No. 19-6604 and 19A534

In the
Supreme Court of the United States

Ray Jefferson Cromartie,
Petitioner,

v.

Warden, GDCP,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should grant certiorari to review an irrelevant question not presented to the federal courts below where reasonable jurists could conclude that Petitioner failed prove an "extraordinary circumstance" to reopen his 28 U.S.C. § 2254 application to reconsider a time-barred ineffectiveness claim.

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INTRODUCTION

The question before this Court is whether the Eleventh Circuit Court of Appeals erred in denying Petitioner Ray Jefferson Cromartie's request for a certificate of appealability (COA) from the district court's denial of his Federal Rule of Civil Procedure 60(b) motion. Cromartie argued that he could prove an "extraordinary circumstance" in the form of "actual innocence" with a newly obtained affidavit from co-defendant Thaddaeus Lucas stating he "overheard" co-defendant Corey Clark state he shot the clerk at the Junior Food Store.[1] Doc. 95-1 at 1-4. Cromartie argues this affidavit is enough to show he is "actually innocent" of the Junior Food Store crimes. But, as correctly found by the district court, Lucas admits in his affidavit that he does not know what occurred in the Junior Food Store and the record evidences serious doubt as to whether Cromartie was diligent in obtaining this information. As this evidence lacks reliability and there still remains overwhelming evidence of Cromartie's guilt, the district court found Cromartie failed to show he was "actually innocent" of the Junior Food Store crimes and therefore had not presented an "extraordinary circumstance" to reopen his § 2254 application to reconsider his time-barred ineffective assistance claim. Reasonable jurists could certainly conclude that Cromartie failed to prove an "extraordinary circumstance" to reopen his federal habeas proceeding.

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[1] Cromartie alleges that this is the "first" time Lucas has revealed this information, but it is not. As correctly found by the district court, Lucas provided this information in 1997 to Georgia Board of Pardons and Paroles, which Cromartie knew about during his state habeas proceeding. Doc. 99 at 6.

STATEMENT

A. Facts of the Crimes

1. Madison Street Deli Crimes

On April 7, 1994, Dan Wilson, the clerk of the Madison Street Deli was shot in the face as he was washing dishes in the back kitchen. Doc. 18-12 at 36, 111. He was shot with a .25 caliber handgun which testimony at trial showed Cromartie had borrowed from his cousin Gary Young. *Id.* at 63, 107-08. Wilson survived the attack. *Id.* at 61-64.

A surveillance video camera recorded the events proceeding the shooting of Wilson and captured an individual resembling Cromartie attempting unsuccessfully to open the cash register. *Id.* at 67-70, 84-87; Doc. 18-14 at 4.

Witnesses testified that Cromartie obtained Young's handgun prior to the Madison Street Deli shooting and Cromartie made statements implicating himself in the Madison Street Deli shooting to witnesses that testified at trial. Doc. 18-12 at 111; Doc. 18-13 at 46. Specifically, Carnell Cooksey testified that on the night of the Madison Street Deli shooting he saw Young give Cromartie his handgun, which Cooksey identified as the handgun shown at trial to be the weapon used in both convenience store shootings. Doc. 18-12 at 107-09, 115, 120-21. Cooksey also testified that Cromartie asked him if he was "down with the 187"—which was "slang for robbery"—and Cooksey told Cromartie he was not interested. *Id.* at 111.

In corroboration, Young testified that he gave the handgun to Cromartie identified as the weapon used in the Madison Street Deli shooting. Doc. 18-

13 at 28. Young also testified that Cromartie confessed to him that he shot the clerk at the Madison Street Deli.[2] *Id.* at 46-52.

2. Junior Food Store Crimes

Approximately two days later, nearly identical crimes were committed at the Junior Food Store—only this time the store clerk died as a result of being shot in the head. During the early morning hours of April 10, 1994, Thaddeus Lucas (Cromartie's step-brother) drove Cromartie and Corey Clark to the Junior Food Store located in Thomasville, Georgia, ostensibly for Cromartie and Clark to steal beer from the store. Doc. 18-15 at 82, 89.

