances:

> The argument as to why § 2254(d) might not apply in certain instances in which a federal evidentiary hearing is premised in sound practicality. If the federal evidentiary hearing uncovers new, relevant evidence that impacts upon a petitioner's claim(s) and was not before the state court, it is problematic to ascertain how a federal court would defer to the state court's determination. That is, the new, relevant evidence was never before the state court so it never considered the impact of the evidence when denying relief, and there is arguably nothing to defer to.
>
> In contrast, the argument that a federal evidentiary hearing does not alter the federal

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considered by the state court. (Doc. 79 at 25-26.) Second, the order of the Supreme Court of Georgia mostly rejected the affidavits as insufficiently material to prove the ultimate fact in issue—Mr. Davis's innocence. Davis, 283 Ga. at 441-48, 660 S.E.2d at 358-63. Such determinations are relevant to § 2254(d)(2) deference rather than § 2254 (e)(1).

[49] Courts distinguish these sections as follows:

> § 2254(d)(2)'s reasonableness standard would apply to the final decision reached by the state court on a determinative factual question, [and] § 2254(e)(1)'s presumption of correctness . . . to the individual factfindings, which might underlie the state court's final decision or which might be determinative of new legal issues considered by the habeas court.

Teti v. Bender, 507 F.3d 50, 58 (1st Cir. 2007). The Court will follow this distinction while adjudicating Mr. Davis's claim.

> standard of review is as follows. AEDPA places a highly deferential standard of review in habeas cases and provides that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings" unless certain conditions are met. 28 U.S.C. § 2254(d). The words "shall" and "any" are powerful words and render AEDPA applicable to all claims raised in a habeas petition regardless of whether a federal evidentiary hearing is held. After all, AEDPA itself dictates under what circumstances a federal evidentiary hearing can be held. *See* 28 U.S.C. § 2254(e). A petitioner's habeas claim, even if subject to a proper federal evidentiary hearing, is still "any" claim for the purposes of § 2254(d)'s highly deferential standard of review, and the new evidence in the federal proceeding is considered in determining whether the state court reached an unreasonable determination.

LeCroy v. Sec'y, Fl. Dept. of Corr., 421 F.3d 1237, 1263 n.30 (11th Cir. 2005). The Supreme Court has not resolved this issue, and the circuit courts are split. Some hold AEDPA deference inapplicable under these circumstances. Bryan v. Mullin, 335 F.3d 1207, 1216 (10th Cir. 2003) (en banc); Nunes v. Mueller, 350 F.3d 1045, 1055 (9th Cir. 2003). One finds both sections applicable. Morrow v. Dretke, 367 F.3d 309, 315 (5th Cir. 2004). The majority of circuits adopt a middle ground that deference is applicable, but operates with decreased force. Teti, 507 F.3d at 58 (" '[T]he extent to which a state court provides a full and fair hearing is no longer a threshold requirement before deference applies; but it might be a consideration while applying deference under § 2254(d)(2) and § 2254(e)(1).' " (quoting Lambert v. Blackwell, 387 F.3d 210,

235 (3d Cir. 2004))); Lambert, 387 F.3d at 235 (same); see Brown v. Smith, 551 F.3d 424, 429 (6th Cir. 2008) (where federal habeas evidentiary hearing uncovers "substantial" new evidence, AEDPA deference does not apply); Matheney v. Anderson, 377 F.3d 740, 747 (7th Cir. 2004) (" 'The evidence obtained in such a hearing is quite likely to bear on the reasonableness of the state courts' adjudication . . . but we do not see why it should alter the standard of federal review.' " (quoting Pecoraro v. Walls, 286 F.3d 439, 443 (7th Cir. 2002) (alterations in original))). This Court concurs with the middle approach and applies it here. The Court now considers Mr. Davis's showing.[50]

B. Evidence Diminishing the State's Showing at Trial (Recantation Evidence)[51]

The Court begins by considering the recantation evidence. Courts look upon recantation evidence with suspicion. E.g., United States v. Baker, 479 F.3d 574, 578 (8th Cir. 2007); United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988);

[50] The Court notes that while AEDPA deference is applicable, it has not affected any of this Court's determinations. In all cases where this deference was applicable, this Court found itself in accord with the Supreme Court of Georgia's determinations.

[51] To the extent that it is relevant, the evidence regarding the bullets and shell casings both diminishes the State's showing at trial and tends to show innocence. As the primary focus is on Mr. Davis's ability to prove his innocence, the Court has discussed this evidence in the section regarding innocence. See Analysis Part III.C.iv.

United States v. Hedman, 655 F.2d 813, 818 (7th Cir. 1981). As the Eighth Circuit Court of Appeals has explained:

> It is easy to understand why this should be so. The trial is the main event in the criminal process. The witnesses are there, they are sworn, they are subject to cross-examination, and the jury determines whether to believe them. The stability and finality of verdicts would be greatly disturbed if courts were too ready to entertain testimony from witnesses who have changed their minds, or who claim to have lied at the trial.

United States v. Grey Bear, 116 F.3d 349, 350 (8th Cir. 1997).

Additionally, it bears noting that even with regard to credible recantations, not all recantations are of equal value. A witness may recant only a small, insignificant portion of his prior testimony, making the recantation irrelevant. In its closing argument at trial, the State explained that the evidence of the MacPhail murder[52] was (1) eyewitness testimony regarding who was wearing the white and yellow shirts, and the actions taken by the individual in each shirt;[53] (2) personal identifications of Mr. Davis as the shooter; and (3) secondhand confessions by Mr. Davis. (See Trial Transcript at 1496-1502.)

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[52] The State also referenced the evidence regarding bullets and shell casings. (Trial Transcript at 1502.) However, this evidence was offered to show that the same person who was responsible for the murder of Officer MacPhail was also responsible for the Cloverdale shooting, it was not offered as evidence to show that any specific individual committed either crime. (Id. at 1502-03.)

[53] The Court includes under this heading testimony that the same person—the one in the white shirt—both assaulted Larry Young and shot Officer MacPhail. (Trial Transcript at 1497.)

Accordingly, to actually diminish the State's case in a meaningful manner, a recantation would have to somehow attack one of these three types of evidence. With this background, the Court considers the recantation evidence.

i. Antoine Williams

Antoine Williams was the night porter at the Burger King on the night of the shooting. At trial, his testimony was used to establish that the person in the white shirt both struck Larry Young with the pistol and shot Officer MacPhail, and to directly identify Mr. Davis as the person in the white shirt. (Trial Transcript at 958-64, 969-70, 1497, 1499-1500.) Mr. Davis contends that Mr. Williams has since recanted his direct identification. (Doc. 2 at 6-7.)

The earliest statements from Antoine Williams are two statements given to the police in the days following the murder. In his first statement, he explains that the same person struck Larry Young and shot Officer MacPhail, and that this person was wearing a white shirt. (Pet. Ex. 32-OO at 1-2.) In his second statement, Antoine Williams identified Mr. Davis as the shooter from a photo array with a sixty percent certainty. (Pet. Ex. 32-PP at 1-2.) He also stated that he could distinguish yellow and white on the night in question, despite watching the events through the tinted windows of his car. (Id. at 1-2.)

At trial, Mr. Williams identified Mr. Davis as the shooter and testified that the same person who struck Larry Young shot Officer MacPhail. (Trial Transcript at 958-64.) However, he initially backed off his earlier statement about his ability to distinguish the yellow and white shirts.[54] (Id.) Mr. Williams next statement, the recantation affidavit, stated that he was unsure of his direct identification of Mr. Davis as the shooter.[55] (Doc. 3, Ex. 4 at 3.)

At the evidentiary hearing, Mr. Williams testified that he was not sure who shot the police officer and that he felt pressure to identify Mr. Davis as the shooter at trial. (Evidentiary Hearing Transcript at 12-15.) However, Mr. Williams never testified that his earlier statement or testimony were false, only that he could not remember what he said.[56] (Id.

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[54] Despite initially recanting his statement regarding the shirt colors, Mr. Williams ultimately reaffirmed his statement to the police, explaining that his memory would have been better closer to the events in question. (See Trial Transcript at 958-60.)

[55] In his affidavit and at the evidentiary hearing, Mr. Williams also explained that he signed his police statements without reviewing them because he cannot read. (Doc. 3, Ex. 4 at 3; Evidentiary Hearing Transcript at 12-13.) However, this fact is a red herring. While Mr. Williams may have been unable to read his police statements, he does not contest the accuracy of their contents. (Evidentiary Hearing Transcript at 10-26.)

[56] For example, with respect to his initial identification of Mr. Davis, Mr. Williams testified: "Q: Do you remember telling [Detective Ramsey] you were 60 percent sure that Troy Davis was the person that shot Officer MacPhail? A: I maybe did, ma'am. I can't remember. Being honest, I can't." (Evidentiary Hearing Transcript at 21.) Saying that one cannot remember his prior testimony is different from admitting that it is false.

at 15-21.) He also contradicted his testimony regarding feeling pressured at trial during cross-examination:

> Q: But it's your testimony the police never pressured you to say anything in those two statements from August 19th or August—
>
> A: —Ma'am, nobody never pressured me, ma'am. I just . . .
>
> Q: And nobody suggested for you to say anything specific?
>
> A: No, ma'am, never.

(Id. at 24.)

