OCTOBER TERM 2019

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAY JEFFERSON CROMARTIE,

Petitioner,

v.

WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION PRISON,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

CAPITAL CASE

EXECUTION SCHEDULED FOR
7:00 P.M., WEDNESDAY, NOVEMBER 13, 2019

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November 13, 2019

CAPITAL CASE

QUESTIONS PRESENTED

In this capital case, Ray Jefferson Cromartie was convicted of malice murder and sentenced to death as the man who shot a store clerk, Richard Slysz. The robbery was committed by two men, with a third acting as getaway driver. Mr. Cromartie was convicted largely on the testimony of his co-defendant, Corey Clark, the getaway driver, Thaddeus Lucas, and two associates who claimed Mr. Cromartie admitted the shooting. Mr. Cromartie, however, has always maintained that he did not shoot Mr. Slysz.

After years of silence concerning the identity of the shooter, Thaddeus Lucas has now come forward and attested in a sworn affidavit that Corey Clark admitted committing the shooting. Mr. Cromartie sought to reopen the judgment based on this new evidence of his innocence of malice murder, and proffered evidence of his diligence both from Mr. Lucas's affidavit and from the declaration of an investigator concerning current counsel's repeated efforts to locate and obtain information from Mr. Lucas.

The lower courts denied the request to reopen the judgment on the ground that Mr. Cromartie had not been diligent in obtaining the new evidence from Mr. Lucas, because it purportedly could have been obtained by trial counsel and/or state habeas counsel. Mr. Cromartie has alleged that prior counsel provided ineffective assistance. The questions presented are as follows:

1. If a petitioner's prior counsel provided deficient representation by failing to obtain or present evidence of innocence, should evidence obtained by subsequent diligent counsel be deemed new evidence of innocence (an issue as to which there is a circuit split)?

2. When there are material issues of fact regarding a petitioner's diligence with respect to the presentation of new evidence of innocence, should a federal district court hold a hearing to resolve those issues?

RELATED PROCEEDINGS IN LOWER FEDERAL COURTS

Middle District of Georgia, *Cromartie v. Shealy et al.*, No. 7:19-CV-181. Judgment entered October 28, 2019.

Eleventh Circuit Court of Appeals, *Cromartie v. Shealy et al.*, No. 19-14268. Judgment entered October 30, 2019; rehearing en banc denied November 8, 2019.

Middle District of Georgia, *Cromartie v. Warden Georgia Diagnostic and Classification Prison*, No. 7:14-CV-39. Judgment entered May 10, 2017.

Eleventh Circuit Court of Appeals, *Cromartie v. GDCP Warden*, No. 17-12627. Judgment entered March 26, 2018.

United States Supreme Court, *Cromartie v. Sellers*, No. 18-5796. Judgment entered December 3, 2018.

Middle District of Georgia, *Cromartie v. Warden Georgia Diagnostic and Classification Prison*, No. 7:14-CV-39. Motion to reopen judgment denied November 12, 2019.

Eleventh Circuit Court of Appeals, *Cromartie v. GDCP Warden*, No. 19-14457. Judgment entered November 13, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ray Cromartie respectfully requests that a writ of certiorari issue to review the United States Court of Appeals for the Eleventh Circuit's denial of Mr. Cromartie's application for a certificate of appealability (COA).

OPINIONS BELOW

The opinion of the court of appeals declining to issue a certificate of appealability (App. A) is unreported. The order of the district court denying the motion for relief from judgment under Federal Rule of Civil Procedure 60(b) (App. B) is unreported. The order of the district court denying the petition for a writ of habeas corpus (App. C) is reported at *Cromartie v. Warden, Georgia Diagnostic and Classification Prison*, No. 7:14-CV-39 (MTT), 2017 WL 1234139 (M.D. Ga. March 31, 2017).

JURISDICTION

The court of appeals issued its opinion declining to issue a certificate of appealability on November 13, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

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

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

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

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

Federal Rule of Civil Procedure 60 provides, in pertinent part:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a part or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (6) any other reason that justifies relief.
>
> (c) Timing and Effect of the Motion.
>
> (1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

STATEMENT OF THE CASE

A. Introduction

On November 4, 2019, a little over a week prior to Mr. Cromartie's scheduled execution, Mr. Cromartie's co-defendant (and prosecution trial witness) Thaddeus Lucas contacted defense counsel to provide evidence of what Mr. Cromartie has been alleging all along: that another man shot Richard Slysz, the person whose killing resulted in Mr. Cromartie's death sentence. On November 6, 2019, Mr. Lucas signed a sworn statement acknowledging, for the first time, that he overheard Corey Clark—the co-participant in the convenience store robbery at the heart of this case—admit to killing Mr. Slysz. As Mr. Lucas stated:

> While I did not see what happened in the Junior Food Store, I later overheard Corey Clark tell Gary Young that he shot the clerk in the face. I heard Corey say this to Gary just before the shooting that happened at the Cherokee apartments. I think we were in Tina

> Washington's apartment when I heard Corey say that he shot the clerk to Gary Young.
>
> I have not wanted to talk about this before. I have not told anyone what Corey said about shooting the clerk because I was worried that it would ruin my life more than it already has. I served 10 years in prison for this and I didn't think saying anything about it would change the situation for Ray or Corey and so I just tried to put the whole thing behind me.
>
> But over the last couple of weeks I have read about the case in the news and it has made me very angry because the story is not the truth of what really happened. I know that some of my own past statements and being quiet about this helped hide the truth. But I keep hearing that Jeff Cromartie is the shooter and I know that is probably not true. I don't know for certain what happened that night because I wasn't in the store, but I know what I heard Corey say about it to Gary—that he shot the clerk.