Lucas testified that Cromartie asked him to drive him to the store, Cromartie picked the store, and Cromartie told Lucas were to park. Doc. 18-15 at 86-89. Specifically, corroborated by Clark's testimony, that after dropping Cromartie and Clark off near the side of the Junior Food Store, Cromartie instructed Lucas to wait for him and Clark at "Providence Plaza" apartments which was located nearby. Id. at 89, 139. Lucas also testified that although he knew Clark, this was the only time Clark ever rode in his car.[3] *Id.* at 83-90, 117. Additionally, Lucas testified that Cromartie did not tell him what happened in the store but Clark did; however, Lucas did not testify as to what Clark told him. *Id.* at 93. And when asked whether he

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[2] Additionally, Katina Washington testified that Young gave his handgun to someone on the night of the Madison Street Deli shooting and Cromartie was there when that occurred. Doc. 18-15 at 39-40. However, because Washington did not see the hand-off she could not positively identify to whom Young gave his handgun. *Id.* at 41.

[3] Contrary to Cromartie's assertion, the record does not show that Clark and Lucas testified that they were "long-time friend[s]." Doc. 95 at 8 n.2; *see also* Doc. 99 at 2 n.3.

knew Cromartie was going to "kill" the clerk, Lucas testified that he was "surprised" and would not have taken Cromartie to the store. *Id.* at 125.

Upon entering the store, Clark testified he walked to the beer cooler in the back of the store while Cromartie walked down the first aisle to the front cash register. *Id.* at 140. As with the first victim, the store clerk Richard Slysz was shot twice in the head as he sat on a stool behind the register. *Id.* at 140-41. Clark testified he was "shocked" and the shots were "unexpected." *Id.* at 140. Ballistics tests confirmed that the same Raven .25 caliber pistol was used in both the Madison Street Deli and Junior Food Store shootings. Doc. 18-16 at 12-21.

Clark testified that he saw Cromartie unsuccessfully attempt to open the cash register. Doc. 18-15 at 141-42. Clark then went behind the counter and tried to open the cash register while Cromartie went to the back of the store and stole two twelve packs of Budweiser beer from the store's cooler. Doc. 18-12 at 117; Doc. 18-15 at 142-43. Both men then fled the scene. Doc. 18-15 at 142. Clark testified that as Cromartie was fleeing the scene, one of the cases of Budweiser tore open, spilling beer cans onto the muddy ground. Doc. 18-15 at 143; see also Doc. 18-12 at 113, 134. Clark gathered all of the cans but two, got into Lucas' car at Providence Plaza with the beer, and all three men returned to the Cherokee Apartments. Doc. 18-15 at 143; *see also id.* at 90-91.

Walter Seitz,[4] who worked at the Jack Rabbit Foods store, which sat across a well-lit street from the Junior Food Store, corroborated Clark's testimony. Seitz explained that he had a clear view into the Junior Food

[4] Seitz called in the original complaint to the police regarding the Junior Food Store shooting. Doc. 18-13 at 22-23.

Store and "never lost sight of the store" after he heard the gunshots. Doc. 18-15 at 25-27. He testified that he heard the gunshots, then saw a "light skinned black" person, which was shown at trial to be Cromartie, (*id.* at 147; Doc. 18-17 at 150-51), run from the front of the store "where the clerk was to the back of the store," then run from the store with "two twelve packs of beer" (Doc. 18-15 at 26-27). Following this individual, Seitz saw another male, "darker in complexion and thinner"5 exit the store in the same direction as the first male. *Id.* at 28-29.

William Taylor also corroborated Clark's testimony. Taylor testified that on the night of the crimes he was driving by the Junior Food Store and saw two black individuals come out of the Junior Food Store, run to the left of the store, "drop something perhaps and go back to pick it up." Doc. 18-12 at 133. Taylor stated he thought the item the individual was carrying was beer. *Id.* at 134.