Mr. Williams's testimony does not diminish the State's case. First, it is not proper to consider Mr. Williams's testimony a recantation—he never indicated that his earlier statements were false, only that he can no longer remember what he said. And, to the extent that his present testimony is inconsistent with what he had previously said, he indicated that his memory would have been better at the time of the crime. (Id. at 18.) Second, Mr. Williams testified that his prior testimony was never coerced by state officials.[57] (Id. at 18-19, 24.) This testimony accords with the record; Mr. Williams's statements were far from ideal and if the State was to coerce testimony, it surely would have coerced testimony more favorable

[57] Although Mr. Williams's own testimony undermines allegations of coercion, there was also credible testimony by the officers and prosecutors that Mr. Williams was not coerced. (Evidentiary Hearing Transcript at 306, 347, 442.)

than that actually provided by Mr. Williams. (See Pet. Ex. 32-PP at 1 (direct identification was only sixty percent certain); Trial Transcript at 958-60, 972 (unable to distinguish between yellow and white shirt).) Accordingly, Mr. Williams's testimony established only that his statements were never coerced and that he can no longer remember his previous statements—not that his prior testimony was false or, more importantly, that Mr. Davis was not the shooter.[58]

ii. Kevin McQueen

Kevin McQueen was the "jailhouse snitch." At trial, his testimony was used to relate Mr. Davis's confession to the MacPhail murder. (Trial Transcript at 1230-32, 1501.) Mr. Davis contends that Mr. McQueen admits his prior testimony was a "complete fabrication." (Doc. 2 at 7.)

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[58] Mr. Davis will surely object to this finding, claiming that Mr. Williams unequivocally identified Mr. Davis at trial as the shooter and has now "recanted" that identification. However, such a claim would be an exaggeration both as to the recantation and trial testimony. At trial, Mr. Williams's identification was not unequivocal, he testified on cross-examination that his initial identification was to a certainty of only sixty percent (Trial Transcript at 969-70) and never stated that his certainty had increased by the time of trial. Before this Court, Mr. Williams again expressed uncertainty as to the shooter's identity, but he never testified that Mr. Davis was, in fact, not the shooter. (See Evidentiary Hearing Transcript at 10-26.) This is a far cry from Mr. Williams testifying that he lied under oath when identifying Mr. Davis at trial or that, despite his prior statements, he is now sure that Mr. Davis was, in fact, not the shooter. Moreover, Mr. Williams testified that his memory would have been better closer to the events in question, implicitly deferring to his prior statements. (See id. at 18.)

At trial, Mr. McQueen claimed that Mr. Davis confessed the following events to him. Mr. Davis began his night by shooting at the group from Yamacraw—the Cloverdale shooting. (Trial Transcript at 1230.) Mr. Davis then went to his girlfriend's house for a time, and later to the Burger King to eat breakfast. (Id. at 1231.) While at Burger King, Mr. Davis ran into someone who "owed [him] money to buy dope." (Id.) There was a fight regarding the drug money, and when Officer MacPhail came over, Mr. Davis shot him. (Id. at 1231-32.)

At the hearing before this Court, Mr. McQueen testified that there was "no truth" to his trial testimony. (Evidentiary Hearing Transcript at 28.) He claimed that he fabricated the testimony to get revenge on Mr. Davis for an altercation in the jail and because he received benefits from the State. (Id. at 29, 32.) Mr. McQueen put the same recantation into an affidavit on December 5, 1996, but stated his only reason for testifying falsely was the altercation between he and Mr. Davis. (Doc. 3, Ex. 6 at 1-2.)

Other than claiming that Mr. Davis was guilty of both the MacPhail murder and Cloverdale shooting, Mr. McQueen's trial testimony totally contradicts the events of the night as described by numerous other State witnesses. Supra Background Part III.N. Indeed, while other witnesses described a fight over alcohol, Mr. McQueen described a fight over drugs; and

while other witnesses claimed Mr. Davis went to shoot pool immediately prior to the murder, Mr. McQueen claimed Mr. Davis went to get breakfast. Id. These inconsistencies make it clear that Mr. McQueen's trial testimony was false, a fact confirmed by Mr. McQueen's recantation.[59] (Evidentiary Hearing Transcript at 31.) Given that Mr. McQueen's trial testimony was so clearly fabricated, and was actually contrary to the State's theory of the case, it is unclear why the State persists in trying to support its veracity. (Id. at 33-39.) Regardless, the recantation is credible, with the exception of the allegation of prosecutorial inducements, but only minimally reduces the State's showing at trial given the obviously false nature of the trial testimony.[60]

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[59] While the Court credits Mr. McQueen's recantation, it does not credit the portion of his testimony claiming that he received inducements to testify at trial. As Mr. Lock credibility testified, Mr. McQueen received no favorable treatment for his testimony. (Evidentiary Hearing Transcript at 453-54 ("Q: So my question to you, Mr. Lock, is: to your knowledge as the chief assistant district attorney at this time did Mr. McQueen get any benefit for the information that he was giving . . . regarding Mr. Davis? A: No, and I'm relatively certain that any assistant district attorney that contemplated doing that would have come to me about doing it.").)

[60] That is to say, if a witness testified credibly at trial and then recanted, that recantation would obviously be much more damaging to the State's case than a recantation by a witness who only confirmed what should have been apparent to all at the time of trial—that the testimony was fabricated.

iii. Jeffery Sapp

Jeffery Sapp was a long-time friend of Mr. Davis. At trial, Mr. Sapp's testimony was used to relate Mr. Davis's confession to the MacPhail shooting.[61] (Trial Transcript at 1251-52, 1501.) Mr. Davis contends that Mr. Sapp has "recanted his testimony in full" and that his false trial testimony was "the result of police pressure." (Doc. 2 at 7-8.)

Jeffery Sapp testified twice in this case, first at Recorder's Court and then at trial. Both times he testified that Mr. Davis confessed to shooting Officer MacPhail, but that Mr. Davis claimed the shooting was in self-defense. (Recorder's Court Transcript at 166-67; Trial Transcript at 1251-52.) Under direct-examination at trial, Mr. Sapp further testified that he had made up a portion of Mr. Davis's confession. (Trial Transcript at 1253.) In his recantation affidavit, Mr. Sapp claimed that he fabricated the entire confession due to police harassment. (Doc. 3, Ex. 7 at 1-2.) At the hearing before this Court, Mr. Sapp again testified that he falsified Mr. Davis's

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[61] Monty Holmes provided similar statements to the police regarding a confession by Mr. Davis. Supra Background Part I.T. Monty Holmes, who did not testify at trial, has since recanted his police statement, claiming police coercion. (Doc. 3, Ex. 33 at 2.) Because Mr. Holmes's testimony did not form a portion of the evidence presented to the jury, his recantation does not diminish the proof at trial. Moreover, the State provided credible, live testimony from Officers Ramsey and Oglesby that Mr. Holmes was not coerced by police. (Evidentiary Hearing Transcript at 247, 317.)

entire confession due to police pressure. (Evidentiary Hearing Transcript at 51-57.) In addition to this testimony, Mr. Sapp attempted to lie about other facts regarding this case to exculpate Mr. Davis. For example, he attempted to hide his knowledge of Mr. Davis's street name: Rough as Hell ("RAH").[62] (Id. at 61.)

Jeffery Sapp's recantation is valueless because it is not credible. First, as noted above, his false exculpatory testimony at the hearing indicates that he was not a credible witness. Second, the truth of his trial testimony is corroborated by other statements given to police. (Id. at 351.) Third, his claims of state coercion are impossible to square with various aspects of his allegedly false testimony, such as claiming that Mr. Davis acted in self-defense.[63] (Trial

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[62] Sapp testified as follows:

> Q: And what does Rah stand for?
>
> A: Raheem.
>
> Q: Does it also stand for "Rough as Hell?"
>
> A: No, ma'am. It's like a Muslim name that the older guys gave us to quit eating pork.

(Evidentiary Hearing Transcript at 61.) This testimony cannot be characterized as anything other than a direct lie by Mr. Sapp, who long ago testified to his knowledge of what RAH stood for. (Recorder's Court Transcript at 162.)

[63] Ironically, at the hearing there was credible testimony from Officer Ramsey that Mr. Davis's mother threatened Mr. Sapp

Transcript at 1253.) Indeed, if the State wanted to coerce false testimony, they would not include within it an affirmative defense. Also, Mr. Sapp felt comfortable enough at trial to claim that a portion of his police statement was false, dealing with some details of Mr. Davis's confession, but still testified that Mr. Davis confessed to the MacPhail shooting.[64] (Id. at

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should he testify at trial. (Evidentiary Hearing Transcript at 350-51.)

[64] Even if Mr. Sapp's claims of fabricating a confession were credible, they are not new evidence that was unavailable prior to trial. At trial he testified:

> Q: Do you recall making a statement to the police about this matter?
>
> A: Yeah.
>
> Q: Do you recall making the statement on August 21 in the middle of the afternoon?
>
> A: No, they came to my house that morning, about two o'clock in the morning.
>
> Q: Two o'clock in the morning?
>
> A: Yeah, beating on my door, woke me up, so you know, I just said a lot of stuff that I ain't even meant. A lot of stuff he didn't even tell me, I just made up.
>
> . . .
>
> Q: Do you remember what you said in that statement?
>
> A: No, I can't remember what I said.
>
> . . .
>
> A: He shot the officer and got a good look at him, and it was self-defense. And all the rest, I just said. He never did tell me any of that.