Affidavit of Thaddeus Lucas. This newly available evidence that Clark shot Mr. Slysz exonerates Mr. Cromartie, who was convicted of malice murder as the shooter, not on the basis of felony murder. ECF No. 18-19 at 4-26 (charge of the court).[1]

Mr. Lucas's affidavit explains why he did not come forward before and why he has done so now. He heard Corey Clark confess, and he can no longer continue to remain quiet about it. Since the trial, Lucas has never made any formal statement or given testimony about the Junior Food Store crime, despite numerous attempts by Mr. Cromartie's counsel and investigators. Declaration of Jessica Johnson, ¶¶ 3-4. Last week, he contacted Mr. Cromartie's counsel and then told what he knew for the first time.

[1] Citations to "ECF No." refer to documents filed in the habeas corpus proceeding in the district court.

On November 8, 2019, two days after Mr. Lucas signed his sworn affidavit, Mr. Cromartie filed a motion for relief from final judgment pursuant to Federal Rule of Civil Procedure 60(b)(6) in the district court. ECF No. 95. The 60(b) motion sought to set aside the earlier final judgment denying habeas relief on timeliness ground of Mr. Cromartie's powerful claim that his trial attorneys were ineffective in the investigation and presentation of mitigating life-history and mental-health evidence at the penalty phase.

Rule 60(b) "allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discovered evidence." *Gonzalez v. Crosby*, 545 U.S. 524, 528 (2005). Rule 60(b)(6), "the catchall provision of Rule 60(b), authorizes relief for 'any other reason that justifies relief' from the operation of a judgment." *Lugo v. Sec'y, Fla. Dept. of Corr.*, 750 F.3d 1198, 1210 (11th Cir. 2014) (quoting Fed. R. Civ. P. 60(b)(6)).[2]

A 60(b) movant must "show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez*, 545 U.S. at 535 (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). In "determining whether extraordinary circumstances are present, a court may consider a wide range of factors. These may include, in an appropriate case, 'the risk of injustice to the parties' and 'the risk of undermining the public's confidence in the judicial process.'" *Buck v. Davis*, 137 S.

[2] In habeas cases, where, as here, a 60(b) motion challenges only a district court's prior ruling that a habeas petition was time-barred, it "is not the equivalent of a successive habeas petition." *Gonzalez*, 545 U.S. at 535-36.

Ct. 759, 778 (2017) (quoting *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 863–864 (1988)).

With the newly available Lucas affidavit serving both as an extraordinary circumstance supporting the 60(b) motion and as evidence of actual innocence that serves as an equitable exception to the claim's untimeliness, *see McQuiggin v. Perkins*, 569 U.S. 383 (2013), Mr. Cromartie moved to set aside the final judgment denying habeas relief in the district court. Mr. Cromartie has been seeking to prove that he was not the killer through DNA testing, but the State of Georgia has steadfastly refused to test any of the physical evidence and the lower courts have not ordered testing. The State's refusal to grant DNA testing to defendants like Mr. Cromartie is presently pending before this Court. *See Cromarte v. Shealy*, No. 19-6570.

On November 12, 2019, the district court denied the motion for relief from judgment. *Cromartie v. Warden*, No. 7:14-CV-39, Order (Nov. 12, 2019) (hereafter "DCO"). On November 13, 2019, at 4:00 p.m., the Eleventh Circuit affirmed. *Cromartie v. GDCP Warden*, No. 19-14457, Opinion (11th Cir. Nov. 13, 2019) (per curiam) (unpublished) (hereafter "11th Cir. Op.").

B. The Crimes and Trial

On the evening of April 7, 1994, Dan Wilson, the clerk of the Madison Street Deli in Thomasville, Georgia, was shot in the face during a robbery by a single assailant. *See Cromartie v. State*, 514 S.E.2d 205, 209 (Ga. 1999). Mr. Wilson suffered serious injuries but survived. *Id.* Surveillance video of the cash register area captured a view of the assailant (but not the shooting itself), but the assailant's face was

covered up to his nose. ECF No. 18-12 at 86; ROA 3192. [3] On April 8, 1994, the morning after the shooting, police received a call from a man named David McRae who lived one block from the store. He noticed a black knit cap and dark green hooded sweatshirt in his yard that he had not seen there before; police retrieved the items. ECF No. 18-12 at 100. At trial, it was the state's theory that the shooter had worn and discarded the cap and sweatshirt. ECF Nos. 47-50.[4]

In the early-morning hours of April 10, 1994, Richard Slysz, the clerk of the Junior Food Store in Thomasville, was shot and killed, also during a robbery. *Cromartie*, 514 S.E.2d at 209. Witnesses described seeing two men at or around the store at the time of the shooting. ECF No. 18-15 at 27-28. Police recovered two fired cartridge casings found on the floor near the deceased, ECF No. 18-15 at 227, two beer cans that had apparently been dropped outside the store, *id.* at 208, a piece of cardboard from a Budweiser beer case, *id.*, and a box of cigarettes found near the deceased, ECF No. 18-17 at 118.