On the same side of the store in which Taylor testified he saw the individuals drop what he thought was beer, the police found a footprint, which was identified as a possible match for Cromartie's shoes but not Young's, Clark's or Lucas' (Doc. 18-17 at 52-53), a couple of beers, and a portion of a Budweiser beer carton with Cromartie's thumb print, containing 15 points of comparison (Doc. 18-13 at 140-41, 148; Doc. 18-18 at 58). *See also id.* Doc. 18-13 at 18, 201-03; Doc. 18-15 at 207-10, 217-18; Doc. 18-17 at 150.

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[5] Clark testified at trial that he was 6'2" and weighed 189 lbs. and was approximately the same size at the time of the crimes. Doc. 18-15 at 134. He also testified that he was taller and darker in skin tone than Cromartie. *Id.* at 142.

Law enforcement brought in the canine unit to track the perpetrators of the Junior Food Store crimes. The dogs tracked to the Providence Plaza apartments' parking lot where the trail ended. Doc. 18-13 at 204; Doc. 18-15 at 89, 139.

Finally, Cooksey testified that Cromartie confessed to him that he committed the murder at the Junior Food Store. Doc. 18-12 at 114.

B. Trial and Direct Appeal Proceedings

Cromartie was indicted by the Thomas County Grand Jury on October 20, 1994, for one count of malice murder, one count of armed robbery, one count of aggravated assault, one count of aggravated battery and four counts of possession of a firearm during the commission of a crime. Doc. 17-1 at 29-34.

Cromartie was represented by Michael Mears and Mears' team during trial. During his career, Mears was involved in approximately 100-120 death penalty cases. Doc. 21-14 at 39. Mears served as lead counsel in at least 60 death penalty cases and had tried about 27-29 death penalty cases to a jury. *Id.* Additionally, Mears was a national educator on defending death penalty cases. *Id.* at 41-42.

On September 26, 1997, following a jury trial, Cromartie was convicted as charged in the indictment. Doc. 17-8 at 63. Following the sentencing phase of trial, the jury found three statutory aggravating circumstances: 1) that the offense of murder was committed during an armed robbery; 2) that the offense of murder was committed for the purpose of receiving money or any other thing of monetary value; and 3) that the offense of murder was outrageously or wantonly vile, horrible, or inhuman, in that it involved

depravity of mind, or aggravated battery to the victim prior to the death of the victim. Doc. 17-8 at 74-75. The jury recommended a sentence of death on October 1, 1997. *Id.* at 74.

The trial court sentenced Cromartie to death for malice murder, consecutive sentences of life imprisonment for armed robbery, twenty years for aggravated battery, and five years for each count of possession of a firearm during the commission of a crime. *Id.* at 77-82.

The Georgia Supreme Court affirmed Cromartie's convictions and death sentence on March 8, 1999. *Cromartie v. State*, 270 Ga. 780. Thereafter, Cromartie filed a petition for writ of certiorari in United States Supreme Court, which was denied on November 1, 1999. *Cromartie v. Georgia*, 528 U.S. 974, 120 S. Ct. 419 (1999), *r'hrg. denied*, 528 U.S. 1108, 120 S. Ct. 855 (2000).

C. State Habeas Proceeding

Cromartie filed a petition for writ of habeas corpus on May 9, 2000 in the Superior Court of Butts County. Doc. 19-14. An amended petition for writ of habeas corpus was filed on December 9, 2005. Doc. 20-22. Petitioner was represented by a team of attorneys from the Georgia Resource Center and pro bono counsel Martin McClain. Both *specialized* in representing death row inmates in collateral appeals.

During his state habeas proceeding, Cromartie raised a claim that his rights were violated under *Brady* due to the State's alleged suppression of statements by two witnesses—Terrell Cochran and Keith Reddick—that they saw Gary Young[6] running from the Madison Street Deli, one of the crime

[6] Young was the owner of the handgun used by Cromartie during the crimes, and the individual Cromartie alleged committed the crimes.

scenes, on the night of the crime. The team of attorneys representing Cromartie, who had specialized in death penalty litigation for nearly a decade, did not raise a claim that his trial counsel was ineffective for failing to investigate and present evidence regarding his life and mental health for mitigation purposes.

