No. 15-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

MARCUS RAY JOHSON, Petitioner

vs.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent

---

PETITION FOR A WRIT OF CERIORARI OR A WRIT OF HABEAS CORPUS IN A CAPITAL CASE

"'It would be an atrocious violation of our Constitution and the principles upon which it is based' to execute an innocent person."

> *In re Davis*, 557 U.S. 952, 953 (2009) (Stevens, J., concurring) (quoting *In re Davis*, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting).

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QUESTIONS PRESENTED FOR REVIEW

THIS IS A CAPITAL CASE

1. When a state prisoner has a colorable claim of actual innocence and circuit law forecloses the filing of a § 2254 petition under 28 U.S.C. § 2244, does 28 U.S.C. § 2241 authorize the filing of a second or successive habeas corpus petition in district court?

2. Does it violate the constitution to execute someone who can make a strong showing that he is factually innocent of murder without affording him federal judicial examination of the claim and, if so, what vehicle exists for him to present his claim for federal consideration?

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Petitioner, Marcus Ray Johnson, convicted and sentenced to death on the basis of paper-thin circumstantial proof that has further eroded over the course of the past twenty-odd years, is scheduled to be executed by the State of Georgia at 7:00 p.m. tonight. He respectfully petitions this Court to grant a writ of certiorari to review the Eleventh Circuit's denial of relief or, alternatively to exercise its original habeas jurisdiction to review this case and grant appropriate relief pursuant to its authority under 28 U.S.C. §§ 1651(a), 2241(a) or 2254(a), or, in the alternative, to transfer this application for habeas corpus to the district court for hearing and determination in accordance with the Court's authority under 28 U.S.C. § 2241(b).

INTRODUCTION

Marcus Ray Johnson is an innocent man and his impending execution, if allowed to proceed, will be "an atrocious violation of our Constitution and the principles upon which it is

based." *In re Davis*, 557 U.S. 952, 953 (2009) (Stevens, J., concurring in opinion transferring capital case to district court with instructions to conduct a hearing to determine whether new evidence clearly established the petitioner's innocence) (quoting *In re Davis*, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting)).

At trial, the State's evidence showed only that

- Mr. Johnson and Ms. Sizemore behaved amorously after meeting at Fundamentals bar in Albany, Georgia, and left together in the early morning hours of March 24, 1994.

- Semen found in the victim was consistent with Mr. Johnson's DNA, and DNA from a speck of blood on Mr. Johnson's leather jacket was consistent with the victim's, evidence that was consistent with Mr. Johnson's admission that he had sex with Ms. Sizemore in a vacant lot at 17th Avenue and that he punched her in the nose when she afterwards became clingy.

- Four people in East Albany gave cross-racial identifications of Mr. Johnson as a man they saw in the vicinity of where the victim's body was found later that day. The man they described was doing nothing other than catching a bus to the other side of town and wore clothing that was dirty, not bloody.

- Prosecutors presented a pocket knife Mr. Johnson owned as consistent with the murder weapon, although the knife lacked any forensic evidence linking it to the offense and was thus irrelevant.

- Prosecutors presented a pecan tree branch they claimed had been used to sexually mutilate the victim even though the State's forensic testing proved it did not have any blood on it and no forensic evidence linked it to the crime; it was thus irrelevant.

- Other than the speck of blood on Mr. Johnson's jacket (which was consistent with his statement), no other blood from the victim was found on the jacket, or the clothing Mr. Johnson was wearing that night (jeans, boots, etc.), despite the bloody nature of the crime, which involved more than 40 stab wounds to the victim's body and her death by exsanguination.

The prosecutors spun this weak proof into a conviction and death sentence through supposition and hyperbole, aided by erroneous trial court rulings and instructions, and deficiencies in trial counsel's representation. Since trial, the State's proof has substantially eroded, as newly

discovered evidence has, among other things, critically undermined the reliability of the eyewitness identifications on which the convictions and death sentence are based. The entire evidentiary picture now clearly demonstrates that Mr. Johnson is factually innocent. His execution would be a miscarriage of justice in violation of the Eighth and Fourteenth Amendments.

"A credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the existence of a procedural bar to relief. 'This rule, or fundamental miscarriage of justice exception, is grounded in the "equitable discretion" of habeas courts to see that federal constitutional errors do not result in the incarceration [or execution] of innocent persons." *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). "The miscarriage of justice exception, [this Court's] decisions bear out, survived AEDPA's passage." *Id.* at 1932.

This Court has the power and obligation to prevent the fundamental miscarriage of justice that will result if Mr. Johnson is executed. Under the fundamental miscarriage of justice doctrine, actual innocence, for instance, "may overcome a prisoner's failure to raise a constitutional objection on direct review"; "may provide a gateway for federal habeas review of a procedurally defaulted claim of constitutional error"' and authorizes a federal court to "recall its mandate in order to revisit the merits of a decision," *McQuiggin*, 133 S. Ct., at 1932 (citing *Bousley v. United States*, 523 U.S. 614, 622 (1998), *House v. Bell*, 547 U.S. 518, 537-38 (2006), and *Calderon v. Thompson*, 523 U.S. 538, 558 (1998)). In *In re Davis*, 537 U.S. 952 (2009), this Court, presented with a freestanding claim of actual innocence, transferred the original writ filed under 28 U.S.C. § 2241 to the district 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 petitioner's innocence."

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 2241, 2254(a), 1651(a) and Article III of the United States Constitution.

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Hill states that he applied to the district court pursuant to 28 U.S.C. § 2241 but that court ruled it had no jurisdiction over the petition. *See* Attachment A (*Johnson v. Warden, Georgia Diagnostic and Classification Prison,* M.D.Ga. 5:15-cv-439). The Eleventh Circuit Court of Appeals, in turn, held the district court lacked jurisdiction and denied leave to file a second or successive petition under 28 U.S.C. § 2244. *See* Attachment B (*Johnson v. Warden, Georgia Diagnostic and Classification Prison,* Eleventh Circuit Case No. 15-15173 -- Order of November 19, 2015. Mr. Johnson exhausted his state remedies for his actual innocence and related claims when the state habeas court dismissed as procedurally barred his Petition for Writ of Habeas Corpus (Order of November 18, 2015, in *Johnson v. Chatman*, Butts County Superior Court Case No. 2015-HC-22), and the Georgia Supreme Court denied his Application for Certificate of Probable Cause to Appeal. The Georgia Board of Pardons and Paroles denied his application for clemency on November 18, 2015.