On the evening of April 12, 1994, a shootout broke out at a housing development in Thomasville. Gary Young testified that he fired a gun during the shootout. ECF No. 18-13 at 66, 81. Young attempted to hide the gun later that night by tossing it near adjacent railroad tracks. ECF No. 18-12 at 126.

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[3] Record on Appeal to the Georgia Supreme Court.

[4] Terrell Cochran and Keith Reddick testified in state habeas proceedings in this case that, on the night of the Madison Street Deli shooting, they saw Gary Young running from the area of the Madison Street Deli wearing a dark colored hooded sweatshirt. ECF No. 21-14 at 144-45.

The following day, April 13, 1994, police detained and questioned Carnell Cooksey. ECF No. 18-13 at 232. Cooksey told them where Young had thrown the gun, and Cooksey implicated Mr. Cromartie in the two convenience-store shootings. ECF No. 18-12 at 107, 111, 114. Police arrested Mr. Cromartie that same day. They also arrested two alleged co-conspirators in the Junior Food Store shooting, Corey Clark and Thaddeus Lucas, as well as Young.

Police recovered the firearm that Young had thrown near the railroad tracks. ECF No. 18-13 at 233. A ballistics analysis of the gun and the fired cartridge casings from the two crime scenes revealed that the gun—a Raven Arms .25 caliber semiautomatic pistol—had been used to shoot both Mr. Wilson and Mr. Slysz. ECF No. 18-16 at 15-22. It was the same gun that Young testified that he had fired at the housing development. Young testified that the gun was his. ECF No. 18-13 at 69, ECF No. 18-14 at 77.

In September 1997, Mr. Cromartie stood trial alone for the Madison Street Deli and Junior Food Store shootings.[5] The evidence that Mr. Cromartie committed the Madison Street Deli shooting consisted almost entirely of inculpatory statements allegedly made by him to Young, as well as testimony by Cooksey that he had seen Young hand his gun to Mr. Cromartie. During state habeas proceedings, Cooksey

[5] Lucas received a twenty-year sentence for robbery, with ten years to serve in custody. ECF No. 18-15 at 70. That sentence was concurrent with another identical sentence on an unrelated assault case. *Id.* Clark received a twenty-five-year sentence for robbery and hindering apprehension. ECF No. 18-15 at 131. He was paroled in 2005, after serving slightly more than ten years of his sentence. Young was initially charged in the Madison Street Deli shooting, ROA 3228, but those charges were later dropped, ROA 3227. His charge for being a felon in possession of a firearm was also dropped despite his admission to possessing and firing the gun. ROA 3227.

testified that he, in fact, never saw Young hand a gun to Mr. Cromartie. ECF No. 21-14 at 127. There was no physical evidence tying Mr. Cromartie to the Madison Street Deli shooting, there were no witnesses to the shooting, and the surveillance video was of too poor quality to identify the shooter.

As for the Junior Food Store shooting, the key testimony came from the alleged co-conspirators, Lucas and Clark. Lucas testified that Mr. Cromartie asked Lucas to drive Corey Clark and him to a store so that they could steal some beer. Lucas did not see a gun. ECF No. 18-15 at 86-89. He dropped them off and waited for them while they went into the store. They came back with two cases of beer. *Id.* at 89-90. He testified that Clark told him what happened at the store, but was not asked what Clark told him. *Id.* at 93.[6]

Clark testified that both he and Mr. Cromartie went into the Junior Food Store. ECF No. 18-15 at 140. Clark stated that Mr. Cromartie walked to the counter at the front of the store while Clark went to the cooler at the back of the store to get the beer. *Id.* According to Clark, he then heard two shots, and Mr. Cromartie instructed him to run to the front of the store to attempt to open the cash register. *Id.* at 141. Clark claimed that he did. *Id.* at 142. Meanwhile, according to Clark, Mr. Cromartie—who was already standing at the front of the store—ran to the back of the store and took two twelve-packs of Budweiser. *Id.* Clark explained that, when they ran from the store, one of the two packs of beer ripped open and several beers

[6] Mr. Lucas is Mr. Cromartie's half brother, but did not know him or even that he existed until Lucas was eighteen years old. ECF No. 18-15 at 82-83. Lucas was, however, a long-time friend of Corey Clark and Gary Young. ECF No. 18-15 at 135; 18-13 at 27.

fell on the ground. *Id.* Clark testified that he picked up several beers and they fled. *Id.* at 143. The state also presented evidence that: (1) a fingerprint found on a piece of cardboard outside the Junior Food Store was Mr. Cromartie's, ECF No. 18-17 at 58; and (2) a footprint in the mud near the store was from an Adidas shoe, and that Mr. Cromartie had Adidas shoes. ECF No. 18-16 at 26.[7]

On September 26, 1997, the jury convicted Mr. Cromartie of malice murder and related charges. At the penalty phase, the prosecution put on no additional evidence. The defense presented the testimony of five family members. The entire penalty phase—including opening and closing statements and the court's charge—lasted three hours. *See* ECF No. 18-19 at 80 (penalty phase begins at 9:05 a.m.); *id.* at 189 (jury retires to deliberate at 12:05 p.m.); *see also Cromartie v. GDCP Warden*, No. 17-12627, Order (11th Cir. Mar. 26, 2018) (Martin, J., dissenting in part from the denial of COA reconsideration) ("[T]he jury got just a glimpse of Mr. Cromartie's childhood trauma from the scattered testimony of five of his family members . . . .").