After eight years of discovery, the habeas court held an evidentiary hearing on August 12-14, 2008. Docs. 21-14 – 23-20. Respondent subpoenaed Lucas to the hearing but he refused to testify before consulting his attorney. No testimony was ever taken from Lucas; however, Cromartie to put into evidence Lucas's pardons and paroles file in which he stated Cromartie's friend, ostensibly Clark, shot the clerk at the Junior Food Store. Docs. 21-41 at 40 Doc. 21-15 at 19, 29, 31. Both parties submitted post-hearing briefs and proposed orders. Docs. 23-32, 23-33, 23-34, 23-35, 23-36. Nearly two years after the submission of the proposed orders, on February 9, 2012, the state habeas court entered an order denying relief. Doc. 23-37 at 18. The court dismissed Cromartie's *Brady* claim as procedurally defaulted, and alternatively concluded the claim was without merit. Doc. 23-37 at 18. Cromartie filed a motion for reconsideration based upon new testimony from trial witness Gary Young and, after further discovery and briefing, the state habeas court denied the motion on October 9, 2012. Doc. 24-9. The Georgia Supreme Court denied Cromartie's application for a certificate of probable cause to appeal (CPC) on September 9, 2013. Doc. 24-14.

Cromartie filed a petition for writ of certiorari in the United States Supreme Court seeking review of the state court's determination of his *Brady* claim, which was denied on April 21, 2014. *Cromartie v. Chatman*, 134 S. Ct. 1879 (2014).

D. Federal Habeas Proceeding

Cromartie filed his federal habeas petition on March 20, 2014.[7] Doc. 1. In this initial petition, Cromartie alleged in Claim II, 15 instances of ineffective assistance of trial counsel, none of which mentioned or alluded to a failure by trial counsel to investigate and present evidence of Cromartie's life history and mental health.[8] Doc. 1 at 16-17, 18.

On January 6, 2015, Petitioner filed a request to amend his petition and the district court granted that request on the same day. Docs. 43, 44. Subsequently, Petitioner amended his petition on June 22, 2014, and included a new claim, Claim X, that trial counsel were ineffective during the sentencing phase of trial regarding the investigation and presentation of Cromartie's life and mental health. Doc. 62, at 55-57. The amended petition goes on for an additional fifteen pages alleging the facts in support of Petitioner's new ineffective assistance of trial counsel claim. *Id.* at 57-71.

Respondent filed his answer to the amended petition on July 22, 2015, and asserted that the new claim was unexhausted and procedurally defaulted because it was not raised in his state habeas proceeding. Doc. 64 at 13. However, after further research and consideration, Respondent requested permission on March 21, 2016, from the district court to amend his answer to assert a time-bar to Petitioner's new ineffective-assistance claim pursuant to § 28 U.S.C. 2244(d)(1). Doc. 74. Cromartie objected to the amendment. Doc.

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[7] Respondent filed a motion to dismiss the initial petition as untimely. Doc. 9. The district court denied the motion. Doc. 42.

[8] Cromartie was initially represented by the Georgia Resource Center and Martin McClain in his federal habeas proceeding. However, counsel was replaced in order to litigate certain portions of the timeliness challenge to the original petition.

75. This Court granted the request to amend on August 22, 2016, and determined Respondent's request to amend was not futile because Cromartie's new ineffective-assistance claim did not, pursuant to Federal Rule of Civil Procedure 15(c), relate back to a claim in his initial petition. Doc. 80 at 4-12. After full briefing of all claims, this Court denied Cromartie's request for federal habeas relief and declined to issue a COA as to any of Cromartie's claims. Doc. 81.

Cromartie timely filed a motion for a COA with this Court on August 24, 2017. In a single-judge order, Cromartie's motion was denied. Cromartie then requested reconsideration of the denial of his motion for COA. His motion was then reviewed by a three-judge panel and was denied on March 26, 2018. The majority and the dissent agreed that Cromartie was not entitled to a COA on his *Brady* claim. Regarding the time-bar, the majority held that the ineffective-assistance claim in his initial petition was too general to place Respondent on notice of Cromartie's new ineffective-assistance claim and did "not share a 'common core of operative facts'" with his newly pled Claim X. App. 10-12 (quoting *Mayle v. Felix*, 545 U.S. 644, 664 (2005)).