CONSTITUTIONAL PROVISIONS INVOLVED

This petition involves the following provisions of the United States Constitution:

Article I, Section 9, Clause 2, of the United States Constitution provides:

> The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it. (U.S. Const. Art. I, § 9, cl. 2).

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (U.S. Const. amend. VIII).

The Fourteenth Amendment to the United States Constitution, in pertinent part, provides:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law . . . . (U.S. Const. amend. XIV §1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2241 provides, in pertinent part:

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless –

* * *

> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentence him and each such district courts shall have concurrent jurisdiction to entertain the application. . . .

28 U.S.C. § 2244 provides in pertinent part:

(b)

(1) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 [28 USCS § 2254] that was not presented in a prior application shall be dismissed unless—

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)

- **(i)** the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
- **(ii)** the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3) (A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

STATEMENT OF THE CASE

A. Introduction

Marcus Lee Johnson has presented a persuasive claim of actual innocence and that his execution will offend the Eighth and Fourteenth Amendments, yet no court will ever consider the merits of this claim without this Court's intervention.

No court, in either the State or the federal system, has been willing to consider the entire evidentiary picture in this case, which demonstrates there was inadequate proof of Mr. Johnson's guilt presented at trial and that newly discovered evidence has further eroded the prosecution's proof. The state courts have dismissed the new evidence as irrelevant. And the federal courts have ruled that Mr. Johnson's claims are not cognizable in federal court. Because he has consistently maintained his innocence, he is barred from raising that claim again, despite new evidence further bolstering the claim. And because a state petitioner can only challenge his conviction and sentence pursuant to 28 U.S.C. § 2254, the federal courts said, he is precluded from raising his claims via 28 U.S.C. § 2241, this Court's miscarriage-of-justice exception to procedural bars notwithstanding.

Yet, how can it be that the federal courts have no power to consider his compelling case of innocence before the State of Georgia is authorized to execute him? This Court must intervene to prevent this fundamental miscarriage of justice.

B. Procedural History

Mr. Johnson is a person in the custody of the State of Georgia under the terms of verdicts entered April 5 and 7, 1998, in the Superior Court of Dougherty County, Georgia. Pursuant to these judgments, Mr. Johnson was convicted of the murder of Angela Sizemore and sentenced to death. Mr. Johnson has since been incarcerated at the Georgia Diagnostic and Classification Prison in Jackson, Georgia.

The Georgia Supreme Court affirmed Mr. Johnson's conviction and sentence of death on July 6, 1999. *Johnson v. State*, 271 Ga. 375 (1999). A timely filed motion for reconsideration was denied on July 30, 1999.

Mr. Johnson thereafter filed a Petition for Writ of Certiorari in the United States Supreme Court. On February 22, 2000, the United States Supreme Court denied the Petition. *Johnson v. Georgia*, 120 S. Ct. 1199 (2000).

On May 23, 2000, the trial court issued an order scheduling Mr. Johnson's execution for the period between 7:00 P.M. June 12, 2000, and 7:00 P.M. June 19, 2000. On June 5, 2000, Mr. Johnson filed a Petition for Writ of Habeas Corpus, a Motion for Stay of Execution and a Motion for Leave to Proceed *In Forma Pauperis* in the Superior Court of Butts County, Georgia. Mr. Johnson's scheduled execution was thereafter stayed, and Mr. Johnson was granted indigent status for purposes of pursuing state habeas corpus remedies.

Mr. Johnson filed an Amended Petition for Writ of Habeas Corpus on November 9, 2001. The habeas court conducted an evidentiary hearing on the claims raised in the petition on June 24-26, 2002. After briefing and submission of proposed orders, the court denied relief on all claims on January 7, 2004.

Mr. Johnson thereafter filed a Notice of Appeal in the Superior Court of Butts County and an Application for Certificate of Probable Cause to Appeal in the Georgia Supreme Court. The Application for Certificate of Probable Cause to Appeal was denied the application on July 11, 2005. A timely filed Motion for Reconsideration was denied on September 19, 2005.

On June 7, 2006, Mr. Johnson filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of Georgia, Albany Division. On September 30, 2009, the district court denied all relief. Mr. Johnson's Motion to Alter and Amend Judgment was thereafter denied on October 30, 2009. Mr. Johnson appealed to the Eleventh Circuit Court of Appeals, which affirmed the district court's denial of relief on August 23, 2010. *Johnson v. Upton*, 615 F.3d 1318 (11th Cir. 2010). Mr. Johnson's petition for rehearing was denied on October 13, 2010.

Mr. Johnson filed a Petition for Certiorari in the United States Supreme Court on March 12, 2011. The Court denied his petition on June 20, 2011. *Johnson v. Upton*, 131 S.Ct. 3041 (2011).

On September 22, 2011, the Dougherty County Superior Court issued an execution warrant setting Mr. Johnson's execution for a window from October 5, 2011 to October 12, 2011.

On September 27, 2011, Mr. Johnson filed in Dougherty County Superior Court an Extraordinary Motion for New Trial and Motion for Stay of Execution pursuant to O.C.G.A. § 5-5-41. On October 3, 2011, Mr. Johnson filed an additional motion for a 60 day stay based on newly discovered biological evidence deemed appropriate for DNA testing. The Dougherty County Superior Court held a hearing on October 4, 2011, and issued a stay of execution.

In the course of proceedings on Mr. Johnson's Extraordinary Motion for New Trial, the Dougherty County Superior Court ordered rounds of DNA testing using new methods sensitive

enough to determine the existence of DNA profiles even when the amount of biological material was scant, such as on the surface of clothing.

Additionally, on June 26-27, 2014, the Dougherty County Superior Court conducted hearings at which Mr. Johnson presented testimony by DNA and crime scene experts about the significance of the results of the newly available DNA testing. Mr. Johnson also presented the testimony of an expert on eyewitness identification, Dr. Steven Cole, in support of Mr. Johnson's claim that overwhelming new and previously unavailable evidence that faulty witness identifications had resulted in hundreds of wrongful convictions would have resulted in the court allowing an expert like Dr. Cole to testify at trial. Finally, Mr. Johnson also presented new and previously unavailable testimony by witnesses with first-hand knowledge that Ms. Sizemore was engaged in illegal drug smuggling involving large amounts of marijuana and money, which were facilitated by a state's witness, Tony Kallergis, (who omitted such information entirely from his testimony at Mr. Johnson's trial) and that on the night of the murder, Ms. Sizemore had been paid several thousand dollars in cash.