1251-55.) Fourth, his claims of state coercion are refuted by credible, contrary testimony from both prosecutors and Officer Ramsey. (Evidentiary Hearing Transcript at 240, 442, 465.) In sum, neither Mr. Sapp's recantation nor his claims of police coercion are credible. Accordingly, his recantation does not diminish the State's case.

iv. Darrell Collins

Darrell Collins was the third individual involved in the altercation with Larry Young. At trial, he testified that Mr. Davis was wearing the white shirt and assaulted Larry Young.[65] (Trial Transcript at 1124, 1128, 1158, 1497.) According to Mr. Davis, Darrell Collins has since recanted the latter portion of that testimony, which was originally secured through police coercion. (Doc. 2 at 6.)

In statements that Mr. Collins gave to the police in the days following the shootings, he stated that Mr. Davis was responsible for the Cloverdale shooting, struck Larry Young on

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(Trial Transcript at 1253.) His present recantation is a second attempt at recantation in which he goes further than he did at trial; it is new only in its breadth and rationale, not in its existence. Moreover, it is unclear why, if Mr. Sapp was being coerced to testify, he felt comfortable testifying that his previous inculpatory testimony was largely false.

[65] Mr. Collins also told the police that Mr. Davis was responsible for the Cloverdale shooting, but recanted this testimony at trial. (Trial Transcript at 1120.) He also testified at trial that he included this in his police statement due to police coercion. (Id. at 1137.)

the head, and wore a white shirt on the night of the incidents. (Pet. Ex. 32-C at 1-2, Pet. Ex. 32-D at 2.) At the trial, Mr. Collins reaffirmed that Mr. Davis was wearing the white shirt and assaulted Mr. Young. (Trial Transcript at 1124, 1128, 1158.) However, Mr. Collins testified that he lied about Mr. Davis's involvement in the Cloverdale shooting due to police intimidation. (Id. at 1120.)

In his recantation affidavit, Mr. Collins claimed a second lie—that he never saw Mr. Davis strike Larry Young. (Doc. 3, Ex. 3 at 2-3.) He averred that he was comfortable revealing the first lie at trial but not the second because he felt the police cared more about whether Mr. Davis assaulted Mr. Young than Mr. Davis's responsibility for the Cloverdale shooting. (Id.) At the hearing, Mr. Collins again claimed that he lied about both the assault on Larry Young and the Cloverdale incident due to police coercion. (Evidentiary Hearing Transcript at 83, 91, 94.) Specifically, he claims that he simply parroted what the police told him to say. (Id. at 88-91, 96, 106-07, 118.) However, he did not recant his earlier testimony that Mr. Davis was wearing the white shirt on the night of the shootings.[66] (Id. at 115, 129.)

[66] At the hearing, Mr. Collins did not recant his testimony regarding the white shirt. Instead, he testified that he presently had no memory of what color shirt Mr. Davis was wearing that night, but would assume that whatever he told the

Mr. Collins testimony is neither credible nor a full recantation. First, regardless of the recantation, Mr. Collins's previous testimony, that has never been unequivocally recanted, still provides significant evidence of Mr. Davis's guilt by placing him in the white shirt. Second, if Mr. Collins's claim that he simply parroted false statements fed to him by police is truthful, query why Mr. Collins never directly identified Mr. Davis as Officer MacPhail's murderer. Surely, this would have been the best available false testimony, and given Mr. Collins's proximity to the murder it would have been as reasonable as any other false testimony. Third, there was credible testimony from Officer Sweeney and Mr. Lock that Mr. Collins's testimony was not coerced.[67] (Id. at 322-23, 442.)

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police about the color of Mr. Davis's shirt would have been a lie because all inculpatory testimony he provided is presumptively false in his mind. (Evidentiary Hearing Transcript at 129.) Of course, that statement is very different from stating that, as a matter of his own knowledge, he is sure that he was lying when he placed Mr. Davis in the white shirt.

[67] Further, even if Mr. Collins's allegations regarding coercion and false testimony are true, they are not new. Mr. Collins testified at trial that he was coerced and that his statements regarding Mr. Davis's involvement in the Cloverdale shooting were fabricated. (Trial Transcript at 1143.) Moreover, his explanation as to why he revealed only the lie regarding the Cloverdale shooting at trial is not believable. (See Doc. 3, Ex. 3 at 2-3 (explaining that Mr. Collins believed the police cared more about his false testimony regarding Mr. Young than the Cloverdale incident).) Indeed, it would be puzzling to think that the police would not find Mr. Collins's accusations of harassment in the context of the Cloverdale shooting offensive but would be bothered by the exact same allegations with respect to the assault on Larry Young.

Fourth, Mr. Collins generally lacked credibility, testifying to an implausible version of events: that he was less than ten feet[68] from Larry Young when the assault occurred and did not turn away from the confrontation until Officer MacPhail arrived, but saw nothing. (Id. at 83-84, 109-10.) Given the close proximity, it would be safe to assume that surely Mr. Collins saw either Mr. Coles or Mr. Davis strike Mr. Young—not that Mr. Coles simply saw nothing. Because Mr. Collins continues to provide evidence of Mr. Davis's guilt and his recantation is not credible, his testimony does not diminish the State's case.

v. Harriett Murray

Harriett Murray was Larry Young's girlfriend. At trial, her testimony was used to place Mr. Davis in the white shirt and to directly identify him as the gunman in the MacPhail shooting. (Trial Transcript at 846-51, 856, 1497-98.) Mr. Davis contends that Ms. Murray's "recantation" affidavit is important because it described Mr. Coles and not Mr. Davis as the shooter. (Doc. 2 at 7.) Ms. Murray is deceased and did not testify at the evidentiary hearing.

The first recorded statements by Ms. Murray are two police statements; one on August 19, 1989 and one on August 24, 1989.

[68] Mr. Collins testified that he was as close to the assault as he was to the court reporter while he was on the witness stand—a distance of approximately five feet. (Evidentiary Hearing Transcript at 112.)

In the former, she described Officer MacPhail's shooter as wearing a white shirt. (Pet. Ex. 32-U at 2.) In the latter, Ms. Murray identified Troy Davis as the shooter by first identifying Mr. Davis as one of the three men at the shooting, and then using a process of elimination—she eliminated Mr. Coles as the shooter because she recognized him as the person in the yellow shirt and Mr. Collins because he was too short to be the person in the white shirt. (Pet. Ex. 32-V at 2.)

During her Recorder's Court and trial testimony, Ms. Murray testified that the shooter was wearing a white shirt and was the same person who assaulted Mr. Young. (Recorder's Court Transcript at 56-58, 60-63; Trial Transcript at 846-51.) At trial, Ms. Murray also directly identified Mr. Davis as the gunman. (Id. at 865.) Ms. Murray was also thoroughly cross-examined at trial as to discrepancies between her various statements regarding the assault on Larry Young, and her difficulty in indentifying Mr. Davis as Officer MacPhail's murderer. (Id. at 871-79, 888-89.)

Ms. Murray's "recantation" is an unnotarized affidavit, begrudgingly obtained. (Evidentiary Hearing Transcript at 41 ("Q: Mr. Hanusz, can you explain why the affidavit was not notarized. A: The affidavit was not notarized because neither Mr. Mack nor myself are South Carolina notaries, and Ms. Murray would not allow us time to get a notary or accompany us to a

notary to have it sworn.").) It does not contain any direct recantation, any admission that Ms. Murray lied under oath, or even a statement that Ms. Murray was aware that her affidavit varied from her trial testimony.[69] (Doc. 3, Ex. 8 at 1.) The only "recantation" in the affidavit is an indirect one—Ms. Murray states that she saw the "man who was arguing with Larry, chasing him from the Time-Saver, and who slapped Larry shoot the police officer." (Id. (emphasis added).) Mr. Davis finds this change important because Ms. Murray indicated that Mr. Coles was arguing with Mr. Young, despite testifying that Mr. Davis slapped Larry Young and shot Officer MacPhail. On this basis, Mr. Davis reasons that Ms. Murray has now identified Mr. Coles as the shooter instead of Mr. Davis. (Doc. 2 at 7.)

This affidavit is not helpful to Mr. Davis's showing because it seems unlikely that it was intended to recant or alter Ms. Murray's testimony regarding who shot Officer MacPhail. It would have been a simple matter for Ms. Murray to directly state that her identification at trial of Mr. Davis as the murderer was mistaken, but she chose not to do so. To the contrary, her affidavit, at first blush, actually appears to affirm her trial testimony; only a close examination reveals the

[69] The affidavit does not allege police coercion. (Doc. 3, Ex. 8.) However, it bears noting that there was credible testimony at the hearing that Ms. Murray was not coerced. (Evidentiary Hearing Transcript at 288-89.)

minor inconsistency—that the same person who shot Officer MacPhail and assaulted Larry Young, also argued with Larry Young. (See Doc. 3, Ex. 8.) Given that Ms. Murray spent a minimal amount of time reviewing the affidavit, even refusing to wait to have it notarized, it seems likely that she was unaware of this inconsistency. (See Evidentiary Hearing Transcript at 41.) This reading is confirmed by her behavior regarding the securing of the affidavit. Surely if Ms. Murray believed her testimony placed an innocent man on death row, she would have found time to wait for a notary public to validate her statement.