Cromartie filed a petition for writ of certiorari in the United States Supreme Court from the Eleventh Circuit Court of Appeals, which was denied on December 3, 2018. *Cromartie v. Sellers*, 139 S. Ct. 594 (2018).

E. Extraordinary Motion for New Trial Proceeding

On December 27, 2018, Cromartie filed his extraordinary motion for new trial in Thomas County Superior Court seeking DNA testing for the first time under O.C.G.A. § 5-5-41(c). The trial court held a hearing on

Cromartie's motion and on September 16, 2019, the trial court denied Cromartie's request for DNA testing. Cromartie timely filed an application for discretionary appeal with this Court on October 11, 2019. The Georgia Supreme Court summarily denied Cromartie's application on October 25, 2019.

F. First Execution Order

An execution order was entered on October 16, 2019, setting Cromartie's execution for October 30, 2019 at 7:00 p.m. at the Georgia Diagnostic and Classification Prison. Because this order was obtained while Cromartie's extraordinary motion for new trial was pending before the Georgia Supreme Court, it was void.

G. Successive State Habeas Proceeding

With his execution six days away, Cromartie filed a successive state habeas petition alleging for the first time in the state courts his claim of ineffective assistance of trial counsel for failure to present mitigating evidence during the sentencing phase. The state habeas court dismissed that petition on October 29, 2019 based on Georgia law finding that Cromartie could have previously raised his new claim of ineffective assistance of trial counsel in his first state habeas proceeding. The court found that neither case law nor a miscarriage of justice provided Cromartie a basis to overcome that bar.

Cromartie filed an application for certificate of probable cause to appeal and a motion for stay of execution. On October 30, 2019, the Georgia Supreme Court entered a provisional stay of execution because the trial court did not have jurisdiction to enter the warrant for execution.

H. Second Execution Order

Two days later, on November 1, 2019, the trial court signed and filed a second execution order setting Cromartie's execution for November 13, 2019. Cromartie directly appealed that order but the Georgia Supreme Court denied the appeal on November 5, 2019. The Court also denied the CPC application from the successive state habeas petition on the same day.

I. 42 U.S.C. § 1983 Proceeding

On October 22, 2019, Cromartie filed a complaint in the middle district court challenging Georgia's DNA statute, O.C.G.A. § 5-5-41(c). Additionally, on October 24, 2019, Cromartie filed a corresponding motion to stay his execution scheduled for October 30, 2019 at 7:00 p.m. at the Georgia Diagnostic and Classification Prison. This district court dismissed the complaint and denied the motion for stay on October 28, 2019.

Subsequently, Cromartie filed a notice of appeal in the district court on October 29, 2019 and requested a motion to stay his execution. This Court denied the appeal and the motion for stay was denied on November 30, 2019 as moot. On November 6, 2019, Cromartie filed a petition for rehearing en banc and requested another stay of his execution pending that motion, which was denied on November 8, 2019.

J. Rule 60(b) Motion

On November 8, 2019, Cromartie filed his current Rule 60(b) motion requesting that the district reopen his § 2254 application to consider his time-barred ineffective assistance of trial counsel claim. The district court denied the motion and a COA on November 12, 2019. Cromartie filed a notice of appeal in this Court on November 12, 2019. This response follows.

REASONS FOR DENYING THE PETITION

I. Cromartie did not present a claim of ineffective assistance of collateral counsel to the federal courts to overcome his lack of diligence in bringing his evidence of an extraordinary circumstance.