The Dougherty County Superior Court denied critical DNA testing on a number of items, particularly on blood obtained from soil at the alleged 16th Avenue site in Albany. The court had previously ordered testing be done to determine if a DNA profile could be found to match that of Angela Sizemore, thus confirming or ruling out the site as having any connection to her murder. After the laboratory performed the wrong kind of testing, which could not determine such profile, the court denied further testing to correct the laboratory's error.

All relief was denied in the Dougherty County Superior Court's April 20, 2015, Final Order, which was apparently authored by District Attorney Greg Edwards and submitted to the lower court as a proposal with no notice to Mr. Johnson.

On July 20, 2015, Mr. Johnson filed an application to appeal the Dougherty County Superior Court's order denying relief. The Georgia Supreme Court issued a summary denial of Mr. Johnson's application on August 19, 2015.

On November 2, 2015, the Dougherty County Superior Court issued an execution warrant setting a window from November 19 to November 26, 2015, during which Mr. Johnson can be executed. His execution is currently scheduled for November 19, 2015. A motion for stay of execution has been filed herewith.

On November 16, 2015, Mr. Johnson filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Case Number 2015-HC-22. The court denied relief in an order entered on November 18, 2015. The Georgia Supreme Court denied Mr. Johnson's Application for a Certificate of Probable Cause to Appeal on November 19, 2015. A petition for writ of certiorari to address the Georgia Supreme Court's ruling is currently pending before this Court

On November 19, 2015, Mr. Johnson filed a petition for habeas corpus relief under 28 U.S.C. § 2241 in the District Court for the Middle District of Georgia, Macon Division. The district court dismissed the petition for lack of jurisdiction that same day. Attachment A. Mr. Johnson filed a COA application and alternative an application for leave to file a second or successive petition in the Eleventh Circuit Court of Appeals that same day. The Eleventh Circuit denied COA and denied to file a second or successive petition later that day. Attachment B.

This Petition follows.

C. Relevant Facts

A complete statement of facts may be found in the Petition for Writ of Habeas Corpus filed below in Butts County Superior Court in case number 2015-HC-22, at pages 14-49, incorporated herein by this reference.

The State's trial evidence established that in the early morning hours of March 24, 1994, Mr. Johnson and the victim met at the Fundamentals bar in Albany, Georgia late at night on March 23, 1994, or in the early morning hours the next day, where they were seen drinking, dancing and behaving amorously. Mr. Johnson was playing pool that night at the Fundamentals club, wearing his standard biker clothes: black leather jacket, black leather leg chaps, boots, and blue jeans. Sometime between 1:30 and 2:30 a.m., Mr. Johnson and Ms. Sizemore left the bar together, in an inebriated state, walking across the Fundamentals parking lot and heading south toward the vicinity of the Monkey Palace bar (where Mr. Johnson worked) and Palmyra Avenue. The first street they would have come to walking that way would have been 17th Avenue, then subsequently 16th Avenue. The victim's sport utility vehicle ("SUV") remained behind in the parking lot of P2, another bar where Ms. Sizemore had been drinking earlier, which was across Slappey Boulevard from Fundamentals.

Around 8:00 a.m. that morning, on March 24, 1994, a man walking his dog discovered Ms. Sizemore's body in her SUV, which was parked by a holding pond in the predominantly African-American neighborhood of East Albany. She had been beaten about the face and head, stabbed more than 40 times, and a foreign object had been inserted into her vagina and anus causing

significant internal tearing.[1] Her nose was contused and had dried blood around it. A black greasy substance was caked on the bottoms of her feet and in the stab wounds.[2] This black greasy substance was never collected, tested or explained, though it had no discernable connection to the 16th Avenue location the State claimed was the crime scene.

In the course of investigation, Albany Police investigators spoke with four witnesses, Tammy Sheard, Lillie Covin, Emmitt Wheeler and Mary Ann Florido, who later testified at trial. They reported seeing a white man in the general vicinity where Ms. Sizemore's SUV was found. These witnesses gave varying descriptions of the man and his clothing.[3] During the investigation, they made identifications of Mr. Johnson as the man they saw, through various methods (photo lineup, mugshot books, show-up identifications) and at various times, including an initial

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[1] *See Johnson*, 271 Ga. at 376.

[2] *See* Exhibit 10 at 2831-32 (GBI Crime Lab records); TT 2236-38, 2258-59 (testimony of state pathologist Dr. Clark).

[3] The witnesses generally described the man's clothes as being soiled with red clay dirt. They remembered he wore a leather jacket and varyingly described his pants as being black, white, acid washed and light blue. None of them indicated the man was wearing leather leg chaps, which Mr. Johnson had been seen wearing at the Fundamentals bar. Only one, Tammy Sheard, could recall anything even vaguely about the man's facial hair, and her recollection changed after seeing Mr. Johnson's picture on television. Three of the witnesses (Sheard, Covin, Wheeler) described the man's hair as shoulder length, one described it as long, and three (Sheard, Florido, Wheeler) described it as sandy brown or blond. Mr. Johnson's arrest photo shows Mr. Johnson to have dark hair ending above the shoulders. Exhibit 19 (State's Trial Exhibit 95). Wheeler said the man he saw was wearing sneakers, not boots. Two of the witnesses stated they saw a ring on the white male, but their reports were conflicting and trial counsel was able to establish some evidence of police coaching of one witness, Tammy Sheard, as to the description of the ring.

identification that was not made until four years later when the witness, Lily Covin, viewed Mr. Johnson at a pretrial hearing wearing a red prison jumpsuit.[4]

News reports about the murder were broadcast during the day and early evening of March 24, 1994, and the owner of Fundamentals bar called police and advised them that Mr. Johnson and the victim had left the bar together in the early morning hours. Police arrested Mr. Johnson that evening and brought him to the station where he gave a statement in which he stated he left the bar with Ms. Sizemore, had sex with her in a vacant lot at 17th Avenue, and afterwards punched her in the nose when she became clingy. He was adamant that he had left her alive at 17th Avenue. He has consistently maintained this position over the past 21 years.