More importantly, it is not obvious that the implication of this "recantation" even exculpates Mr. Davis. Ms. Murray's affidavit simply states that the same individual who assaulted Larry Young and shot Officer MacPhail, also argued with Larry Young. (Doc. 3, Ex. 8 at 11.) Nowhere does it provide any identifying information as to who took all three actions. That is, there is no way to know whether Ms. Murray believed that Mr. Coles or Mr. Davis took all three actions. Moreover, the affidavit states that the individual argued with Larry Young, it does not attribute any specific threats to him. (Id.) It could easily be that Ms. Murray considered all three of the individuals to have been "arguing" with Larry Young, an interpretation that does not require any implied recantation of

Ms. Murray's prior testimony. Accordingly, the Court finds this affidavit valueless to Mr. Davis's showing.[70]

vi. Dorothy Ferrell[71]

Dorothy Ferrell was a guest at the Thunderbird Motel, located across Oglethorpe Avenue from the Burger King parking lot. At trial, Ms. Ferrell's testimony was used to show that the shooter was wearing a white shirt and to directly identify Mr. Davis as the gunman. (Trial Transcript at 1015, 1021, 1497, 1499.) Mr. Davis contends that Ms. Ferrell has clearly disavowed her prior statement, stating that she lied at his trial based on promises of favorable treatment by the District Attorney. (Doc. 2 at 5-6.) Mr. Davis intentionally declined to allow Ms. Ferrell to testify, preventing her testimony from being challenged on cross-examination and denying this Court the

[70] Even if this Court adopted Mr. Davis's reading of this affidavit, it would be valueless because it contains no new evidence. As Mr. Davis notes, the only way to understand this affidavit as a recantation is by reference to inconsistencies between her initial police statements and later testimony. (Doc. 2 at 7.) These same inconsistencies were known to Mr. Davis at trial and were put before the jury. (Id. at 871-79, 888-89.)

[71] At the hearing, the admission of Ms. Ferrell's affidavit was discussed, but never decided due to an intervening discussion. (Evidentiary Hearing Transcript at 468-73.) However, Ms. Ferrell's affidavit is already in the record in this case because it was presented with Mr. Davis's first federal habeas petition. (See Doc. 3 at 2.) Therefore, resubmitting it at the hearing was unnecessary to require its consideration by this Court.

opportunity to personally assess her credibility. (Evidentiary Hearing Transcript at 272-73.)

Ms. Ferrell gave two statements to the police: one on August 19, 1989 and one on August 24, 1989. In the former, she described the shooter as wearing a white shirt. (Pet. Ex. 32-Y at 2.) In the latter, she again related that the shooter was wearing a white shirt. (Pet. Ex. 32-Z at 4.) She also identified Mr. Davis from a photo line-up and discussed a prior identification of Mr. Davis based on a picture she saw in a police cruiser; however, she admitted to seeing a picture of Mr. Davis on the news between the two identifications. (Id. at 2-4.) Both at the probable cause hearing and at trial, Ms. Ferrell testified that that shooter was wearing a white shirt and directly identified Mr. Davis as the shooter. (Recorder's Court Transcript at 137-40; Trial Transcript at 1015, 1021.) At trial, a number of inconsistencies between her trial testimony and prior testimony were pointed out for the jury during cross-examination. (Id. at 1043-52.)

In her recantation affidavit, Ms. Ferrell claims that she never saw who shot the police officer and that her testimony was coerced. (Doc. 3, Ex. 1.) Mr. Davis has also submitted a letter from Ms. Ferrell to District Attorney Spencer Lawton,

asking for special treatment for her trial testimony.[72] (Doc. 3, Ex. 2.) Ms. Ferrell did not testify at the evidentiary hearing.[73] Unlike Ms. Murray, Ms. Ferrell was available to testify and, in fact, was sitting just outside the courtroom waiting to be called to testify. (Evidentiary Hearing Transcript at 272-73.) Despite her ready availability, Mr. Davis made the tactical decision not to call her to the witness stand.[74] (Id.) This decision is especially curious because, based upon the contents of her affidavit and her lack of any obvious connections to Mr. Davis, it would appear she should have been his star witness.

Ms. Ferrell's affidavit is a clear recantation, but Mr. Davis's intentional decision to keep Ms. Ferrell from testifying destroys nearly its entire value. In determining actual innocence, "affidavits are disfavored because the affiants'

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[72] At the evidentiary hearing, Ms. Ferrell did not testify at all, and Mr. Lawton was never questioned regarding inducements to Dorothy Ferrell. (Evidentiary Hearing Transcript at 456-65.) Even if the letter was sent, there is no evidence that Mr. Lawton offered any inducement to Ms. Ferrell in exchange for her testimony.

[73] Given that Mr. Davis specifically requested this hearing, claiming that a determination based on affidavits was insufficient (Doc. 2 at 28), his decision to rely on an affidavit where live testimony was readily available strongly suggests his belief that this recantation would not have held up under cross-examination.

[74] Mr. Davis explained the decision not to call Ms. Ferrell as based upon "the circumstances under which she's been avoiding the Petitioner made us reluctant to call her, even though she was perfectly willing to meet with the state yesterday." (Evidentiary Hearing Transcript at 273.)

statements are obtained without the benefit of cross-examination and an opportunity to make credibility determinations." Herrera, 506 U.S. at 417. Surely, this general antipathy towards affidavit testimony counts double where the affiant is available, and the affidavit is submitted in lieu of live testimony to prevent cross-examination and credibility determinations.[75] Moreover, much of Ms. Ferrell's affidavit testimony was directly contradicted by credible, live testimony at the hearing. Officer Ramsey testified that he never coerced her testimony in any way or suggested what the contents of her testimony should be, and that Ms. Ferrell actually approached a different officer without solicitation and identified Mr. Davis as the shooter. (Evidentiary Hearing Transcript at 342-44.) And, Mr. Lock credibly testified that he never attempted to coerce a witness to stick to a prior statement. (Evidentiary Hearing Transcript at 442.) Given the suspicious manner in which this recantation was presented and the credible live testimony contradicting it, the recantation holds very little weight.

[75] This Court made very clear to Mr. Davis that presenting the affidavit instead of live testimony would severely diminish the value of its contents because he was intentionally preventing the State from cross-examining the witness. (Evidentiary Hearing Transcript at 272-73.) Mr. Davis was apparently so concerned as to what Ms. Ferrell would say on the stand that he explained, "[w]e understand that her testimony is not going to be afforded as much weight. We're okay with that." (Id. at 273.)

vii. Larry Young

Larry Young was the individual assaulted in the Burger King parking lot. At trial, his testimony was used to establish that his assailant was definitely not the person in the yellow shirt, that the person in the yellow shirt was Mr. Coles, and that the person in the white shirt struck him. (Trial Transcript at 801-02, 805-06, 811-13, 832-33, 1497.) Mr. Davis contends that Mr. Young has recanted his trial testimony. (Doc. 2 at 6.)

Mr. Young gave a statement to the police on August 19, 1989. He stated that he was not sure, but that he believed his assailant was the man in the white shirt. (Pet. Ex. 32-N at 3.) He also gave a detailed description of the man in the yellow shirt. (Id. at 6.) At the probable cause hearing, Mr. Young testified that the person in the yellow shirt was Mr. Coles, and that he was assaulted by someone other than Mr. Coles, likely the person in the white shirt. (Recorder's Court Transcript at 12-14, 18-21, 43.) At trial, Mr. Young testified that he was arguing with the person in the yellow shirt, that the person in the yellow shirt was not Mr. Davis, and that he was not sure who struck him but did not believe it was the person in the yellow shirt.[76] (Id. at 801-02, 805-06, 811-13, 832-33.) In his

[76] While Mr. Young's testimony indicated that he did not know exactly who struck him, in closing argument the prosecutor did treat Mr. Young's testimony as claiming that the individual in the white shirt assaulted him. (Trial Transcript at 1497.)

recantation affidavit, he claims that the police refused to allow him medical treatment and that his testimony was coerced. (Doc. 3, Ex. 5.) Like Mr. Collins, Mr. Young claims he testified by simply stating what the police wanted him to say. (Id.) Mr. Young was included on Mr. Davis's witness list and was expected to testify at the evidentiary hearing. (Doc. 45 at 1.) However, Mr. Young was never called to the stand.

Like the affidavit of Ms. Ferrell, the value of Mr. Young's affidavit is minimal. First, affidavits are disfavored in this context because they do not allow for cross-examination and credibility determinations. Herrera, 506 U.S. at 417. Just as with Ms. Ferrell, Mr. Davis chose to present less reliable affidavit evidence of Mr. Young's testimony to avoid cross-examination. Second, Officer Whitcomb testified credibly that he neither coerced Mr. Young's testimony nor suggested to him what to say. (Evidentiary Hearing Transcript at 253-55.) Mr. Young was not present to contradict this testimony, and his affidavit is insufficient for the task.[77] Accordingly, this

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Accordingly, the Court will treat Mr. Young's testimony as if it was used to help establish that the white shirt assaulted him.