Cromartie asked the district court to reopen his § 2254 application under Rule 60(b) to reconsider his time-barred ineffective assistance of trial counsel claim for failure to investigate and present mitigating evidence. In support, Cromartie attached an affidavit from co-defendant Lucas who stated he "overheard" co-defendant Clark tell Gary Young he shot Mr. Slysz and that he, Lucas, did not "know for certain what happened that night because he [wasn't] in the store."[9] Doc. 95-1 at 3-4. Cromartie argued that this constituted an "extraordinary circumstance" that proved he was "actually innocent" of the Junior Food Store crimes. As pointed out by the Eleventh Circuit Court of Appeals, the district court denied the request for three reasons: (1) "it found that Lucas' affidavit statements were 'not new reliable evidence of Cromartie's actual innocence' given that Lucas states numerous times in his affidavit that he did not see what happened inside the store and has no personal knowledge about it"; (2) "the district court found unpersuasive Lucas' excuse for not coming forward earlier"; (3) "it emphasized that 'Cromartie has not been diligent with regard to this 'new' evidence.'" App. 3-4.

Cromartie asks this Court to grant certiorari to review whether alleged deficiency of his prior counsel for not obtaining the affidavit of Lucas could be used to subvert the diligence consideration enumerated in *McQuiggin v.*

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[9] As pointed out below, and noted by the federal courts, Cromartie had Lucas' alleged statement from his pardons and paroles file stating Cromartie's "friend," ostensibly Clark, shot the clerk—*which Cromartie submitted as an exhibit during the state habeas evidentiary hearing*. Doc. 21-41 at 40.

Perkins, 569 U.S. 383 (2013) because his current counsel was diligent. First, this question was not presented to the lower courts other than in a passing argument. Second, his proof that his current counsel have been diligent in seeking this information was only supplied in his reply brief to the district court after Respondent pointed out he had not presented any evidence of diligence. And this "proof" was presented, as found by the court of appeals, in a "shrewdly drafted" affidavit by current counsel's investigator. App. 5 n. 2. The court of appeals goes on to address the many credibility issues with this affidavit:

> It omits any mention of when the defense team first obtained a copy of the Parole Board document containing Lucas' "Personal History Statement." It states that "[o]n previous occasions" when confronted with the statement attributed to him in the document Lucas "stated that he did not remember saying that nor did he know how that information got into the statement." Johnson Aff. at ¶ 5. The Johnson affidavit omits, however, any mention of whether Lucas stated to Ms. Johnson that the information attributed to him in the document was true, regardless of how it came to be attributed to him. The affidavit says that Lucas was "reluctant to discuss the case," but not that he refused to do so. Nor does it say that he wouldn't tell her whether the statement attributed to him was the truth.
>
> A strategic reason for omitting that fact from the Johnson affidavit is obvious. If the affidavit recounted that on the "previous occasions" when she spoke with him about it Lucas denied the truth of the statement attributed to him in the document, that would undermine his credibility. But if the affidavit recounted that he had acknowledged on any of those "previous occasions" she spoke with him that the statement attributed to him in the Parole Board document was true, the defense would have to explain why it had failed to use that information to advance its actual innocence gateway theory before. This is all the more reason to conclude that Cromartie has not acted with reasonable diligence in this regard and has not presented strong evidence of actual innocence.

App. 5-6 n.2.

Third, Cromartie's claim that there is a circuit split regarding whether information is new can depend on the diligence of the prior counsel. But that is confusing diligence with whether it is new, reliable evidence. All the federal courts were stating was that, as part of its consideration of Cromartie's claim, he not been diligent in bringing this evidence. The courts found this unlikely given that he had the pardons and paroles file of Lucas many years ago and never did anything with it. *See* App. 5 n.2.

Finally, as will be discussed below, even if the federal courts were wrong about his diligence or there is some sort of circuit split, the other two reasons provided by the courts stand on their own as reasonable determinations in denying his motion to reopen his § 2254 case and deny his COA. In sum, Cromartie's convoluted diligence argument is nothing more than a red herring trying to divert this Court from seeing that Lucas affidavit is not an extraordinary circumstance.