The forensic evidence the State developed is wholly consistent with Mr. Johnson's statement and establishes no link between Mr. Johnson and either the 17th Avenue location the State claims was the murder scene or the East Atlanta scene where Ms. Sizemore's body was found. The State presented DNA evidence a vaginal swab was consistent with Mr. Johnson's DNA and that a speck of blood on Mr. Johnson's leather jacket was consistent with Ms. Sizemore's DNA – evidence fully consistent with Mr. Johnson's statement.

No other physical evidence has ever linked Mr. Johnson to the murder. The GBI crime lab found Mr. Johnson's pocketknife to have no blood or residue of any kind on it, and although GBI

[4] The jury never heard that another witness, Mr. Johnson's neighbor Lee Libby, told police the same day as the murder that he had seen Mr. Johnson that morning wearing his black leather jacket, boots, and leather leg chaps, a noticeable clothing item the State's eyewitnesses never mentioned, but which Mr. Johnson had been seen wearing at Fundamentals the evening before. *See* Exhibit 38 (police reports) at 3, 8. Mr. Libby did not mention anything about Mr. Johnson's clothes being heavily soiled with red clay dirt.

stated it was not the murder weapon,[5] the State introduced it at trial and argued that it was used to kill Ms. Sizemore. Although it could be expected there would be substantial amounts of blood on Mr. Johnson's person and possessions, none was found apart from the speck of blood on his jacket. A tree branch the state claimed was used to sexually mutilate the victim, moreover, proved to have no blood on it, although that did not prevent the prosecution from arguing that it was the instrument used to assault Ms. Sizemore.

No evidence establishes that Mr. Sizemore was murdered or even present at the 16th Avenue site, and no evidence links Mr. Johnson to the victim's SUV.

Given the paucity of the probative forensic evidence one would expect in a case like this, the prosecution's case hinged upon the credibility of its eyewitness identifications of Mr. Johnson in the vicinity where the victim's body was found, identifications that were protected from scrutiny by the trial court's ruling precluding the admission of expert testimony on the subject of their reliability and a jury instruction, since outlawed as misleading, that bolstered their credibility. New evidence, moreover, demonstrates both the general unreliability of eyewitness identification – misidentifications account for close to 75% of the exonerations in recent years – and the fatal flaws of the identifications made in this case.[6]

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[5] Notes from the GBI file indicate that Albany investigators did not want to test Mr. Johnson's pocketknife, as they did not believe it to be the murder weapon. Exhibit 10 at 2959 (GBI file).

[6] Additional new evidence further indicates that the victim was involved in the dangerous world of illegal drug smuggling prior to and up to the time of her death, providing a further basis to conclude that her murder had nothing to do with Mr. Johnson.

No reasonable jury, hearing the evidence as it stands today could convict Mr. Johnson on the basis of the State's proof – let alone impose a death sentence.

This Petition follows.

REASONS FOR GRANTING THE WRIT

This is an exceptional case and it calls for an exceptional exercise of this Court's discretionary power to ensure that the State of Georgia does not commit a fundamental miscarriage of justice by executing Mr. Johnson without federal review of this new claims.

This case is exceptional because it presents a persuasive case of factual innocence which no federal court has considered, and raises such important questions regarding the scope of a federal court's authority to issue the writ under 28 U.S.C. § 2241, and whether this Court's equitable miscarriage-of-justice exception to procedural bars permits relitigation of claims of actual innocence, irrespective of 28 U.S.C. § 2244(b)(1)'s language.

A. This Court's Decision In *In re Davis* Suggests That A Federal Court Has Authority To Hear A Second Or Successive Habeas Petition Raising A Colorable Claim Of Actual Innocence Outside The Parameters Of 28 U.S.C. § 2244; Yet No Inmate In The Eleventh Circuit Will Be Permitted To Do So Without Clarification From This Court.

Petitioner has presented compelling evidence that he is factually innocent of Angela Sizemore's murder – evidence that should serve as a gateway to permit the consideration of procedurally defaulted claims and/or as a standalone claim of actual innocence. A federal court should address these claims on the merits before the State of Georgia is allowed to execute him.

Under Eleventh Circuit precedent, however, 28 U.S.C. § 2244(b) precludes Mr. Johnson from filing a second or successive petition under 28 U.S.C. § 2254, and he may not seek to avoid the strictures of § 2244 by filing a petition under 28 U.S. § 2241. The district court dismissed the

federal petition on that basis, and a panel of the Eleventh Circuit affirmed, while denying leave to file a successive petition under § 2244(b).

The question whether this Court's decision in *In re Davis*, 557 U.S. 952 (2009), provides a basis for the district court § 2241 is an important question that warrants this Court's review.

Mr. Johnson filed the federal petition in the district court pursuant to 28 U.S.C. § 2241, not 28 U.S.C. § 2254, on the ground that the *Davis* decision established that, at least with respect to a compelling claim of actual innocence, any federal court or jurist identified in 28 U.S.C. § 2241 (a) as having authority to grant a writ of habeas corpus would have that authority irrespective of the constraints of 28 U.S.C. § 2244(b). This Court exercised its authority to do so under § 2241 in *Davis* and nothing in § 2241 suggests that "any [Supreme Court] justice . . ., the district courts and any circuit judge within their respective jurisdictions"[7] would not have similar authority.

In *Davis*, this Court exercised its authority under 28 U.S.C. § 2241 by transferring the petition to the district court with instructions to address a claim of actual innocence that was otherwise barred under the express terms of § 2244. *Id.* at 952. Following *Davis*'s logic, the district court had comparable authority to consider the claims raised in the federal petition and the court accordingly erred in dismissing the petition for lack of jurisdiction.