The jury debated Mr. Cromartie's fate over the next three days. On October 1, 1997, the jury sentenced Mr. Cromartie to death. A press report indicated that the jurors were initially deadlocked six-to-six over whether to sentence Mr. Cromartie to

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[7] Although this physical evidence shows that Mr. Cromartie was *present* at the Junior Food Store, no physical evidence established that he shot the victim or ever touched the gun. The state's primary evidence that Mr. Cromartie was the shooter came from Corey Clark's testimony. Clark had clear motive to lie; to convince investigators that he was not the shooter, he had to convince them that Mr. Cromartie was.

Carnell Cooksey has made contradictory representations to the Court as to whether Mr. Cromartie confessed to the Junior Food Store shooting, *see* ECF No. 18-12 at 114, or whether he did not, *see* ECF No. 21-14 at 127.

death or life without parole, and that multiple jurors wept after the death penalty verdict was read. ECF No. 18-24 at 105. Before trial, the District Attorney had offered Mr. Cromartie a plea deal to life with the possibility of parole, which, at that time, would have resulted in parole eligibility after seven years. ECF No. 21-14 at 57.

C. State Habeas Proceedings

After his conviction was affirmed on direct appeal, Mr. Cromartie, represented by new counsel, filed a state petition for writ of habeas corpus. In 2008, the state habeas court held a three-day evidentiary hearing. The hearing centered on a *Brady*[8] claim that the prosecution suppressed evidence that Gary Young, not Mr. Cromartie, was the perpetrator of the Madison Street Deli shooting.

Although the amended state habeas petition included a series of allegations regarding trial counsel's ineffectiveness, state habeas counsel did not present any testimony at the evidentiary hearing in support of a claim that trial counsel performed ineffectively at the penalty phase for failing to present mitigating evidence,[9] nor did they include such a claim in their initial post-hearing brief. ECF No. 23-32. Indeed, state habeas counsel did not include any claim of trial counsel ineffectiveness in their initial post-hearing brief, nor did they cite *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Id.* The state habeas court denied relief and the Georgia Supreme Court denied Mr. Cromartie's application for a certificate of

[8] *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[9] The only testimony at the state habeas hearing that could be considered relevant to counsel's penalty-phase ineffectiveness was trial counsel's testimony regarding his penalty-phase investigation and presentation, which was elicited by counsel for the state. ECF No. 21-14 at 101–04.

probable cause to appeal. This Court denied Mr. Cromartie's petition for certiorari on April 21, 2014. *Cromartie v. Chatman*, 134 S. Ct. 1879 (2014).

D. Federal Habeas Proceedings

Mr. Cromartie's initial federal habeas petition was filed on March 20, 2014, by Brian Kammer, an attorney with the Georgia Resource Center (GRC), which represented Mr. Cromartie during his state habeas proceedings. ECF No. 1. The petition primarily included claims raised in an abbreviated fashion, with little factual development. *Id.* Mr. Kammer moved to be appointed to Mr. Cromartie's case the same day, noting that the GRC represented Mr. Cromartie during state habeas proceedings and was familiar with the case. ECF No. 3 at 6. The Court granted Mr. Kammer's appointment motion on March 24, 2014. ECF No. 6.

On March 28, 2014, Mr. Cromartie's other state habeas attorney, Martin McClain, separately moved to be appointed in this case. ECF No. 8. Mr. McClain likewise noted his state habeas representation of Mr. Cromartie in his appointment motion. *Id.* at 4.

The State moved to dismiss the habeas petition in its entirety as having been filed shortly after AEDPA's statute of limitations expired. ECF No. 9. Mr. Kammer filed a motion to withdraw as counsel the next day, acknowledging that as a result of the possibly late filing he could have a conflict of interest. ECF No. 11.

The district court granted Mr. Kammer's withdrawal motion, but appointed Mr. McClain as substitute counsel, ECF No. 13, even though Mr. McClain had the same potential conflict as Mr. Kammer. During this time period when Mr. McClain alone represented Mr. Cromartie, the remaining time on Mr. Cromartie's statute of

limitations did in fact lapse. By the time undersigned counsel were appointed to represent Mr. Cromartie, they had no ability to raise any new claims that did not relate back to claims raised in the initial habeas petition. Months later, the district court removed Mr. McClain because of the conflict and appointed undersigned counsel. ECF No. 36. Ultimately, the district court found that the petition as a whole was timely. ECF No. 42.

