IN THE SUPREME COURT OF THE UNITED STATES

LEONARD TAYLOR,	)	
	)	**CAPITAL CASE**
Petitioner,	)	**Execution Set for**
	)	**February 7, 2023**
v.	)	**at 6:00 p.m.**
	)	
DAVID VANDERGRIFF,	)	**Case Numbers:**
Superintendent,	)	**22-6713**
Potosi Correctional Center	)	**22A709**
	)	
Respondent.	)	
	)	

TO: The Honorable Brett M. Kavanaugh, Associate Justice of the United States Supreme Court and Circuit Justice for the Eighth Circuit

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PETITIONER'S REPLY IN SUPPORT OF HIS APPLICATION FOR STAY OF EXECUTION AND PETITION FOR A WRIT OF CERTIORARI

Respondent's brief in opposition takes a "shotgun" approach, regurgitating the same misleading and meritless factual and legal arguments the state advanced in earlier filings in a cynical attempt to convince this Court to turn a blind eye to an upcoming event that would be "shocking to the conscience." It is certainly not a radical notion to suggest that the execution of a man, who has presented compelling forensic evidence that he could not have possibly committed the murders without affording him a hearing to prove his innocence, would be a constitutionally intolerable event.

In opposing a stay of execution, respondent argues, among other things, that petitioner did not raise a federal question in the court below. Nothing could be further from the truth. Petitioner devoted a substantial portion of his underlying state habeas petition to the argument that his upcoming execution would violate the Eighth and Fourteenth Amendments because he is actually innocent and was not afforded a constitutionally adequate process to prove it. (*See* St. hab. pet. at 45-59). The other challenges to petitioner's death sentences, based upon the Missouri Supreme Court's failure to reassess the proportionality of petitioner's death sentences as required by statute and the *Amrine*, *Deck*, and *Wolfe* decisions, also present cognizable Fourteenth Amendment claims under *Hicks v. Oklahoma*, 447 U.S. 443 (1990).

Respondent's cavalier attitude in addressing Mr. Taylor's compelling claim of innocence provides a textbook example of what legal scholars have described as the "myth of infallibility" of the criminal justice system. This view has been shattered by the numerous DNA exoneration cases that began to emerge in the 1990s and 2000s. The ever-expanding number of DNA exonerations has given rise to a phenomenon that one commentator has dubbed "innocence consciousness," which has rightly replaced the mistaken belief that the justice system almost never convicts an innocent person. *See* Marvin Zalman, *An Integrated Justice Model of Wrongful Convictions*, 74 Alb. L. Rev. 1465, 1468, 1479-1480 (2011).

Credible studies have indicated that between three to five percent of American prisoners who have been convicted and sent to prison are innocent. *See* Samuel R. Gross, et al., *Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. and Criminology 523 (2005). In fact, Professor Gross has contended that "any plausible guess at the total number of miscarriages of justice in America in the last fifteen years must be in the thousands, perhaps tens of thousands." *Id*. at 551. This is one of those cases.

Ironically, respondent's attempts to denigrate the exonerating impact of the new expert testimony and other exculpatory evidence and exaggerate the strength of the state's evidence of guilt, amplifies the constitutional necessity of a state court evidentiary hearing where all of these issues can be thoroughly aired in a court of law. In final analysis, it is safe to say that this Court has never been confronted by a freestanding claim of actual innocence that is as compelling as the facts presented here, involving conclusive scientific evidence that these murders occurred during a time frame during which petitioner had an airtight alibi. Coupled with the fact that, by any objective measure, the state's evidence at trial was far from convincing and has been further discredited with other new evidence, this is truly an extraordinary case. If there ever was or will be a truly persuasive claim of actual innocence in a capital case, this is it.

A. THIS CASE PRESENTS AN IDEAL VEHICLE TO ADDRESS WHETHER THE CONSTITUTION PRECLUDES THE EXECUTION OF AN INNOCENT MAN BECAUSE PETITIONER'S CLAIM OF INNOCENCE IS MUCH STRONGER THAN THE FACTS THIS COURT CONFRONTED IN EXAMINING THE CLAIMS OF INNOCENCE OF TROY DAVIS AND LLOYD SCHLUP.