In *Davis*, the petitioner had sought leave pursuant to 28 U.S.C. § 2244 to file a successive habeas corpus petition raising a freestanding claim of actual innocence. This Court denied his application, concluding that Davis's claim was predominantly based on evidence "discovered before or during [his] first federal habeas proceeding," that freestanding innocence claims are not

[7] 28 U.S.C. § 2241(a).

cognizable under 28 U.S.C. § 2244(b)(2)(B), and that, assuming such claims are cognizable, the only newly discovered evidence properly reviewable under the statute was insufficient to "negate the rest of the State's evidence at trial" and thus could not establish a prima facie case of actual innocence. *See In re Davis*, 565 F.3d 810, 819-24 (11th Cir. 2009).[8]

That ruling was not subject to review, as 28 U.S.C. § 2244(b)(3)(E) provides that a circuit court's ruling on authorization "shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari." Davis, accordingly, filed an original habeas petition in this Court pursuant to 28 U.S.C. § 2241.[9] This Court, in turn, issued an order transferring the petition for writ of habeas corpus to the Southern District of Georgia "for hearing and determination," with instructions that the district court "should receive testimony and make findings of facts as to whether evidence that could not have been obtained at the time of trial clearly establishes petitioner's innocence." *Davis,* 557 U.S., at 952.[10]

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[8] The Eleventh Circuit has since said unambiguously that a freestanding innocence claim may not be brought under § 2244(b)(2)(B)(ii). *In re Everett*, 797 F.3d 1282, 1290 (11th Cir. 2015).

[9] Such a procedure was suggested in *Felker v. Turpin*, 518 U.S. 651, 658-62 (1996). There, this Court determined that § 2244's review-stripping language "has not repealed our authority to entertain original habeas petitions," inasmuch as nothing in the statutory language mentioned the court's authority to entertain original habeas petitions and the Court would not read such an appeal into its language.

[10] Following the transfer, the district court conducted a hearing and issued an opinion recognizing the viability of a freestanding innocence claim, *see In re Davis*, No. CV409-130, 2010 U.S. Dist. LEXIS 87340 (S.D. Ga. Aug. 24, 2010), but concluding that Davis failed to prove "by clear and convicting evidence, that no reasonable jurors would have convicted him in light of the new evidence" and the evidentiary record as a whole. *Id.* at *210. The court denied a certificate of appealability ("COA") on the ground that this Court lacked jurisdiction and the Eleventh Circuit agreed, observing that "Davis filed a habeas petition pursuant to the Supreme Court's *original* jurisdiction," after the Eleventh Circuit had ruled he had no recourse under § 2244, and concluding that granting a COA "would be nullifying our previous decision denying Davis leave to file a

Davis thus demonstrates that, at least in an extraordinary case of factual innocence, the strict limitations imposed by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA") may not be construed to limit a federal court's authority to entertain the writ under 28 U.S.C. § 2241. Section 2241 provides that "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions" has authority to grant the writ, 28 U.S.C. § 2241(a), and it makes no distinction between the authority accorded each court or individual jurist.

Although *Davis* involved action from an original writ application filed in this Court, nothing in the statutory language precludes an initial application to the district court, rather than this Court. To the contrary, 28 U.S.C. § 2242 suggests that petitions brought under § 2241 should typically be made to the district court in the first instance. *See* 28 U.S.C. § 2242 ("If addressed to the Supreme Court, a justice thereof or a circuit judge [the petition] shall state the reasons for not making application to the district court of the district in which the applicant is held."). *See also* Supreme Court Rule 20.1 (petitioner must show "that adequate relief cannot be obtained in any other form or from any other court"); F.R.A.P. Rule 22 (instructing that "[a]n application for a writ of habeas corpus must be made to the appropriate district court" and that "[i]f made to a circuit judge, the application must be transferred to the appropriate district court").

The district court and Eleventh Circuit relied on circuit precedent that predated *Davis* or that was otherwise inapplicable as not concerning claims of actual innocence brought by

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successive habeas petition," which the court declined to do. *Davis v. Terry*, 625 F.3d 716, 719 (11th Cir. 2010).

condemned inmates. *See, e.g.*, *Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004); *Medberry v. Crosby*, 351 F.3d 1049, 1058-62 (11th 2003).[11]

This Court, in *Davis*, exercised its authority under § 2241 to transfer for hearing and determination a case raising a standalone claim of actual innocence – a claim the Eleventh Circuit had ruled was not cognizable in a second or successive petition under 28 U.S.C. § 2244. *See In re Davis*, 565 F.3d 810 (11th Cir. 2009). *Davis* thus demonstrates that, at least in the rare circumstance where a habeas petitioner can establish his actual innocence, he may seek relief without having to comply with the strictures of 28 U.S.C. § 2244.

Section 2241 grants authority to issue writs to "the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions," without making any distinction in the scope of that authority among that selection of the judiciary. If the Supreme Court is authorized to address freestanding claims of innocence (or other claims that may be reached through the miscarriage of justice gateway) that cannot be addressed pursuant to 28 U.S.C.

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[11] In *Thomas*, *supra*, a majority of the panel held that the district court properly construed as a petition brought under 28 U.S.C. § 2254 a non-capital defendant's *pro se* challenge to a state parole decision, which was styled an action brought pursuant to 28 U.S.C. § 2241. The panel majority concluded that the limitations on habeas proceedings set forth in § 2254 applied to all proceedings brought by an individual in custody pursuant to a judgment of a state court. *Thomas*, 371 F.3d at 787. Judge Tjoflat wrote a concurring opinion in which he conducted a detailed exploration of statutory history and language and concluded that "in light of the expansive language of § 2241, I reject the proposition that § 2254 is the exclusive route through which convicted state prisoners may seek federal habeas relief." *Id.* at 811 (Tjoflat, J., specially concurring). *Thomas* did not involve a miscarriage of justice and the petitioner raised no claim of actual innocence. Regardless of whether *Thomas* in the typical case precludes the filing of a petition under § 2241, it is clear that under *In re Davis*, Mr. Johnson is entitled to challenge his conviction and death sentence in light of his compelling claim of actual innocence.

§ 2244 – as was the case in *Davis* – then the remaining courts or jurists identified by the statute, including this district court, must perforce be authorized to do the same.

To hold otherwise risks suspending the writ. *See* U.S. Const. Art. I, § 9. Moreover, it violates due process and equal protection because federal inmates under comparable circumstances are not precluded from seeking to vindicate claims of actual innocence. *See, e.g. Bryant v. Warden*, 738 F.3d 1253 (11th Cir. 2013) (savings clause of 28 U.S.C. § 2255 permitted petitioner to challenge illegally sentence under § 2241 as he was precluded from asserting the claim under § 2244 and § 2255); *see also Webster v. Daniels*, 784 F.3d 1123 (7th Cir. 2015) (*en banc*) (petitioner alleging actual innocence of the death penalty based on intellectual disability could file suit under § 2241 because claim was not cognizable under §§ 2244 and 2255).