[77] Moreover, as with many other witnesses, if the State was prepared to coerce false testimony, they could have coerced much more inculpatory information. Mr. Young was at the scene of the murder and was the victim of the assault. Surely the State would have had Mr. Young directly identify Mr. Davis at trial if they were looking to coerce false testimony.

affidavit, like Ms. Ferrell's, carries some, but not much weight.

viii. Summary

Not all recantations are created equal; a witness may recant only a portion of their testimony or the witness may recant in a manner that is not credible. To hear Mr. Davis tell it, this case involves credible, consistent recantations by seven of nine state witnesses. (Doc. 2 at 5-11.) However, this vastly overstates his evidence. Two of the recanting witnesses neither directly state that they lied at trial nor claim that their previous testimony was coerced. Supra Analysis Parts III.B.i (Antoine Williams), III.B.v (Harriet Murray). Two other recantations were impossible to believe, with a host of intrinsic reasons why their author's recantation could not be trusted, and the recantations were contradicted by credible, live testimony. Id. Parts III.B.iii (Jeffrey Sapp), III.B.iv (Darrell Collins). Two more recantations were intentionally and suspiciously offered in affidavit form rather than as live testimony, blocking any meaningful cross-examination by the state or credibility determination by this Court. Id. Parts III.B.vi (Dorothy Farrell), III.B.vii (Larry Young). Moreover, these affidavit recantations were contradicted by credible, live testimony. While these latter two recantations are not totally valueless, their import is greatly diminished by the suspicious

way in which they were offered and the live, contrary testimony. Finally, Kevin McQueen's recantation is credible, but his testimony at trial was patently false, as evidenced by its several inconsistencies with the State's version of the events on the night in question. Id. Part III.B.ii (Kevin McQueen). Accordingly, it is hard to believe Mr. McQueen's testimony at trial was important to the conviction, rendering his recantation of limited value. Ultimately, four of Mr. Davis's recantations do not diminish the State's case because a reasonable juror would disregard the recantation, not the earlier testimony; and the three others only minimally diminish the State's case.

C. Other Evidence

Mr. Davis also offers evidence to directly prove his innocence, as opposed to simply diminishing the State's case. This evidence includes: (1) hearsay confessions by Mr. Coles, (2) statements regarding Mr. Coles conduct subsequent to the murder, (3) alternative eyewitness accounts, and (4) new evidence regarding the physical evidence in this case.

i. Hearsay Confessions

Mr. Davis has proffered several hearsay confessions by Mr. Coles regarding the murder of Officer MacPhail. At the hearing,

both Mr. Hargrove[78] and Mr. Gordon[79] testified that Mr. Coles confessed Officer MacPhail's murder to them. (Evidentiary Hearing Transcript at 156-173, 192-94.) The record also contains affidavits from Shirley Riley[80] and Darold Taylor[81] relating hearsay confessions. (Doc. 3, Exs. 17, 18.) Mr. Davis contends that these confessions are "powerful" evidence of his innocence.[82] (Doc. 84 at 17.) While the confessions are not meaningless, they lack the power imparted to them by Mr. Davis.

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[78] Mr. Hargove testified that Mr. Coles confessed the murder to him while at a house party. (Evidentiary Hearing Transcript at 157, 162-63.)

[79] Mr. Gordon contends that Mr. Coles stated that "I shouldn't'a did that shit," but Mr. Gordon can only speculate as to the meaning of these words. (Evidentiary Hearing Transcript at 193-94.) It is not clear that "that shit" refers to murdering Officer MacPhail, it could just as easily refer to hassling Larry Young and starting the events of that evening in motion. However, for the purposes of this petition, the Court will assume that Mr. Coles was referring to Officer MacPhail's murder.

[80] Ms. Riley averred that Mr. Coles confessed the murder to her, but that she suspected the confession was a lie to impress her. (Doc. 3, Ex. 17 at 1.)

[81] Mr. Taylor stated that Mr. Coles once confessed the murder to him, but told Mr. Taylor to "stay out his business" when pressed on the issue. (Doc. 3, Ex. 18 at 5-6.)

[82] Mr. Davis attempted to offer an additional hearsay confession through Ms. Quiana Glover. The Court declined to admit this confession for reasons stated at the hearing and in its order on the motion for reconsideration. (Evidentiary Hearing Transcript at 480-83; Doc. 91.) However, the Court notes that it is aware of the contents of Ms. Glover's testimony. (Evidentiary Hearing Transcript at 483.) That testimony would have been cumulative and would have suffered from the same defects discussed in this section. Accordingly, had the Court considered the testimony, it would have had no effect on the outcome of this case.

Confessions composed of hearsay are "particularly suspect" because the reliability of the underlying confession will often be impossible to ascertain. See Herrera, 506 U.S. at 417. When other petitioners have attempted to use hearsay confessions as part of a Herrera showing, the showing was found wanting even when the confessions were offered in conjunction with other evidence of innocence. See, e.g., House, 547 U.S. at 555 ("We conclude here, much as in Herrera, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it."); Herrera, 506 U.S. at 417; Cooper v. Brown, 510 F.3d 870, 885 (9th Cir. 2007). The previous failures of such confessions to satisfy Herrera lead to the conclusion that while hearsay confessions may tip the balance in an otherwise close case, they will rarely, if ever, form the crux of a showing of actual innocence.[83]

This case illustrates exactly why this type of evidence is only marginally probative. Even if this Court found the

[83] This conclusion rests on sound considerations. As the Supreme Court of Georgia noted, if such proof could form the crux of a showing of innocence, it would be easy for " 'a person [to] subvert the ends of justice by [falsely] admitting the crime to others and then absenting himself.' " Davis, 283 Ga. at 444, 660 S.E.2d at 360 (quoting Timberlake v. State, 246 Ga. 488, 492, 271 S.E.2d 792, 796 (1980)) (alteration in original). Likewise, for any minimally connected convict, rounding up several persons who will concoct false confessions should not be difficult. This is likely why such proof has never been sufficient under Herrera. Cf. House, 547 U.S. at 540; Herrera, 506 U.S. at 417.

witnesses relating the confessions credible, that would not prove that Mr. Coles was being truthful when confessing to these witnesses.[84] Here, assuming Mr. Coles actually made the confessions, there is an obvious explanation for why he would have confessed falsely--he believed that his reputation as a dangerous individual would be enhanced if he took credit for murdering Officer MacPhail.[85] (See Doc. 3, Ex. 17 at 1.) Mr. Davis had the burden of proving the confessions were truthful and not made for the above reason.[86] Of course, the easiest way

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[84] One writer has explained the hearsay problem as follows:

> In the hearsay situation, two "witnesses" are involved. The first complies with all three of the ideal conditions[--oath, personal presence at trial, and cross-examination--]for the giving of testimony but merely reports what the second "witness" said. The second "witness" is the out-of-court declarant whose statement was not given in compliance with the ideal conditions but contains the critical information.

2 Kenneth S. Broun, McCormick on Evidence § 245 (6th ed. 2009). Because the important witness does not testify under ideal conditions, it becomes very difficult to gauge the accuracy and sincerity of the "second witnesses" testimony. See id.

[85] Indeed, Ms. Riley suspected that Mr. Coles was falsely confessing for this very reason. (Doc. 3, Ex. 17 at 1.)

[86] Mr. Davis attempts to turn his high burden into a prima facie one. He contends that once a hearsay confession is offered, regardless of its reliability, the Court must assume the truth of the matter asserted and the State has a duty to disprove it. (See Doc. 84 at 12.) This is incorrect, the State has no such burden. Of course, if Mr. Davis did offer truly persuasive evidence of the matter asserted in the hearsay confession or of his innocence, the State may have a need to call Mr. Coles to rebut Mr. Davis's case. That is likely why the alternative suspect was called in House, where the petitioner presented the hearsay confessions and disproved two highly probative pieces of

to meet that burden would have been to put Mr. Coles on the stand and show him not to be credible on this subject.[87] Additionally, if Mr. Davis had other highly probative evidence of his innocence or Mr. Coles's guilt—for example, if Mr. Coles firearm was found and determined to be the murder weapon—that too would render these confessions more meaningful. However, there is no truly persuasive evidence substantiating the hearsay confessions, so they are only of minimal value to this Court.[88]

ii. Mr. Coles's Conduct Immediately After the Shooting

Mr. Davis has presented evidence regarding Mr. Coles's "suspicious" conduct immediately subsequent to the shooting. At the hearing, April Hutchinson testified that, immediately after the murder, Mr. Coles asked her to walk with him so that it

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DNA evidence—blood on House's jeans and semen on the victim's nightgown—used to secure his conviction. 547 U.S. at 540-48.

[87] As Mr. Davis explained, Mr. Coles will likely deny his involvement in the crime and proffer some explanation for the confessions, or outright deny that he made them. (Evidentiary Hearing Transcript at 158-59.) However, the Court is not required to accept such testimony at face-value. In the end, Mr. Davis appeared to forget that the witness stand is the crucible of credibility; and his reluctance to put Mr. Coles to the test robbed the Court of its ability to accurately assess Mr. Coles's claim that he did not shoot Officer MacPhail.

[88] Further, it bears noting that one of the persons relating the confession—Mr. Gordon—was not a credible witness. See infra Analysis Part III.C.iii. His credibility is discussed fully in the section regarding alternate eyewitness accounts of the murder, which is the true import of his testimony.

would "seem like he didn't do anything."[89] (Evidentiary Hearing Transcript at 140.) The record also reflects affidavit evidence from Tonya Johnson, refelcting that Mr. Coles and his friend "Terry" disposed of firearms subsequent to the murder, and Anita Saddler, stating that Mr. Coles was carrying a firearm on the night of the MacPhail shooting.[90] (Doc. 3, Exs. 22, 25.)