Cromartie argued below that that he could prove an extraordinary circumstance through a claim of "actual innocence"—but actual innocence "is a narrow and well-defined *exception that will rarely be found to exist*." *Gonzalez*, 366 F.3d at 1274 (emphasis added). This "gateway should open only when a petition presents 'evidence of innocence *so strong* that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error.'" *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 316 (1995)) (emphasis added). Moreover, "[a]ctual factual innocence is required; legal innocence is not enough." *Gonzalez, supra.*

As correctly found by the federal courts, Lucas' affidavit does not prove Cromartie is innocent of the Junior Food Store crimes. Lucas' affidavit does not state, as alleged by Cromartie that he did not shoot Mr. Slysz or that Clark informed Lucas that he, Clark, shot Mr. Slysz. Instead, his affidavit states, as pointed out by the district court, that Lucas "overheard" Clark tell Gary Young he shot Mr. Slysz and that he, Lucas, did not "know for certain what happened that night because he [wasn't] in the store." Doc. 99 at 5; Doc. 95-1 at 3-4.

Moreover, as found by the district court, Lucas' explanation for coming forward now "falls flat" undermining its reliability. Doc. 99 at 5. First, Lucas claims he did not want the providing of this information to "ruin" his life, but as noted by the district court, he provided this information over twenty years ago to Pardons and Paroles. Doc. 99 at 5; Doc. 95-1 at 7-10. Second, Lucas claims that he became "angry" recently when he read the news and people were saying Cromartie committed the shooting at the Junior Food Store. *Id.* at 4. But his statement is contradicted by his trial testimony and his statements to the police, because he certainly had no problem pointing his finger at Cromartie at trial, and he never provided any statement to the jury or the police, suggesting Clark, not Cromartie, shot Mr. Slysz. Docs. 18-15 at 86-89, 125; 22-13 at 38-41. This is clearly not proof of "actual innocence."

Cromartie argues that because Lucas stated he "overheard" Clark admit to shooting Mr. Slysz, this creates a dispute of fact which should garner him an evidentiary hearing. But there is no dispute of fact, the federal courts did not find nor did Respondent state that Lucas has not made this statement. What the federal courts correctly found was that this statement was not enough, even if true, to prove "actual innocence." Cromartie has not shown

that the district court abused its discretion in making this determination when the record is viewed as a whole—especially as Lucas still admits he was not in the store and does not know what happened. *See* App. 5-7.

As admitted by Cromartie below, "[a] petitioner attempting to demonstrate his actual innocence must support his contention with 'new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial.'" Doc. 95 at 17 (quoting *Schlup*, 513 U.S. at 324). Cromartie's evidence is none of these things, nor is it even close. Indeed, Lucas admits that he does not know what happened in the Junior Food Store as he was not in the store on the night of the crimes. Doc. 95-1 at 3-4.

Contrary to Cromartie's assertion, there is overwhelming evidence of his guilt as found by the court of appeals. *See* App. 6-7. The shootings committed at the Madison Street Deli and Junior Food Store were nearly identical: both occurred late at night in a convenience store with only the clerk present; both clerks were shot in the head with the same weapon; and at both a failed attempt to open the cash register occurred. Cromartie confessed to being the shooter at the Madison Street Deli to two individuals, was identified as the shooter at the Junior Food Store by co-defendant Clark, and a similar shoeprint and his thumb print were identified at the Junior Food Store crime scene. There was also no evidence that Clark was at the Madison Street Deli on the night of the crimes. Further, there were two eyewitnesses to the Junior Food Store crimes who provided testimony consistent with co-defendant Clark's testimony about the crimes. Finally, none of the evidence Cromartie presented in state habeas to undermine his

conviction, and relied upon in his current motion, was found to be credible by the state habeas court.

Cromartie fails to show that reasonable jurists could debate the correctness of the district court's determination that Lucas' late affidavit shows Cromartie has a credible claim of "actual innocence." Consequently, Cromartie has failed to show that reasonable jurists could not conclude that he was not entitled to a COA. Certiorari review should be denied.

CONCLUSION

For the reasons set out above, this Court should deny the petition and the motion for stay of execution.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I served this brief on all parties required to be served by mailing a copy of the brief to be delivered via email, addressed as follows:

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