B. If The Execution Of One Who Is Almost Certainly Innocent Violates The Federal Constitution, There Must Be A Federal Forum To Vindicate That Right On The Basis Of Compelling New Exculpatory Evidence, Irrespective Of Whether The Claim Has Been Previously Adjudicate And Lost.

Evidence presented at trial, in conjunction with evidence that could not have been obtained at the time of trial, clearly establishes[12] Mr. Johnson's innocence such that no reasonable jury would vote to convict in light of the current evidentiary landscape. There is no competent evidence tying Mr. Johnson to Ms. Sizemore's murder, but the evidence now shows that the eyewitness identifications in this case are wholly unreliable, and that a state witness actively misled police and the jury regarding the illegal drug trafficking activities in which he and Ms. Sizemore were engaged on the night she was murdered, including Ms. Sizemore's possession of thousands of

[12] *See, e.g., Davis*, 557 U.S. at 952.

dollars in drug proceeds on her person that night. Mr. Johnson did not kill Angela Sizemore, and his execution, if it proceeds, will be a grotesque and horrifying violation of the Constitution.

At a time of declining use of capital punishment due to well-founded and well-documented concerns that it fails to accurately identify perpetrators before imposing death sentences, society recoils at State execution of an innocent person.[13] Such a barbaric act is "at odds with contemporary standards of fairness and decency." *Spaziano v. Florida*, 468 U.S. 447, 465 (1984). The "natural abhorrence civilized societies feel at killing" an innocent person, *Ford v. Wainwright*, 477 U.S. 399, 409 (1986), requires that the law remove that possibility as much as is humanly possible. The Fourteenth Amendment provides protection so that "no person can be punished criminally save upon proof of some specific criminal conduct,"[14] beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307 (1979). A vast array of due process protections helps to assure that no innocent person is convicted of a crime.

Second, as a matter of substantive Eighth Amendment law, "a person who has not in fact killed, attempted to kill, or intended that a killing take place or that lethal force be used may not be sentenced to death," *Cabana v. Bullock*, 474 U.S. 376, 386 (1986), and if such a sentence is imposed the "Eighth Amendment violation can be adequately remedied by *any* court that has the power to find the facts and vacate the sentence," *id.* at 386, and "prevent the execution . . . ." *Id.*

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[13] *See, e.g.*, *Atkins v. Virginia*, 536 U.S. 304, 320 n.25 (2002) (court described growing number of capital case exonerations as "disturbing."); *Glossip v. Gross*, 135 S. Ct. 2726, 2758-59 (2015) (Breyer, J., dissenting) (acknowledging high rates of error in capital sentencing and that as many as 5% of condemned prisoners are likely innocent).

[14] *Schad v. Arizona*, 501 U.S. 624, 633 (1991).

at 390; *cf. Tison v. Arizona*, 481 U.S. 137 (1987).[15] The most basic equitable principle is that courts must prevent a fundamental miscarriage of justice. *Cf. McCleskey v. Zant*, 111 S. Ct. 1454, 1471 (1991). The execution of an innocent person is the paradigm of a fundamental miscarriage of justice.

In *Herrera v. Collins*, 506 U.S. 390 (1993), the United States Supreme Court addressed the issue of whether a colorable claim of actual innocence independent of trial error was cognizable in habeas corpus proceedings. Although not specifically resolved, a majority of the Court intimated that the execution of an innocent person would violate the Constitution, irrespective of the fairness of his trial. Justice O'Connor and Justice Kennedy unequivocally stated that "the execution of a legally and factually innocent person would be a constitutionally intolerable event." 506 U.S. at 419 (O'Connor, J., concurring). However, because both Justice O'Connor and Justice Kennedy felt that Mr. Herrera's proffered evidence of innocence was wholly unpersuasive, they concluded that no constitutional violation would occur upon his execution.

Justice White "assume[d] that a persuasive showing of 'actual innocence' . . . would render unconstitutional the execution of Petitioner. . ." 506 U.S. at 429. But because the proffered new evidence coupled with the evidence produced against him at trial did not show that "no rational

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[15] "The death penalty is said to serve two principle social purposes: retribution and deterrence of capital crimes by prospective offenders." *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.). Executing innocent persons would not deter crime, and because retribution has as its benchmark "that punishment should be directly related to the personal culpability of the criminal defendant," *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring), the execution of an innocent person would clearly serve no retributive function. Such an execution would simply constitute the gratuitous infliction of suffering.

trier of fact could [find] proof of guilt beyond a reasonable doubt," *id*., Justice White concluded Mr. Herrera was not entitled to habeas corpus relief.

Justice Blackmun, joined by Justices Stevens and Souter, found that "nothing could be more contrary to contemporary standards of decency, or more shocking to the conscience, than to execute a person who is actually innocent." *Id.* at 430 (Blackmun, J., dissenting) (citations omitted). Justices Blackmun, Stevens and Souter found that Mr. Herrera's proffered evidence was sufficient to warrant a hearing on the issue and they would have remanded the case to the district court for an evidentiary hearing on the actual innocence claim.

Finally, Chief Justice Rehnquist, assumed "for the sake of argument in deciding [*Herrera*], that in a capital case a truly persuasive demonstration of 'actual innocence' . . . would render the execution of a defendant unconstitutional." *Id.* at 417. The Chief Justice found, however, like Justices O'Connor, Kennedy and White, that the evidence proffered by Mr. Herrera was insufficient to make a truly persuasive showing of actual innocence.

Thus, five Justices[16] unequivocally found in *Herrera* that the United States Constitution, specifically the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause, prohibits the execution of an innocent person. Subsequently, in *Davis*, *supra*, the Court explicitly rejected Justice Scalia's argument that the Constitution does not prohibit the execution of an innocent prisoner, regardless of the procedural posture of his case, transferring the case to the district court with instructions to determine whether

[16] As this synopsis of the plurality opinion in *Herrera* demonstrates, seven of the nine justices of the United States Supreme Court found that the execution of someone who is actually innocent violates the United States Constitution and would be an independent cognizable claim in federal habeas corpus proceedings.

Davis could clearly establish his freestanding innocence claim in light of evidence which was unavailable at the time of trial. *Id.* at 952. *See also id.* at 953 (Stevens, J., concurring) (finding that the execution of an innocent person would be "an atrocious violation of our Constitution and the principles upon which it is based").