Petitioner's claim of innocence is undoubtedly stronger than the claims of innocence this Court confronted in the Lloyd Schlup and Troy Davis cases. *See Schlup v. Delo*, 513 U.S. 298 (1995); *In re Davis*, 557 U.S. 952 (2009). In *Davis*, the claim of innocence that this Court found sufficiently compelling to warrant an evidentiary hearing was based on recantations of the vast majority of the prosecution's witnesses. *Id*. Unfortunately, Mr. Davis, after receiving a hearing, ultimately did not prevail on his claim of innocence. Mr. Davis had no evidence in the same league as the exonerating evidence presented here.

Petitioner's claim of innocence is also much stronger than the claim of innocence this Court confronted in *Schlup*. In *Schlup*, after remand from this Court for an evidentiary hearing, Lloyd Schlup obtained habeas relief under the gateway innocence standard despite the fact that two prison guards, who never wavered, continued to identify him as the murderer of a fellow inmate. *Schlup*, 513 U.S. at 302; *Schlup v. Delo*, 912 F. Supp. 448 (E.D. Mo. 1995).

In contrast, Perry Taylor, the only prosecution witness who provided direct evidence in support of petitioner's guilt, has twice recanted his coerced statements he provided to police. Furthermore, substantial portions of Perry Taylor's statements

to police are demonstrably false and the veracity of his statements have been further cast into doubt by the findings of two independent false confession experts. (*See* Exhs. 20, 26, 27). The remaining evidence of petitioner's guilt pales in comparison to the unchallenged prosecution evidence that reviewing courts confronted in *Schlup*. If petitioner is granted the same due process protections that Lloyd Schlup received, the result would undoubtedly be the same: a reviewing court or other factfinder would conclude, based on the new expert testimony and the weakness of the prosecution's case, that Leonard Taylor is undoubtedly innocent. *Id*.

Respondent also asserts that it is a settled question, based upon this Court's decision in *Herrera* and its progeny, that free-standing claims of innocence do not present cognizable constitutional claims even in capital cases. (Br. in opp. at 15-18). Respondent is wrong. As pointed out in the present petition, this Court has made it clear that *Herrera* did not actually resolve the issue of whether the Constitution precludes the execution of an innocent prisoner. *See McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931 (2013); *House v. Bell*, 547 U.S. 518, 554-555 (2006). If respondent's position is correct, this Court would have not remanded Troy Davis' § 2241 petition to the district court for an evidentiary hearing on his free-standing claim of innocence. *See In re Davis*, 557 U.S. 952 (2009).

B. RESPONDENT'S ATTEMPT TO DENIGRATE THE STRENGTH OF THE EXONERATING EVIDENCE AND EXAGGERATE THE PROSECUTION'S CASE IS MISLEADING AND UNPERSUASIVE.

Respondent goes to great lengths to attack the exonerating impact of the new forensic evidence regarding the time of death and other credible evidence, that the victims were alive during the eight days before their bodies were found, a period of time where petitioner had an ironclad alibi. Although petitioner addressed many of these arguments in his present petition and in previous state court litigation, a few more words are in order here.

Respondent's characterization of the prosecution's evidence as overwhelming is preposterous. Furthermore, respondent's reliance on a statement made by the Missouri Supreme Court that petitioner's claims for post-conviction relief advanced in his 29.15 appeal only consisted of "pebbles in a mountain of evidence", is misleading. The Missouri Supreme Court's characterization is technically correct in light of the fact that the only challenges to the state's evidence that were advanced in petitioner's 29.15 appeal, were issues regarding the accuracy of Angela Rowe's phone records. *See Taylor v. State*, 382 S.W.3d 78 (Mo. banc 2012). The inaccuracy of these phone records is also only a small part of the "mountain of evidence" that Leonard Taylor is innocent, including petitioner's ironclad alibi, the false testimony of medical examiner Dr. Phillip Burch regarding the time of the victims' death, the presence of rigor mortis in two of the dead bodies, and the credible evidence from

neighbor Elmer Massey and other witnesses, that the victims were alive in the days preceding their deaths after petitioner had left town.

When this "mountain of evidence" of innocence is viewed in conjunction with Perry Taylor's recantation and the other new evidence, no reviewing court now, in light of all the evidence that has emerged, could reasonably conclude that the evidence of Mr. Taylor's guilt is overwhelming. This position is underscored by the fact that respondent, in his brief in opposition, did not directly address the "elephant in the room;" the undisputed fact that it is not scientifically possible for rigor mortis to still be present in a body eight days or more after death.