After replacing initial federal habeas counsel, current counsel litigated the question of the initial petition's timeliness and the district court ultimately denied the state's motion to dismiss, ruling that the initial petition was timely. ECF No. 42 at 2, 16. Current counsel then sought and were granted the opportunity to file an amended habeas petition. ECF No. 44 at 1–2. Mr. Cromartie filed the amended federal petition on June 22, 2015, along with an extensive proffer of supporting materials. ECF Nos. 62, 62-1, 62-2. Included in the amended petition was a fully developed claim that Mr. Cromartie's trial attorneys were ineffective for failing to investigate and present mitigating life-history and mental-health evidence at the penalty phase. ECF No. 62 at 55–71. The supporting materials included declarations from numerous lay witnesses, expert reports, and records. ECF Nos. 62-1, 62-2.

The amended petition alleged that Mr. Cromartie's life has been plagued by trauma, abuse, and neglect, starting from before he was born, when his mother drank alcohol throughout her pregnancy. *See* ECF No. 62-1 at 7 (Estelle Barrau Decl.); ECF No. 62-2 at 87 (Julian Davies, M.D., Report). The trauma continued from there, as Mr. Cromartie's life was "marked by an essentially unrelenting stream of harmful

influences," including "family violence; verbal, emotional, and physical abuse; severe parental neglect and abandonment; poverty; witnessing extreme violence; frequent changes in living arrangements; and a family and personal history of substance abuse." ECF No. 62-1 at 88 (Bhushan Agharkar, M.D., Decl.).

The amended petition further alleged that Mr. Cromartie's history of trauma has had severe and life-long consequences. He suffers from Alcohol-Related Neurodevelopmental Disorder as a result of prenatal exposure to alcohol; multiple neuropsychological impairments, including impaired executive functioning; the effects of complex trauma; and symptoms of depression, anxiety, and posttraumatic stress disorder. ECF No. 62-2 at 97–100 (Julian Davies, M.D., Report); ECF No. 62-2 at 76–77 (Daniel Martell, Ph.D., Report); ECF No. 62-1 at 87–90 (Bhushan Agharkar, M.D., Decl.). These factors combined to negatively impact Mr. Cromartie's ability to make rational decisions and respond appropriately to stressors, and placed him at much greater risk of negative life outcomes, including trouble with the law. *Id.*

The amended petition also alleged that, although this mitigating evidence was available at the time of trial, very little of it was presented during the penalty phase. *See* ECF No. 62 at 55–71. Trial counsel offered only a brief presentation involving five lay witnesses, and failed to adequately investigate or present expert testimony that could explain Mr. Cromartie's life history from a mitigating and mental-health perspective. ECF No. 18-19 at 88–154.

Finally, the amended petition alleged that Mr. Cromartie was prejudiced by counsel's failure to effectively present mitigating evidence. ECF No. 62 at 63–71. The

amended petition alleged that, given the prosecution's pretrial offer of life with the possibility of parole after seven years, *see* ECF No. 21-14 at 57, and the jury's lengthy penalty-phase deliberations, there is a reasonable probability that, had counsel performed effectively, at least one juror would have voted to spare his life. ECF No. 62 at 71.

Thus, the penalty phase ineffectiveness claim pleads a set of facts comparable to those on which this Court has granted sentencing relief. *See, e.g.*, *Porter v. McCollum*, 558 U.S. 30, 43-44 (2009) (counsel's deficient mitigation presentation prejudiced petitioner in light of evidence of abusive childhood, military service, and cognitive defects); *Rompilla v. Beard*, 545 U.S. 374, 392-93 (2005) (same; evidence of abuse and mental problems likely caused by fetal alcohol syndrome); *Wiggins v. Smith,* 539 U.S. 510, 537 (2003) (same; evidence of petitioner's "excruciating life history").[10]

The district court denied the habeas petition on March 31, 2017, without granting an evidentiary hearing. ECF No. 81. The district court ruled that the penalty-phase-ineffectiveness claim (and that claim only) was untimely because it did not relate back to any of the claims raised in the initial petition by predecessor counsel and was not otherwise timely. *Id.* at 70-72. The district court declined to issue a certificate of appealability (COA) as to any claim. *Id.* at 85-86.

[10] In the court below, Judge Martin lamented that this claim has never been considered on the merits because of procedural bars. 11th Cir. Op. 9-10 (Martin, J., concurring). This Court, but only this Court, has the opportunity to correct that before it is too late.

Mr. Cromartie next sought COA from this Court. On January 3, 2018, Chief Judge Ed Carnes denied the COA application in a single-judge order. Mr. Cromartie then sought panel reconsideration of Chief Judge Carnes's COA denial. The panel denied reconsideration as to the penalty-phase-ineffectiveness claim over a lengthy dissent. This Court denied certiorari. *Cromartie v. Sellers*, 139 S. Ct. 594 (2018).