Ms. Hutchinson's testimony does little to prove Mr. Coles's guilt. She testified that Mr. Coles wanted to walk with her so that it would "seem like he didn't do anything." (Evidentiary Hearing Transcript at 140.) However, there is no way to know what Mr. Coles meant by "do anything," rendering this testimony meaningless. When considering this statement, it must be remembered that Mr. Coles instigated the altercation with Larry Young, which lead directly to the assault of one person and the murder of another. It would not be surprising if, at the time,

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[89] Ms. Hutchinson also offered general testimony that Mr. Coles was a person of whom the community was afraid. (Evidentiary Hearing Transcript at 140-41.) This evidence is not probative of Mr. Coles's guilt—simply because Mr. Coles was feared does not mean that he was responsible for murdering Officer MacPhail.

[90] Ms. Saddler also averred that Mr. Coles was acting nervous and jittery, and appeared to have some knowledge regarding the MacPhail murder. (Doc. 3, Ex. 25 at 4.) Again, this does not show Mr. Coles's guilt. Given his proximity to the murder, it is not surprising that he appeared both nervous and knowledgeable in the wake of the shooting. Antoine Williams was also knowledgeable and nervous after witnessing the murder, but his nervousness is not meaningful proof that he murdered Officer MacPhail. (See Evidentiary Hearing Transcript at 20.)

Mr. Coles believed he was responsible for something illegal, even if he was not responsible for shooting Officer MacPhail.

The testimony regarding the guns is not irrelevant, but it is not highly probative either. Apparently, a disturbing number of people were armed on the night Officer MacPhail was murdered. At some point that evening Mr. Coles, Mr. Davis, "Terry," Mark Wilds, and Lamar Brown all carried a firearm. (Trial Transcript at 912-13; Doc. 3 Ex. 22; Evidentiary Hearing Transcript at 181.) Presumably, these individuals were not licensed to carry firearms, so they were engaging in illegal activity simply by virtue of possessing the weapons and would have had reason to hide their weapons. Indeed, "Terry" was also hiding his firearm, but no one contends that he shot Officer MacPhail. (Doc. 3, Ex. 22.) At best, then, the fact that Mr. Coles possessed a firearm simply shows only that he had the means to shoot Officer MacPhail, not that he was actually the gunman.[91]

iii. Alternate Eyewitness Accounts

Mr. Davis has presented several alternative eyewitness accounts regarding the events that occurred in the early hours of August 19, 1989. Two witnesses now directly state that they witnessed Mr. Coles murder Officer MacPhail. They are, Benjamin

[91] Also of import is the fact that this is not new evidence. Less than a week after the MacPhail shooting occurred, Mr. Coles admitted that he possessed a firearm the night of the murder. (Pet. Ex. 24-A.)

Gordon,[92] who testified at the hearing, and Joseph Washington, who testified at trial and provided his story through an affidavit. (Evidentiary Hearing Transcript at 184-85; Doc. 3, Ex. 27 at 1-2.) Three other witnesses cannot identify the murderer, but provide other potentially relevant details through affidavits. Gary Hargrove saw the body of the officer near Mr. Coles after the shooting. (Doc. 3, Ex. 15 at 1.) Daniel Kinsman avers that the shooter was left-handed and the gun was shiny. (Doc. 3, Ex. 28 at 2.) Peggie Grant claims to have seen Red Coles wearing a white shirt later that night. (Doc. 3, Ex 26 at 1.)

The Court begins with the eyewitness account from Mr. Gordon, whose testimony is not credible. At the evidentiary hearing, over twenty years after the murder, Mr. Gordon testified for the first time that he saw Mr. Coles shoot Officer MacPhail. (Evidentiary Hearing Transcript at 184-85.) This

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[92] Mr. Gordon also recanted some of his prior statements regarding who was responsible for the Cloverdale shooting. (Evidentiary Hearing Transcript at 178-79.) Several other affiants also provided testimony exculpating Mr. Davis from the Cloverdale shooting. (See Doc. 3, Exs. 30, 31, 32.) The Court does not discuss this testimony because the conviction for the Cloverdale shooting is not specifically challenged in this petition and is largely irrelevant to the murder conviction. (Doc. 2 at 2 ("Since Mr. Davis' trial, evidence has surfaced that shows not only that Troy Davis is innocent, but that Sylvester 'Redd' Coles murdered Officer MacPhail.").) As is explained below, Mr. Davis's conviction for the Cloverdale shooting followed from his conviction for the MacPhail murder, not vice-versa. Infra Analysis Part III.C.iv.

testimony marks the third version of Mr. Gordon's post-trial statement, which adds new exculpatory details each time. (See Doc. 3, Exs. 13, 14.) Mr. Gordon contends that his new eyewitness account was not provided earlier because he was fearful of Mr. Coles.[93] (Evidentiary Hearing Transcript at 191-92.) However, this explanation is belied by Mr. Gordon's previous conduct—this is not the first time he accused Mr. Coles of the murder despite previously stating that he did not see who shot Officer MacPhail. Specifically, in 2008, Mr. Gordon signed an affidavit relating a confession by Mr. Coles to the murder and stating that "I could not tell who done the shooting, but I distinctly recall seeing the person fire the second shot." (Doc. 3, Ex. 13.) It is difficult to understand why fear prevented Mr. Gordon from previously relating that he saw Mr. Coles shoot Officer MacPhail if, at that time, he felt comfortable relating Mr. Coles's confession to the murder. The only explanation for Mr. Gordon's ever-evolving testimony is that it changes to reflect whatever details he believes are necessary to secure Mr. Davis's release. Therefore, his testimony is not credible.

[93] He also testified that he was told to "stick" to his statement at trial. (Evidentiary Hearing Transcript at 203-04.) Given that Mr. Gordon was generally not credible and Mr. Lock testified credibly and contrarily, the Court credits Mr. Lock's testimony on this point. (Evidentiary Hearing Transcript at 442.)

Joseph Washington also claims, through an affidavit, to have witnessed Mr. Coles shoot Officer MacPhail, but his testimony is not credible.[94] (Doc. 3, Ex. 27 at 1-2.) At trial, Mr. Washington was badly impeached when cross-examination revealed inconsistent or missing details in his testimony, and he claimed the impossibility of having been two places at the same time. Supra note 9. Additionally, this testimony is suspect because it is presented in affidavit form, insulating Mr. Washington from being impeached again during a new cross-examination. Herrera, 506 U.S. at 417. The fact that Mr. Washington was badly impeached during his initial testimony, coupled with the presentation of this testimony in affidavit form, leads the Court to find it not credible.

The affidavits of Gary Hargrove and Daniel Kinsman provide indirect eyewitness testimony that does not further Mr. Davis's showing of innocence.[95] Mr. Kinsman stated that the barrel of the gun was "shiny" and that the shooter used his left hand. (Doc. 3, Ex. 28 at 2.) However, there is no evidence that either Mr. Coles or Mr. Davis are left handed. And, regardless

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[94] It is also important to note that Mr. Washington's eyewitness testimony is not new with the exception of the fact that he now avers that Mr. Coles was wearing a white shirt. (Doc. 3, Ex. 27.) Mr. Washington testified at trial that he witnessed Mr. Coles shoot Officer MacPhail. (Trial Transcript at 1341-47.)

[95] The Court reiterates that affidavit testimony is disfavored because it is obtained without the benefit of cross-examination and an opportunity to make credibility determinations. Herrera, 506 U.S. at 417.

of whether the barrel of the weapon was black or chrome, it could still have been "shiny." Therefore, this evidence neither exculpates Mr. Davis nor inculpates Mr. Coles. Gary Hargrove averred that he did not see the shooting, but that he saw the Officer's body near Mr. Coles immediately after the shooting, that Mr. Coles was stopped and facing the Officer when the shooting occurred, and that the person running away was Mr. Davis. This affidavit is not clear evidence of innocence and could be read as further evidence of Mr. Davis's guilt. Indeed, according to trial testimony, it was the individual who was running from the Officer that shot him. (See Trial Transcript at 848-51, 910-11.) Accordingly, these affidavits do not further Mr. Davis's showing.

Finally, Mr. Davis presented the affidavit of Peggie Grant, Ms. Hutchinson's mother. This affidavit places Mr. Coles in the white shirt soon after the murder occurred. (Doc. 3, Ex. 26.) Because this evidence was presented in affidavit form, it is disfavored and its value diminished. Herrera, 506 U.S. at 417. Moreover, this evidence is refuted by ample record evidence that either places Mr. Coles in the yellow shirt or Mr. Davis in white shirt. (See Trial Transcript at 805-06, 914, 959-60, 979-82, 1015-21, 1128, 1162-63, 1216-17.)[96] However, despite the

[96] One of the witnesses who testified on this subject was Eric Ellison. Given Mr. Davis's general allegations of coercion, it

fact that the contents of this affidavit are widely refuted, it does provide a small amount of additional value to Mr. Davis's showing by placing Mr. Coles in a white shirt.

iv. The Shell Casing

The final piece of evidence presented at this hearing was the new Georgia Bureau of Investigation ("GBI") Report regarding the munitions from the Cloverdale shooting and MacPhail murder.[97] (Pet. Exs. 31, 31-A.) The new report indicates that it is unclear whether the bullets found at the Cloverdale and MacPhail shooting were fired from the same firearm, despite noting "some agreement of individual characteristics."[98] (Pet. Ex. 31.) The shell casing tests were inconsistent, finding that some of the casings from the various shootings were fired in the same gun while others were not. (Id.)

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bears noting that there was credible testimony at the hearing indicating that Mr. Ellison was not coerced. (Evidentiary Hearing Transcript at 258-59.)