Instead, respondent engages in a feeble attempt to attack the credibility of the medical examiner investigator Joseph Lebb's findings that two of the bodies were in a state of rigor mortis when they were found on December 3, 2004. (Opp. at 21). Respondent appears to suggest that Lebb was not credible because he had no specialized training to detect rigor mortis in a dead body. Apart from the fact that Joseph Lebb had years of experience in examining dead bodies as an investigator for the medical examiner's office, it is obvious that any lay person can easily detect rigor mortis in a dead body.

Anyone who has undergone the traumatic experience of finding a recently deceased friend or relative dead in their home[1] can attest that rigor mortis can be

[1] Unfortunately, one of petitioner's co-counsel has had this experience.

easily detected. Both the arms and legs of the deceased are "stiff as a board" and the limbs of the deceased cannot be easily bent at the knee or elbow joints. Therefore, respondent's suggestion that the rigor mortis findings of Mr. Lebb cannot be trusted to be accurate is absurd.

This is also not the only case where Dr. Burch's false testimony has led to the wrongful murder conviction of an innocent person. (*See* Exh. 23). In the Patricia Stallings case, Dr. Burch provided false testimony at trial that Ms. Stallings poisoned her newborn son with antifreeze. (*Id.*). While awaiting trial, Ms. Stallings gave birth to another son who exhibited the same symptoms that led to the death of her first child. (*Id.*). This fortuitous circumstance[2] led to her exoneration after it was established that her first baby died of a rare genetic condition that was later diagnosed in her second newborn son. (*Id.*).

To add insult to injury, Dr. Burch, after Ms. Stallings was exonerated and released from prison, refused to admit that he gave false testimony regarding the infant's cause of death. (*Id.*). Dr. Burch refused to change the cause of death on the infant's death certificate from "homicide by poisoning" to "natural causes." (*Id.*). Coupled with Perry Taylor's recantation, the inaccuracies in the phone record evidence, and the fact that Angela Rowe was seen alive by a neighbor and her sister

[2] Had Ms. Stallings received a death sentence and had not become pregnant before her trial, she would have likely been executed.

after Leonard had left town, Dr. Burch's demonstrably and patently false testimony provides clear and convincing evidence that Leonard Taylor could not have possibly committed these murders.

Respondent's brief in opposition did not challenge in any manner whatsoever the scholarly article and the Saferstein treatise that petitioner cited in his habeas petition to support his contention that it is not scientifically possible for rigor mortis to be found in a dead body where death has occurred eight to ten days earlier. (*See* Exh. 22). Respondent had an ample opportunity to try to find and present any contrary views from treatises, articles, or other experts on forensic pathology to rebut this contention. His failure to do so speaks volumes.

Respondents unfounded attacks on the strength of petitioner's claim of innocence is also belied by the fact that Wesley Bell, the elected prosecutor in St. Louis County, joined in petitioner's motion filed in the Missouri Supreme Court last week to delay petitioner's execution date for a period ninety to one hundred twenty days to give both his office and counsel for petitioner to more fully investigate and develop petitioner's claim of innocence so that Mr. Bell could make a more informed decision regarding whether to invoke the provisions of newly enacted § 547.031 RSMo Supp. (2001). This new law gives Missouri prosecutors the authority and discretion to file a motion before the trial court to give a wrongfully convicted inmate a hearing on his or her claim of innocence.

In light of Mr. Bell's position in the prior stay litigation, this case comes before this Court in a similar posture to the case of Areli Escobar, a Texas death row inmate. In that case, this Court granted Mr. Escobar's petition for a writ of certiorari and remanded the case to the Texas Court of Criminal Appeals in light of the elected prosecutor's concession of error, that the highest state appellate court refused to accept. *See Escobar v. Texas*, _____ S. Ct. _____, 2023 WL 123974 (Jan. 9, 2023). The same result is warranted here.

C. RESPONDENT'S OTHER ATTEMPTS TO ERECT PROCEDURAL OBSTACLES TO THWART REVIEW OF PETITIONER'S INNOCENCE CLAIM ARE MERITLESS.

Respondent also argues that only new evidence that could not have been discovered earlier by petitioner through the exercise of due diligence, can be considered by a reviewing court by conducting an actual innocence inquiry. This precise argument has been both implicitly and explicitly rejected by both this Court and the majority of federal courts of appeal that have addressed this question.

This Court in *Bousley v. United States*, 523 U.S. 614, 618-619 (1998) held that a prisoner who had pleaded guilty could meet the gateway innocence test based solely on the fact that there was an insufficient factual basis for his guilty plea to the charge for which he was convicted. *Id*. There was technically no "new" evidence, as defined by respondent, in *Bousley*.