E. Rule 60(b) Proceedings

On November 8, 2019, two days after obtaining the Lucas affidavit, Mr. Cromartie moved to set aside his final judgment denying habeas relief under Federal Rule of Civil Procedure 60(b)(6).[11] ECF No. 95. In the 60(b) motion, Mr. Cromartie

[11] In the interim, additional proceedings took place in both the state and federal courts. Mr. Cromartie filed an extraordinary motion for new trial and postconviction DNA testing in the Thomas County Superior Court on December 28, 2018, which sought to test items that remain in the trial court's possession for DNA evidence that could reveal who shot Mr. Wilson and Mr. Slysz. After a hearing, on September 16, 2019, the court denied Mr. Cromartie's motion.

While Mr. Cromartie's request for permission to file an appeal of that denial in the Georgia Supreme Court was pending, the trial court issued a warrant scheduling Mr. Cromartie's execution for a period beginning on October 30, 2019. On October 25, 2019, the Georgia Supreme Court denied the request for a discretionary appeal. On October 30, 2019, the Georgia Supreme Court issued a stay based on a question of state law regarding the validity of the warrant, and on October 31, 2019, it found that the warrant was void because it had been issued while the DNA appeal was pending.

In the meantime, on October 24, 2019, Mr. Cromartie filed a state petition for a successive writ of habeas corpus, seeking to raise his penalty-phase-ineffectiveness claim. On October 29, 2019, the state-habeas court denied the successive petition and, on the same day, Mr. Cromartie filed an application for probable cause to appeal that denial in the Georgia Supreme Court.

On November 1, 2019, the Thomas County Superior Court issued another execution order, setting Mr. Cromartie's execution for the week beginning November 13, 2019. Mr. Cromartie moved to have the second execution warrant found invalid and for a stay of execution. On November 5, 2019, the Georgia Supreme Court denied all of Mr. Cromartie's requests.

On October 22, 2019, Mr. Cromartie filed a complaint under 42 U.S.C. § 1983 in the district court, which challenged the state courts' refusal to permit DNA testing, and on October 24, 2019, he moved for a stay of execution. On October 28, 2019, the district court dismissed the complaint and denied a stay. *Cromartie v. Shealy*, No. 7:19-CV-181, 2019 WL 5553274 (M.D. Ga. Oct. 28, 2019).

Mr. Cromartie appealed, and on October 30, 2019, the Eleventh Circuit addressed his motion for stay and appeal. Based on the Georgia Supreme Court's stay, the Eleventh Circuit denied the motion for stay as moot. The panel at the same time affirmed the dismissal of Mr. Cromartie's complaint in a published opinion. *Cromartie v. Shealy*, No. 19-14268, 2019 WL 5588745 (11th Cir. Oct. 30, 2019). The Eleventh Circuit denied en banc review on November 8, 2019.

alleged that the Lucas affidavit, in combination with prior federal counsel's conflicts of interest, the strength of the underlying penalty-phase-ineffectiveness claim, and the outspoken desires of the victim's daughter not to see Mr. Cromartie executed in the absence of DNA testing, constituted extraordinary circumstances sufficient to set aside the final judgment denying habeas relief solely on timeliness grounds. *Id.* Mr. Cromartie further alleged that Lucas's testimony would also provide a basis for overcoming the untimeliness of the penalty-phase-ineffectiveness claim, as it would establish Mr. Cromartie's actual innocence. *See McQuiggin*, 569 U.S. at 386 ("We hold that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or, as in this case, expiration of the statute of limitations.").

On November 12, 2019, the district court denied the motion to reopen the judgment. Reviewing a cold record and drawing all possible adverse inferences against Mr. Cromartie, the district court ruled that Mr. Cromartie was not diligent, largely because he did not bring out the evidence from Mr. Lucas either at trial or in the state habeas proceedings. DCO 5-7.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER EVIDENCE NOT PRESENTED PREVIOUSLY AS THE RESULT OF COUNSEL'S INEFFECTIVENESS SHOULD BE CONSIDERED NEW EVIDENCE UNDER *MCQUIGGIN*.

The lower courts here asserted that Mr. Lucas's affidavit was not new reliable evidence under *McQuiggin* because that evidence was supposedly obvious to everyone, but prior counsel simply failed to pursue or present it. DCO 5-7; 11th Cir.

Op. 4 (adopting reasoning of district court). As the district court put it, Mr. Lucas had asserted that he knew who shot the decedent, and "[t]he only way Lucas could know who shot Slysz is if *Clark confessed that he was the shooter*." DCO 7. As far as the lower courts were concerned, Mr. Cromartie's trial and state habeas counsel knew that Mr. Lucas had evidence of a confession by Clark to being the shooter, but never attempted to obtain or present that evidence.

If the lower courts are correct in that assumption, then it cannot be doubted that prior counsel's failure to seek, obtain, and present that evidence was ineffective. After all, what evidence would be more exculpatory at trial than evidence that the co-defendant (who pointed the finger squarely at Mr. Cromartie) had himself confessed to being the shooter? *See Green v. Georgia*, 442 U.S. 95 (1979); *Chambers v. Mississippi*, 410 U.S. 284 (1973). And state habeas counsel also had every incentive to develop evidence as exculpatory as that "Clark confessed he was the shooter." Yet state habeas counsel never explored that evidence, even though they confined their limited efforts to obtaining relief from the convictions. This failure by state habeas counsel only compounds their ineffectiveness for not even bothering to investigate a clearly meritorious claim that trial counsel was ineffective with respect to the penalty phase

The Eleventh Circuit adopted the district court's ruling that because prior counsel could have developed and presented evidence that Clark confessed to being the shooter, but failed to do so, the evidence of Clark's confession was not "new." 11th Cir. Op. 4 (adopting district court reasoning); DCO 6-7 (evidence not new because

available to trial counsel). That ruling deepened and hardened an existing circuit split.