[97] The State introduced evidence regarding Mr. Davis's "bloody" shorts. (See Resp. Ex. 67.) However, even the State conceded that this evidence lacked any probative value of guilt, submitting it only to show what the Board of Pardons and Paroles had before it. (Evidentiary Hearing Transcript at 468-69.) Indeed, there was insufficient DNA to determine who the blood belonged to, so the shorts in no way linked Mr. Davis to the murder of Officer MacPhail. The blood could have belonged to Mr. Davis, Mr. Larry Young, Officer MacPhail, or even have gotten onto the shorts entirely apart from the events of that night. Moreover, it is not even clear that the substance was blood. (See Pet. Ex. 46.)

[98] The Court is able to determine the origin of the bullets and shell casings by correlating the evidence inventory sheets in the police report to the GBI Report. (See Resp. Ex. 30 at 295-302.)

In Mr. Davis's filings, the import of this evidence has become a moving target. Initially, he made little mention of it. (See Doc. 2 at 3.) Later, he used this evidence as proof of Mr. Coles's guilt and erroneous factfinding by the Georgia Supreme Court. (Doc. 27 at 4, 45.) Presently, he contends the shell casings were deposited by third parties, destroying the link between the two shootings. (Doc. 80 at 18.)

At trial, the munitions evidence was largely used to establish Mr. Davis's guilt for the Cloverdale shooting by bootstrapping it to his guilt for the MacPhail murder. During closing argument, the State explained the munitions evidence as follows:

> And then there are the silent witnesses in this case. Just as Davis, wearing a white shirt, pistol-whipped Larry and murdered Officer McPhail, so also did Troy Anthony Davis, using the same gun, shoot Micheal Cooper and murder Officer McPhail.
>
> You will recall the testimony of Roger Parian, director of the Crime Lab, when he was discussing the bullets. He was talking about the bullets from the parking lot of the Burger King and from the body of Officer McPhail, and he was talking then about comparing that with the bullet from -- that was recovered from Micheal Cooper's head when he'd been shot in the face.
>
> And what Roger Parian told you is that they were possibly shot from the same weapon. There were enough similarities in the bullets to say that the bullet that was shot in Cloverdale into Micheal Cooper was shot -- was possibly shot from the same gun that shot into the body of Officer McPhail in the parking lot of the Burger King.

> But he was even more certain about the shell casings. . . . He was quite more certain about that, and he said in fact that the one that was recovered from the Trust Company Bank right across from the Burger King parking lot was fired from the same weapon that fired four other shell casings that were recovered in Cloverdale right down the street from the pool party, Cloverdale and Audabon.

(Trial Transcript at 1502-03 (emphasis added).) Reading this argument, two facts are immediately apparent: (1) there was never a definitive contention at trial that the bullets matched and (2) the link between the shootings was used to prove that Mr. Davis not only shot Officer MacPhail but also Michael Cooper. This latter point is confirmed by the balance of the State's closing argument, which is dedicated almost entirely to eyewitness accounts regarding the MacPhail murder. (Id. at 1496-1502.)

There are two reasons why this report has limited value to showing Mr. Davis's innocence with respect to the MacPhail murder.[99] First, the munitions evidence only showed that the shootings were linked; it remained for the State to prove Mr. Davis's guilt as to one shooting before this evidence became relevant. Importantly, the shooting the State proved independent of the munitions was the MacPhail murder. (See Trial Transcript at 1496-1503.) Accordingly, disproving the

[99] The Court does not express an opinion on the relevance of this report to Mr. Davis's guilt regarding the Cloverdale shooting, as that issue is not before this Court. See supra note 92.

munitions evidence is not relevant to Mr. Davis's guilt of the MacPhail murder, even if it is cogent to the Cloverdale shooting. Second, it is not clear that the GBI report varies from the trial testimony. At trial, the testimony indicated a possibility that the bullets matched, a possibility that is also reflected in the GBI report. (Compare Trial Transcript at 1292, with Pet. Ex. 31.) Likewise, the GBI report does reflect that some of the shell casings matched, and it appears that the shell casings discussed at trial are listed as matching in the GBI report. (Compare Trial Transcript at 1294, with Pet. Ex. 31 ("Microscopic examination and comparison reveals the cartridge cases, Items 4C, 4F, 5C and 5F, were fired in the same firearm.").) Accordingly, whatever value this may have with respect to the Cloverdale shooting, it has minimal, if any, value to proving Mr. Davis innocent of the MacPhail murder.

v. Summary

Mr. Davis vastly overstates the value of his evidence of innocence. First, some of the evidence is not credible and would be disregarded by a reasonable juror. Specifically, the eyewitness identifications of Mr. Coles as the shooter by Mr. Gordon and Mr. Washington are not credible. Supra Analysis Part III.C.iii. Likewise, regardless of the credibility of the witnesses offering the hearsay confessions, it is difficult to credit the truth of the underlying statement, which is totally

uncorroborated.[100] Id. Part III.C.i. Indeed, one witness recounting such a confession doubted its truth. Id.

Second, other proffered evidence was not exculpatory with respect to the MacPhail murder. Specifically, to the extent that the munitions evidence has actually changed since trial, it is relevant to the Cloverdale shooting, not the MacPhail murder. Id. Part III.C.iv. Likewise, the eyewitness accounts of Gary Hargrove and Daniel Kinsman are inapposite. Id. Part III.C.iii.

Third, still other evidence that Mr. Davis brought forward is too general to provide anything more than smoke and mirrors. That is, that Mr. Coles was generally feared; possessed a gun, as did an alarming number of people that night; and acted nervous after the murder, as did several other witnesses does very little to actually suggest that Mr. Coles murdered Officer MacPhail. Id. Part III.C.ii. These facts could be true about any number of persons, regardless of whether they were murderers.

Fourth, Ms. Grant's affidavit testimony regarding Mr. Coles wearing a white shirt is likely to be discounted in light of an overwhelming body of contrary evidence. Id. Part III.C.iii. Finally, much of this evidence was proffered in affidavit form,

[100] As was explained, there is a strong explanation for why Mr. Coles may have confessed falsely, and Mr. Davis has done nothing to disprove this, despite having the burden to do so placed squarely on his shoulders. See supra Analysis Part III.C.i.

the value of which is seriously diminished. Herrera, 506 U.S. at 417.

D. Balancing of All of the Evidence[101]

The burden was on Mr. Davis to prove, by clear and convincing evidence, that no reasonable juror would have convicted him in light of the new evidence. In making this determination, the Court looks at all the evidence to make " 'a probabilistic determination about what reasonable, properly instructed jurors would do.' " House, 547 U.S. at 537-38 (quoting Schlup, 513 U.S. at 329).

The Court begins with the evidence that proved Mr. Davis's guilt. As was explained above, the State provided three types of evidence: (1) eyewitness testimony regarding who was wearing the white and yellow shirts, and what actions the individual in each shirt took; (2) personal identifications of Mr. Davis as the shooter; and (3) secondhand confessions by Mr. Davis. (See Trial Transcript 1496-1502.) The State offered significant testimony on these points. The following witnesses identified Mr. Davis as the person in the white shirt: Harriett Murray (id. at 846, 850, 862-65), Antoine Williams (id. at 959-64), Steven Sanders (id. at 979-83), Dorothy Ferrell (id. at 1020-21),

[101] 28 U.S.C. § 2254(d)(2) deference applies to the final factual determination in this case. However, this deference has not played a determinative role, as this Court concurs with the State Court's conclusion.

Darrell Collins (id. at 1128), and Eric Ellison (id. at 1216-17). Mr. Coles was placed in the yellow shirt by Larry Young (id. at 805-06) and Valerie Coles Gordon (id. at 1162-63). Four witnesses[102] stated that the person in the white shirt murdered Officer MacPhail (id. at 850, 959-60, 979, 1015), and four[103] directly identified Mr. Davis as Officer MacPhail's murderer (id. at 862-65, 963-64, 982-83, 1021). In addition, Harriett Murray (id. at 847-50), Antoine Williams (id. at 960-64), and Steven Sanders (id. at 979-82) indicated that the individual in the white shirt both assaulted Larry Young and murdered Officer MacPhail. Finally, Kevin McQueen (id. at 1231-32) and Jeffery Sapp (id. at 1251-52) related secondhand confessions from Mr. Davis.

Mr. Davis's proof to the contrary at trial included the testimony of Joseph Washington, who identified Mr. Coles as the individual who shot Officer MacPhail. (Id. at 1342-43.) Tayna Johnson testified that she observed Mr. Coles at the Cloverdale party on August 18, 1989 wearing a white shirt. (Id. at 1362-63.) She also testified that she observed Mr. Coles acting nervous after the MacPhail shooting. (Id. at 1361.) Jeffery

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[102] These witnesses were Harriett Murray (Trial Transcript at 850), Antoine Williams (id. at 959-60), Steven Sanders (id. at 979), and Dorothy Ferrell (id. at 1015).

[103] These witnesses were Harriett Murray (id. at 862-65), Antoine Williams (id. at 963-64), Steven Sanders (id. at 982-83), and Dorothy Ferrell (id. at 1021).