In light of the entire evidentiary picture, Mr. Johnson's execution will be such an atrocity. By any standard suggested in *Herrera* – whether by showing that "based on newly discovered evidence and the entire record before the jury that convicted him, 'no rational trier of fact could [find] proof of guilt beyond a reasonable doubt," *id.* at 429 (White, J., concurring), or whether by proof that Mr. Johnson "probably is innocent," *id.* at 442 (Blackmun, J., dissenting) – Mr. Johnson has proven his case of innocence. The State's so-called proof consists of a purported crime scene that has no links to either the crime or Mr. Johnson; purported weapons for which no proof appears to show they were used in the crime; a complete lack of physical evidence linking Mr. Johnson to the scene where the victim's body was found and wholly unreliable eyewitness testimony that he was seen in the vicinity doing nothing but catching a bus – a paucity of evidence that is striking considering the bloody nature of the crime and the virtual certainty that abundant forensic evidence should have linked Mr. Johnson to the crime had it occurred as the prosecution claimed it had. The little remaining proof is fully consistency with Mr. Johnson's steadfast position – corroborated in part by witness accounts – that he had consensual sex with the victim after leaving a bar, but left her alive afterward. The new evidence, as well, both undermines the reliability of the little remaining evidence (the eyewitness statements) while pointing to other possible perpetrators.

Despite his compelling case of factual innocence, however, no federal court has been willing to hear this claim.

If it violates the Eighth and Fourteenth Amendments to execute the innocent, then there must be some federal forum in which that claim can be considered. The petition should be granted.

CONCLUSION

The petition for a writ of certiorari and/or habeas corpus should be granted. Alternatively, the petition should be transferred to the district court to consider the new evidence of innocence both as a standalone claim and as a gateway to the ineffective assistance of counsel and due process claims raised below.

This 19th day of November, 2015.

Respectfully submitted,

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COUNSEL FOR MR. JOHNSON

Attachment A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

MARCUS RAY JOHNSON,	)	
	)	
Petitioner,	)	
	)	
v.	)	**CIVIL ACTION NO. 5:15-CV-439(MTT)**
	)	
WARDEN, Georgia Diagnostic and Classification Prison,	)	
	)	
Respondent.	)	
	)	

ORDER

Petitioner MARCUS RAY JOHNSON filed earlier today a Petition for Writ of Habeas Corpus by a Person in State Custody, purportedly pursuant to 28 U.S.C. § 2241, a Motion for Stay of Execution, and a Motion for Leave to Proceed *In Forma Pauperis*.[1] (Docs. 1-3).

I. PROCEDURAL HISTORY

"On March 24, 1994, Johnson raped, murdered, and mutilated Angela Sizemore a few hours after meeting her at a bar in Albany Georgia." *Johnson v. Upton*, 615 F.3d 1318, 1321 (11th Cir. 2010) (citing *Johnson v. State*, 271 Ga. 375, 375-76, 519 S.E.2d 221, 225 (1999)). On April 5, 1998, he was convicted in the Superior Court of Dougherty County of malice murder, felony murder, aggravated assault, rape, and aggravated battery. *Johnson*, 271 Ga. at 375 n.1, 519 S.E.2d at 225 n.1. On April 7, 1998, he was sentenced to death for the murder. *Id*. His conviction and sentence were affirmed on appeal. *Id*. at 375, 519 S.E.2d at 225.

[1] For purposes of this dismissal alone, the motion to proceed *in forma pauperis* is **GRANTED**.

After the United States Supreme Court denied his petition for certiorari (*Johnson v. Georgia*, 528 U.S. 1172 (2000)), Johnson filed a state habeas petition in the Superior Court of Butts County, which was denied on January 7, 2004. (Doc. 1 at 9). The Georgia Supreme Court denied Johnson's Application for Certificate of Probable Cause to Appeal on July 11, 2005, and the United States Supreme Court denied certiorari on April 3, 2006. (Doc. 1 at 10); *Johnson v. Terry*, 547 U.S. 1059 (2006).

Johnson filed a 28 U.S.C. § 2254 petition in this Court on June 7, 2006 ("first habeas petition"). *Johnson v. Hall*, 1:06-CV-84 (WLS). This Court denied relief, and the Eleventh Circuit affirmed on August 23, 2010. *Johnson*, 1:06-CV-84 (WLS) at Doc. 30; *Johnson v. Upton*, 615 F.3d 1318 (11th Cir. 2010). The United States Supreme Court denied certiorari on June 20, 2011. *Johnson v. Upton*, 131 S. Ct. 3041 (2011).

The Superior Court of Dougherty County issued an execution warrant setting Johnson's execution for a window from October 5, 2011 until October 12, 2011. (Doc. 1 at 11-12). Johnson then moved for a new trial and a stay of execution in the Superior Court of Dougherty County based on newly discovered biological evidence. (Doc. 1 at 12). On October 4, 2011, the court entered a stay and ordered some DNA testing. (Doc. 1 at 12-13). After conducting an evidentiary hearing, the court denied relief on April 20, 2015. (Doc. 1 at 12-13). Johnson filed an application to appeal the denial of relief and the Georgia Supreme Court denied his application on July 20, 2015. (Doc. 1 at 13).

The Superior Court of Dougherty County again issued an execution warrant and Johnson is scheduled to be executed later today. (Doc. 1 at 13-14). On November 16, 2015, Johnson filed a petition for writ of habeas corpus in the Superior Court of Butts

County. (Doc. 1 at 14). That court denied relief on November 18, 2015. (Doc. 1 at 14). On November 18, 2015, the Georgia Board of Pardons and Paroles denied clemency. (Doc. 1 at 14). Today, the Georgia Supreme Court denied Johnson's Certificate of Probable Cause to Appeal. (Doc. 1 at 14).

II. DISCUSSION

This Court is required to "promptly examine" Johnson's petition and dismiss it if "it plainly appears from the petition and any attached exhibits that the petitioner is not entitled to relief in the district court."[2]

This is the second habeas petition that Johnson has filed in this Court. "Before a second or successive application … is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application." 28 U.S.C. § 2244(b)(3)(A); *Felker v. Turpin*, 518 U.S. 651, 664 (1996); *In re Hill*, 715 F.3d 284, 290 (11th Cir. 2013). This is a jurisdictional requirement. *Burton v. Stewart*, 127 S. Ct. 793, 796 (2007).