In *Reeves v. Fayette SCI*, 897 F.3d 154 (3d Cir. 2018), the court held as follows:

> [When a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway.

Id. at 164.

The decision below is irreconcilable with *Reeves*. But the split did not begin when the Eleventh Circuit issued its opinion today. Rather, it has deepened and hardened ever since the lower courts began considering innocence claims under *Schlup* and *McQuiggin*. *See generally Reeves*, 897 F.3d at 161-62 & n.6. The following courts of appeals agree with the Third Circuit that facts not developed by prior ineffective counsel count as new: *Gomez v. Jaimet*, 350 F.3d 673, 689-90 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). The Eighth Circuit agrees with the Eleventh Circuit that evidence counts as "new" only if it was "not available at trial." *Amrine v. Bowersox*, 238 F.3d 1023, 1018 (8th Cir. 2001). Three courts of appeals have suggested that newly *presented* evidence can count as new. *See Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 543, 546-47 (2d Cir. 2012). The Fifth Circuit has not taken a clear position, *see Fratta v. Davis*, 889 F.3d 225, 232 (5th Cir. 2018), but has suggested that evidence is not "new" if it could have been discovered by professionally reasonable counsel. *Id.* at 232 n.21.

Thus, there is a live, well-developed conflict among the circuits on this important and recurring issue, one that is appropriate for this Court's certiorari review. Sup. Ct. R. 10(a). This Court should grant certiorari to resolve the conflict.

II. THIS COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A DISTRICT COURT MAY SUMMARILY DENY FOR LACK OF DILIGENCE A MOTION TO REOPEN BASED ON NEW EVIDENCE, WHERE THERE ARE DISPUTES OF MATERIAL FACT AS TO DILIGENCE.

Here, there were disputed issues of material fact as to whether Mr. Cromartie had been diligent in obtaining the exculpatory declaration from Thaddeus Lucas. Despite the existence of conflicting evidence, the district court and the Eleventh Circuit decided the issue adversely to Mr. Cromartie on a cold record without holding a hearing, taking evidence, or observing the demeanor of the witnesses. *See* DCO 5-8; 11th Cir. Op. 4-7. This Court should grant certiorari to resolve whether, in a capital case confronted by a claim of innocence, a lower court may summarily resolve such factual disputes without taking evidence.

When a habeas judgment is rendered on procedural grounds, the petitioner may seek to reopen the judgment on a showing of extraordinary circumstances. Fed. R. Civ. P. 60(b)(6); *Buck*, 137 S. Ct. at 778; *Gonzalez*, 545 U.S. at 535. New, reliable evidence of innocence can present such extraordinary circumstances, *Satterfield v. Dist. Att'y Philadelphia*, 872 F.3d 152, 162-63 (3d Cir. 2017), and also serves to support equitable tolling of any statute of limitations. *McQuiggin*, 569 U.S. at 386. Under *McQuiggin*, any lack of diligence on the petitioner's part is considered "as a factor in determining whether actual innocence has been reliably shown." *Id.* at 387.

Diligence is a familiar concept in habeas proceedings. *See, e.g.*, 28 U.S.C. § 2244(d)(1)(d); 28 U.S.C. § 2255(f)(4). This Court and the lower federal courts have made clear that diligence means "reasonable diligence," not "maximum feasible diligence." *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citations and quotation marks omitted). Diligence, like the other extraordinary circumstances that can justify reopening a judgment and equitable tolling, is an "'equitable, often fact-intensive' inquiry." *Id.* at 654 (quoting *Gonzalez*, 545 U.S. at 540 (Stevens, J., dissenting)). Accordingly, lower courts have previously held that when a petitioner has "alleged facts regarding his diligence that would entitle him to relief," *Aron v. United States*, 291 F.3d 708, 715 (11th Cir. 2002), the district court abuses its discretion if it fails to hold an evidentiary hearing. *Id.*; *accord Aragon-Llanos v. United States*, 556 F. App'x 826, 829-30 (11th Cir. 2014) (unpublished).

Here, however, the lower courts never paused to consider the facts in any careful and considered fashion, much less hold a hearing with respect to diligence. Instead, they reviewed, in a matter of hours, what was essentially a cold record. They chose to act on an extremely abbreviated schedule. In order to do so, they drew all available inferences against Mr. Cromartie. They found a lack of diligence without allowing for any development of the record.