Imposing a due diligence restriction on new evidence can also not be reconciled with this Court's decisions in *Schlup v. Delo*, 513 U.S. 298 (1995) and *House v. Bell*, 547 U.S. 518 (2006). Both of these cases defined new evidence as "evidence that was not presented at trial." *Id.* at 537. More recently, this Court again rejected the argument that a due diligent barrier should be imposed to limit the scope of federal court review of a gateway innocence claim in *McQuiggin v. Perkins*, 569 U.S. 383, 399 (2013).

Respondent's next argument that this Court should deny review based upon principles of federalism and dual sovereignty is misleading and meritless. Specifically, respondent suggests that this Court should decline to review petitioner's case because a federal habeas corpus proceeding was the appropriate avenue for petitioner to pursue his free-standing claim of actual innocence. However, this argument ignores the fact that such claims are not cognizable in most federal courts in habeas corpus actions, including the Eighth Circuit. *See e.g. Burton v. Dormire*, 295 F.3d 839 (8th Cir. 2002). A state habeas corpus action is the only available state avenue that a Missouri prisoner can pursue to advance a claim of innocence because such claims are not cognizable in state post-conviction proceedings pursuant to Mo. S. Ct. Rule 29.15 or 24.035. *See Wilson v. State*, 813 S.W.2d 833 (Mo. banc 1991).

Although it is unusual for this Court to exercise jurisdiction over judgments in state post-conviction actions, it is hardly unprecedented, particularly in capital cases. This Court's recent summary reversal in the *Escobar* case underscores this point.

In *Wearry v. Cain*, 577 U.S. 385, 395-396 (2016), this Court held that it was appropriate to exercise jurisdiction and review a ruling from the state post-conviction court in a capital case when "circumstances so warrant." In light of the compelling evidence that petitioner is innocent and has been denied due process by the Missouri Supreme Court's failure to grant him a hearing and reexamine his death sentence as required by state law, this is truly an extraordinary case. This Court's intervention is necessary to prevent the execution of an innocent man and clarify the scope of constitutional protections that must be afforded to state prisoners who present substantial claims that they are innocent.

D. PETITIONER'S FOURTEENTH AMENDMENT CLAIMS UNDER QUESTION THREE ARE COGNIZABLE AND WORTHY OF THIS COURT'S DISCRETIONARY REVIEW.

Contrary to respondent's position, this is an ideal case for this Court to decide whether a condemned man is constitutionally entitled to a hearing in state court where he presents a persuasive case of actual innocence. Respondent's brief in opposition fails to recognize that Missouri is one of the very few states that does not provide an innocent prisoner with an avenue to pursue a claim that he is innocent

and receive a hearing. As noted in the petition, executive clemency and the newly enacted § 547.031, both of which require a discretionary act by political actors, are not constitutionally adequate substitutes for an adversarial hearing for innocent prisoners.

The only state remedy available for an innocent Missouri prisoner under a death sentence is to file a habeas corpus petition in the Missouri Supreme Court. In virtually every case, the Supreme Court summarily denies the petition, as it did here, without ordering a hearing before a Special Master to allow the petitioner to fully develop his claim.

In defending the constitutional adequacy of this practice, respondent argues that the *Amrine* decision did not announce a hearing requirement. (Br. in opp. at 32). This argument is disingenuous. In *Amrine*, a hearing was unnecessary because Mr. Amrine was granted an evidentiary hearing in district court in his federal habeas action where he presented all of the available evidence of his innocence. *See Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001).

In addressing the constitutional claims involving petitioner's right to a new proportionality review, respondent argues that this claim is foreclosed by the Missouri Supreme Court's decision in *State v. Nunley*, 341 S.W.3d 611, 623-624 (Mo. banc 2011). Although *Nunley* held, without any analysis, that the Missouri Supreme Court's 2010 decisions in *Deck* and *Davis* were not retroactive, the *Nunley*

decision violates due process under *Fiore v. White*, 531 U.S. 225 (2001), by failing to give condemned prisoners the benefit of a prior interpretation of a statutory right. *See also Bunkley v. Florida*, 538 U.S. 835 (2003).

In *Bunkley*, the Florida Supreme Court, in a decision analogous to *Nunley*, held that its subsequent decision interpreting a state statute was not retroactive because it was merely an evolutionary refinement in the meaning of the law. *Id*. at 840. As in *Fiore*, this Court in *Bunkley* held that due process required the court to reverse the state court decision and remand the case for further proceedings. *Id*. at 841-842. The same result is warranted here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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