Johnson argues his petition "is brought pursuant to 28 U.S.C. § 2241, *not* 28 U.S.C. § 2254, and does not require pre-approval from the Eleventh Circuit Court of Appeals." (Doc. 1 at 4). This argument has no merit. In his petition, Johnson challenges his state court conviction and sentencing. Thus, his petition is properly construed as a request for relief under 28 U.S.C. § 2254. A petitioner cannot circumvent the Antiterrorism and Effective Death Penalty Act's ("AEDPA") second or successive petition requirement by labeling his habeas petition something other than what it actually is. *Gonzalez v. Crosby*, 545 U.S. 524, 531 (2005) (action labeled as a Rule 60(b) motion

[2] R. Governing § 2254 Cases U.S. Dist. Cts. 4. Rule 4 applies regardless of whether Johnson's action is brought under 28 U.S.C. § 2241 or 28 U.S.C. § 2254. R. Governing § 2254 Cases U.S. Dist. Cts. 1(b).

was actually a habeas petition and must "be treated accordingly"); *Spivey v. State Bd. of Pardons & Paroles*, 279 F.3d 1301, 1302 n.1 (11th Cir. 2002) (courts must look past "artfully" labelled filings and apply the limit on second or successive habeas petitions); *Gilreath v. State Bd. of Pardons & Paroles*, 273 F.3d 932, 933 (11th Cir. 2001) (underlying 42 U.S.C. § 1983 action challenging imprisonment is actually a habeas action subject to the restrictions on filing second or successive habeas petitions).

Moreover, even if Johnson's action is properly brought under § 2241, it is still subject to AEDPA's second or successive petition restrictions. *Thomas v. Crosby*, 371 F.3d 782, 787 (11th Cir. 2004) (holding that "[a] state prisoner cannot evade the procedural requirements of § 2254 by filing something purporting to be a § 2241 petition"); *Medberry v. Crosby*, 351 F.3d 1049, 1061 (11th Cir 2003) (holding that "state prisoners in custody pursuant to the judgment of a state court may file a habeas corpus petition, as authorized by § 2241, but they are limited by § 2254").

Johnson also argues that the Supreme Court's decision in *In re Davis* gives this Court jurisdiction. 557 U.S. 952 (2009); (Doc. 1 at 5). This argument has even less merit. Davis, a state habeas petitioner, invoked the Supreme Court's original jurisdiction pursuant to 28 U.S.C. § 2241 and Sup. Ct. R. 20.[3] *Id*. at 953 (Stevens, J., concurring); *Felker*, 518 U.S. at 660 (holding that AEDPA does not repeal the Supreme Court's "authority to entertain original habeas petitions"). The Supreme Court, according to Justice Stevens, found Davis's "case [was] sufficiently 'exceptional' to warrant utilization of th[at] Court's Rule 20.4(a), 28 U.S.C. § 2241(b), and … original habeas jurisdiction." *Id*. (citing *Byrnes v. Walker*, 371 U.S. 937 (1962); *Chaapel v. Cochran*, 369 U.S. 869

[3] The "decision" in *Davis* consists of a short paragraph that simply transfers Davis's petition to the district court for resolution. Justice Stevens's concurring opinion provides information about the basis for the Court's action.

(1962)). Relying on 28 U.S.C. § 2241(b)[4], the Supreme Court then "decline[d] to entertain [Davis's] application for a writ of habeas corpus and … transfer[red] the application for hearing and determination to the district court having jurisdiction to entertain it." *In re Davis*, 557 U.S. at 952.

Johnson argues that "*Davis* … demonstrates that, at least in the extraordinary case of factual innocence, the strict limitations imposed by … AEDPA may not be construed to limit a federal court's authority to entertain the writ under 28 U.S.C. § 2241." (Doc. 1 at 7). *Davis* does nothing of the sort. Rather, it simply illustrates that if a case is "sufficiently 'exceptional,'" the Supreme Court may allow a petitioner to invoke its original habeas jurisdiction. *In re Davis*, 557 U.S. at 953 (Stevens, J., concurring). Nothing in *Davis* authorizes this Court, on its own, to entertain a successive petition. At most, it suggests that Johnson may file his habeas petition with the United States Supreme Court pursuant to 28 U.S.C. § 2241 and Sup. Ct. R. 20.

In short, this Court does not have subject matter jurisdiction over Johnson's second habeas petition because he has not received an order from the Eleventh Circuit Court of Appeals authorizing this Court to consider the petition. For this reason, this case is **DISMISSED**.[5]

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[4] 28 U.S.C. § 2241(b) gives "the Supreme Court, any justice thereof, and any circuit judge" the authority to transfer a habeas petition for hearing and determination to the appropriate district court.

[5] A prisoner seeking to appeal a district court's final order denying his petition for writ of habeas corpus has no absolute entitlement to appeal but must obtain a Certificate of Appealability ("COA"). 28 U.S.C. § 2253(c)(1)(A); *Tompkins v. Sec'y, Dep't of Corr*., 557 F.3d 1257, 1259 (11th Cir. 2009) (stating that district court properly denied a COA when reasonable jurists could not disagree that a petition was second or successive). As amended effective December 1, 2009, R. Governing § 2245 Cases U.S. Dist. Cts. 11(a) provides that "[t]he district court must issue or deny a [COA] when it enters a final order adverse to the applicant," and if a COA is issued "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2)." The Court can issue a COA only if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To merit a COA, the Court must determine "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (citations

Johnson moves the Court to "stay his execution pending resolution of the[se] proceedings." (Doc. 3 at 2). Having determined that the Court does not have jurisdiction over Johnson's second habeas petition, the Court **DENIES** his Motion for Stay of Execution.

SO ORDERED, this 19th day November, 2015.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

omitted). If a procedural ruling is involved, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Johnson has not met this standard and the Court, therefore, does not issue a COA.

Attachment B

No. 15-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2015

MARCUS RAY JOHNSON, Petitioner

vs.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON, Respondent

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by electronic transmission and/or hand delivery on counsel for Respondent at the following address:

Beth Burton, Esq.
Deputy Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
bburton@law.ga.gov

This 19th day of January, 2015.

Attorney