This was a serious error. The lower courts did not engage in a "fact-intensive inquiry," but in a rush to judgment, asserting that Mr. Cromartie lacked diligence during the trial and state habeas proceedings. DCO 6-7; 11th Cir. Op. 4.[12] Inasmuch

[12] The district court did not apparently dispute that Mr. Cromartie's current counsel have made diligent efforts to obtain information from Mr. Lucas. DCO 6; *see* Declaration of Jessica Johnson

as Mr. Cromartie alleges that both trial and state habeas counsel were ineffective, he should not be made to bear the consequences of any lack of diligence on the part of such counsel. *See Martinez v. Ryan*, 566 U.S. 1, 9 (2012) (ineffective assistance of collateral counsel may establish cause for default of a claim of ineffective assistance of trial counsel); *Reeves v. Fayette SCI*, 897 F.3d 154, 164 (3d Cir. 2018) (where counsel ineffectively fails "to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway.").[13] The record below presents dramatically conflicting allegations, and inadequately founded assumptions, of material fact respecting diligence, which the lower courts could not properly resolve without a hearing.

The district court suggested, based on Mr. Lucas's trial testimony, that trial counsel had to have known that Mr. Lucas would say that Clark had admitted committing the shooting. DCO 6 ("Lucas testified that Clark told him what happened inside the Junior Food Store, yet no one asked what Clark told him."); *id.* at 7 ("Lucas testified at trial that Clark told him 'what happened at the store.' He further testified that Cromartie never told him 'what happened at the store.'") (record citations omitted). This begs many questions, most notably why any trial counsel who "knew" that Mr. Lucas would contradict the testimony of the prosecution witnesses on this

(describing current counsel's efforts). The Eleventh Circuit added a whole new layer of speculation on that topic. 11th Cir. Op. 4-5 & n.2. Rather than speculate about the relevant facts, courts interested in something other than a rush to judgment hear evidence about them.

[13] The issue of ineffective assistance of prior counsel is discussed in detail in § I, supra.

crucial point would not have asked him the question. No competent trial lawyer who was aware of such exculpatory evidence would fail to raise it.

But the record does not actually support the notion that Mr. Lucas would have testified at trial that Clark confessed to the shooting. First, Mr. Lucas did not so testify. Second, he has now attested that he had "not told anyone what Corey said about shooting the clerk because [he] was worried that it would ruin [his] life more than it already has." Lucas Aff., ¶ 5. The district court refused to credit that sworn statement because Mr. Lucas once told the Parole Board that Clark was the shooter (but without mentioning the source of that information). DCO 5. But a statement to the Parole Board was *not* a public statement: the Parole Board documents bear the stamp, "Confidential State Secret When Completed." ECF No. 95-1 at 7-10. Accordingly, contrary to the district court's inference—unsupported by any testimony—Lucas had never publicly implicated Clark until his recent statement.

Second, the district court indicated that state habeas counsel also knew from Mr. Lucas's statement to the Parole Board that Mr. Lucas claimed that Clark "told him what happened inside the store and that Lucas claimed Clark, not Cromartie, shot Slysz." DCO 6. *See also id.* at 7 ("The only way Lucas could know who shot Slysz is if Clark confessed he was the shooter."). The lower courts then assumed, based on that fact, that state habeas counsel showed lack of diligence by not calling Mr. Lucas to testify. *Id.* at 6-7; *see* 11th Cir. Op. 4-5 (citing DCO).

In fact, the record shows that Mr. Lucas was reluctant to testify in the state habeas proceedings, and exercised his right to speak to an attorney. ECF No. 21-15

at 31-36. The district court simply assumed that state habeas counsel did not follow up on the opportunity to depose Mr. Lucas out of lack of diligence. DCO 6-7. An equally plausible explanation is that Mr. Lucas was hostile and/or reluctant to talk to state habeas counsel after consulting his own counsel. After all, there is an actual record of Mr. Lucas's continuing reluctance to talk, as attested both by Mr. Lucas himself and by investigator Jessica Johnson. The lower courts could not properly resolve these conflicting inferences without conducting a hearing.

The lower courts ignored all this and rushed to judgment. Mr. Cromartie's allegations and affidavits, however, "alleged facts regarding his diligence that would entitle him to relief." *Aron*, 291 F.3d at 715. Accordingly, the district court should have held an evidentiary hearing to resolve the issue of diligence. *Id.*

The state courts failed to consider an additional factor demonstrating Mr. Cromartie's diligence—his efforts to obtain DNA testing in these proceedings, as well as in his separate appeal, currently pending in this Court, from the denial of his complaint under 42 U.S.C. § 1983. *See Cromartie v. Shealy*, No. 19-6570.

To the extent that there are legitimate doubts about the reliability of Mr. Lucas's statement, evidentiary development should be ordered, including discovery and DNA testing, so that Mr. Lucas's new evidence can be corroborated or disproved.

McQuiggin makes clear that diligence is a relevant consideration when a petitioner seeks to reopen judgment on a time-barred claim. *Holland* makes clear that the inquiry into diligence is an equitable, fact-intensive inquiry. But this Court

has not addressed whether or in what circumstances factual development of an innocence gateway claim is required. This Court should grant certiorari to decide that issue.

CONCLUSION

For all of the reasons set forth above and in Mr. Cromartie's other submissions to this Court, this Court should grant the writ of certiorari, and stay Mr. Cromartie's execution pending its consideration of his case.

Respectfully submitted,

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