Sams testified that he saw Mr. Coles, not Mr. Davis, with a firearm the night of the MacPhail shooting. (Id. at 1377-81.) Mr. Davis's mother, Virginia Davis, testified that Mr. Davis left the house for the Cloverdale party wearing a multi-color shirt and the Mr. Davis could not have spoken to Mr. Sapp the afternoon of August 19, 1989. (Id. at 1389, 1411-12.) Finally, Mr. Davis took the stand in his own defense. He denied shooting at Mr. Ellison's car during the Cloverdale party (id. at 1417-18), assaulting Mr. Young (id. at 1423), and shooting Officer MacPhail (id. at 1424). Mr. Davis testified that he did not see who shot Officer MacPhail (id. at 1424), but stated that it was Mr. Coles who slapped Mr. Young (id. at 1423). Also, Mr. Davis denied speaking to Mr. Sapp on August 19, 1989. (Id. at 1431.)

Mr. Davis's new evidence does not change the balance of proof from trial. Of his seven "recantations," only one is a meaningful, credible recantation. Supra Analysis Part III.B. The value of that recantation is diminished because it only confirms that which was obvious at trial—that its author was testifying falsely. Id. Part III.B.ii (Kevin McQueen). Four of the remaining six recantations are either not credible or not true recantations and would be disregarded. Id. Parts III.B.i (Antoine Williams), III.B.iii (Jeffrey Sapp), III.B.iv (Darrell Collins), III.B.v (Harriet Murray). The remaining two recantations were presented under the most suspicious of

circumstances, with Mr. Davis intentionally preventing the validity of the recantation from being challenged in open court through cross-examination. Id. Parts III.B.vi (Dorothy Ferrell), III.B.vii (Larry Young). Worse, these witnesses were readily available—one was actually waiting in the courthouse—and Mr. Davis chose not to present their recantations as live testimony.

Mr. Davis's additional, non-recantation evidence also does not change the balance of proof from trial. At the outset, the Court notes that much of this evidence was presented in affidavit form. Affidavit evidence is viewed with great suspicion[104] and has diminished value. Herrera, 506 U.S. at 417. Moreover, this evidence, whether presented as live testimony or in affidavit form, suffers other serious defects. The two witness identifications of Mr. Coles as the shooter were not credible, and Peggie Grant's affidavit testimony placing Mr. Coles in a white shirt is widely refuted in the record. Id. Part III.C.iii. The hearsay confessions carry little weight because the underlying confessions are uncorroborated and there is good reason to believe that they were false.[105] Id. Part

[104] This suspicion occurs because Mr. Davis has prevented the reliability of this evidence from being tested in open court through cross-examination and credibility determinations. Herrera, 506 U.S. at 417.

[105] There is a strong explanation for why Mr. Coles may have confessed falsely, and Mr. Davis has done nothing to disprove

III.C.i. Further diminishing the value of this evidence is the fact that Mr. Davis had the means to test the validity of the underlying confessions by calling and impeaching Mr. Coles, but chose not to do so.[106] Other evidence in this category simply lacks probative value; the munitions evidence and the accounts from April Hutchinson, Tonya Johnson, Anita Saddler, Gary Hargrove, and Daniel Kinsman are either totally inapposite or are of the most minimal probative value. See id. Parts III.C.ii, III.C.iii, III.C.iv. As a body, this evidence does not change the balance of proof that was presented at Mr. Davis's trial.

Ultimately, while Mr. Davis's new evidence casts 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. After careful consideration, the Court

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this despite having the burden to do so squarely on his shoulders. See supra Analysis Part III.C.i. Indeed, one witness recounting such a confession doubted that Mr. Coles was being truthful when confessing. Id.

[106] Mr. Davis has made clear that he knew both Mr. Coles's work and home address. (Doc. 84, Ex. 1.) Had Mr. Davis at any time sought the help of this Court to subpoena Mr. Coles prior to the conclusion of the hearing, the Court would have ordered the United States Marshall Service to serve Mr. Coles. Mr. Davis never made such a request, instead choosing to attempt self-service at the eleventh hour. His half-hearted efforts belie his true intentions: to be able to say that he "attempted" to provide Mr. Coles testimony when, in fact, he never intended to do so.

finds that Mr. Davis has failed to make a showing of actual innocence that would entitle him to habeas relief in federal court.[107] Accordingly, the Petition for a Writ of Habeas Corpus is **DENIED**.[108]

CONCLUSION

Before the Court is Petitioner Troy Anthony Davis's Petition for a Writ of Habeas Corpus. (Doc. 2.) Pursuant to the order of the Supreme Court, this Court has held a hearing and now determines this petition. Davis, 130 S. Ct. at 1. For the above stated reasons, this Court concludes that executing an innocent person would violate the Eighth Amendment of the United States Constitution. However, Mr. Davis is not innocent: the evidence produced at the hearing on the merits of Mr. Davis's claim of actual innocence and a complete review of the record in this case does not require the reversal of the jury's judgment that Troy Anthony Davis murdered City of Savannah Police Officer Mark Allen MacPhail on August 19, 1989. Accordingly, the

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[107] The Court further notes that whether it adopted the lower burden proposed by Mr. Davis, or even the lowest imaginable burden from Schlup, Mr. Davis's showing would have satisfied neither.

[108] After careful consideration and an in-depth review of twenty years of evidence, the Court is left with the firm conviction that while the State's case may not be ironclad, most reasonable jurors would again vote to convict Mr. Davis of Officer MacPhail's murder. A federal court simply cannot interpose itself and set aside the jury verdict in this case absent a truly persuasive showing of innocence. To act contrarily would wreck complete havoc on the criminal justice system. See Herrera, 506 U.S. at 417.

petition is **DENIED**. The **Clerk of Court** is **DIRECTED** to **file a copy of this order on the docket and forward this order to the Supreme Court of the United States.**

SO ORDERED this 24th day of August 2010.

WILLIAM T. MOORE, JR.
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX

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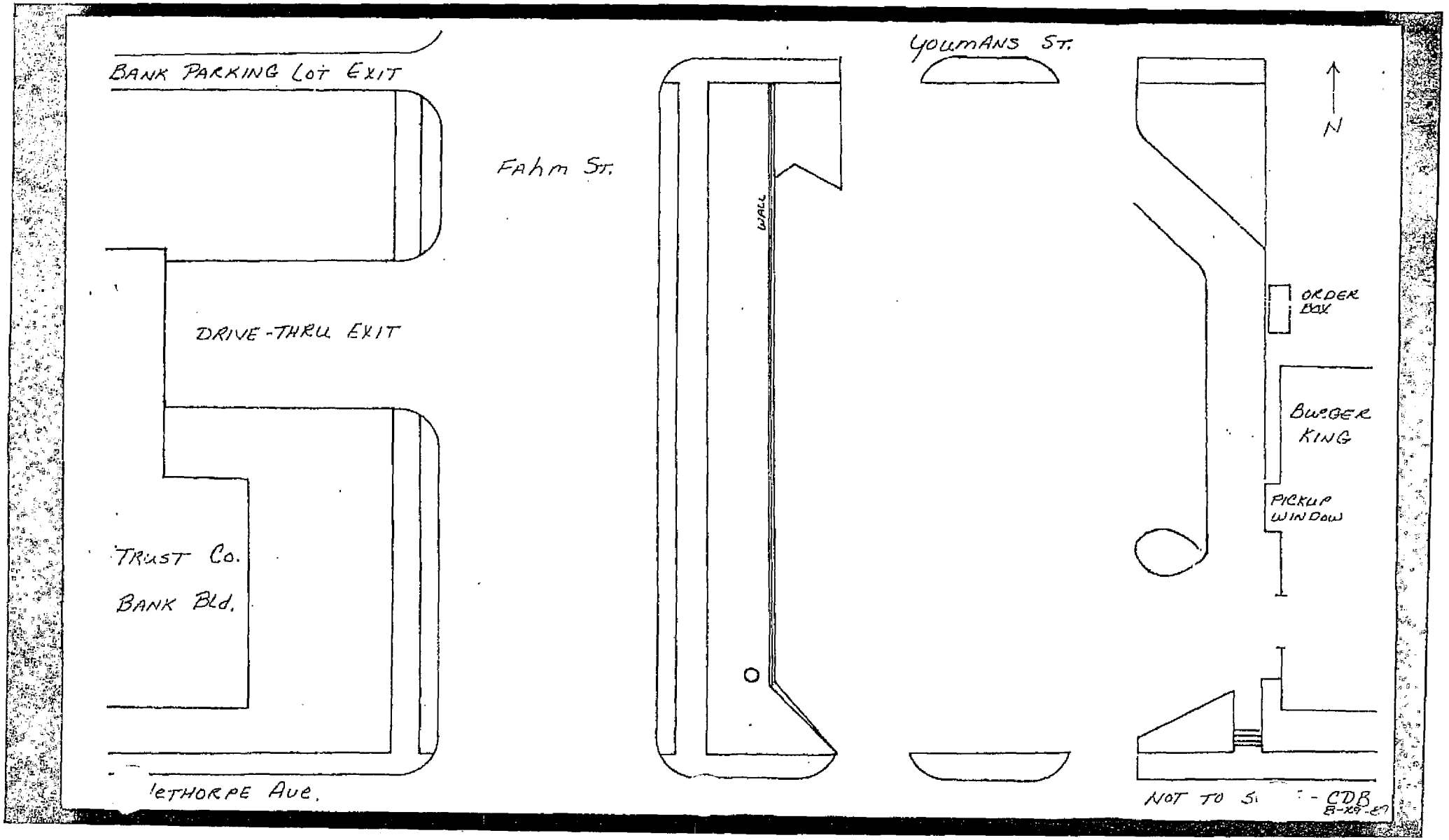
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