

NO. 08-16009-P

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IN THE

**United States Court of Appeals**

**FOR THE ELEVENTH CIRCUIT**

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IN RE: TROY ANTHONY DAVIS

*Petitioner*

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**BRIEF OF HON. GERALD KOGAN, HON. RUDOLPH GERBER,  
PROFESSOR CHARLES OGLETREE, PROFESSOR ERIC  
FREEDMAN, PROFESSOR ELIZABETH SEMEL, AND ATTORNEYS  
STEVE SADOW AND GEORGE KENDALL AS *AMICUS CURIAE* IN  
SUPPORT OF PETITIONER'S APPLICATION FOR PERMISSION  
TO FILE A SECOND PETITION FOR WRIT OF HABEAS  
CORPUS IN THE DISTRICT COURT**

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***BRIEF OF AMICUS CURIAE***

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**IN THE UNITED STATES COURT OF APPEALS  
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**IN RE: TROY ANTHONY DAVIS,**            )  
Petitioner                                    )  
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\_\_\_\_\_ )   **Case No. 08-16009-P**

**CERTIFICATE OF INTERESTED PERSONS**

Counsel hereby certifies that the following have an interest in the outcome of this case:

1. Spencer Lawton, Jr., District Attorney, Trial
2. David T. Lock, District Attorney, Trial
3. Robert E. Barker, Trial Counsel for Mr. Davis
4. Robert Falligant, Trial Counsel for Mr. Davis
5. Nancy A. Askew, Trial Counsel for Mr. Davis
6. Hon. James W. Head, Trial Judge
7. Troy Anthony Davis, Petitioner
8. Thomas H. Dunn, Director, Georgia Resource Center
9. Jason Ewart, Habeas Counsel for Mr. Davis
10. Danielle Garten, Habeas Counsel for Mr. Davis
11. Philip Horton, Habeas Counsel for Mr. Davis
12. Susan V. Boleyn, Counsel for Respondent
13. Mark MacPhail, Deceased

14. Kathleen A. Behan, *Amicus Curiae* Counsel (and former counsel for Mr. Davis).
15. Arnold & Porter LLP, Habeas Counsel for Mr. Davis
16. Mary Elizabeth Wells, Former Counsel for Mr. Davis
17. Hon. Gerald Kogan, *Amici*
18. Hon. Rudolph Gerber, *Amici*
19. Professor Charles Ogletree, *Amici*
20. Professor Eric Freedman, *Amici*
21. Professor Elizabeth Semel, *Amici*
22. Steve Sadow, *Amici*
23. George Kendall, *Amici*

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## **STATEMENT OF THE ISSUE**

In addition to the statement of issues set forth in the Brief of Petitioner, this brief addresses the equitable factors that warrant his successive petition to be considered by this Court.

## **INTEREST OF AMICI**

*Amici Curiae* are Law Professors, Criminal Defense Lawyers, and former Members of the Judiciary who write to address a decisive question before the Court. Each of the *Amici* has a particular interest in and experience with the administration of justice in criminal cases and in ensuring access to the Courts for indigent and capital defendants. The relevant backgrounds of the *Amici*, Hon. Gerald Kogan, Hon. Rudolph Gerber, Professor Charles Ogletree, Professor Eric Freedman, Professor Elizabeth Semel, and Attorneys Steve Sadow and George Kendall, are summarized in the accompanying Motion for Leave to File *Amicus Curiae* Brief, and are incorporated herein by reference. *Amici* seek to bring to the Court's attention relevant historical events from 1995 and 1996 that are pertinent to the state habeas proceedings of Mr. Davis.

In particular, *Amici* seek to alert the Court to the historical circumstances underlying the defunding of the Federal Resource Centers in 1995, and how that defunding combined with the particular procedural posture to create a scenario that Mr. Davis' then counsel deemed "catastrophic" for his case.

Amici believe that in evaluating whether further proceedings are warranted based upon Mr. Davis' Second Petition for a Writ of Habeas Corpus, this Court can and should take into account equitable considerations underlying access to the writ of habeas corpus. *See, e.g. Schlup v. Delo*, 513 U.S. 298, 319 (1995) (recognizing that habeas corpus is "at its core, an equitable remedy."). Amici will present several extraordinary circumstances-- all outside of Mr. Davis' control -- that directly impacted the presentation of his constitutional and actual innocence claims.

First, in 1995, just as Mr. Davis' post-conviction was entering the critical state habeas evidentiary proceeding, Georgia's Federal Resource Center, then serving as Mr. Davis' sole counsel, lost all of its federal funding. During that same time period, federal restrictions were being enacted on access to the writ of habeas corpus, dramatically limiting habeas counsel in presenting claims based upon newly available evidence.

Second, as the public record demonstrates, Georgia was particularly affected by these developments due to the inability of the Resource Center to replace the seventy percent loss in its funding, resulting in massive budget cuts and staff terminations, and widespread chaos in the Center's pending matters, including in matters under death warrants.

Finally, as state habeas counsel for Mr. Davis concedes, in light of the decimation of their resources, of the many cases denied adequate counsel, Mr. Davis' case was particularly adversely affected due to the departure of his lawyer, the decision to "triage" matters, and the ultimate admitted failure to do more than a "cursory, at best" investigation of his innocence prior to his initial state habeas evidentiary hearing.

These extraordinary historical, legislative and case-specific events coalesced in Mr. Davis' case, resulting in a scenario that his own attorney described as a "catastrophe" and that precluded Mr. Davis from an adequate state presentation of his claims of innocence and constitutional violations. Under established doctrine in this Circuit, because Davis has now presented a free-standing Eighth and Fourteenth Amendment claim under *Herrera v. Collins*, 506 U.S. 390 (1993), the law in this Circuit permits this Court to take into account the equities in determining whether to provide for further proceedings in his matter. *See, e.g. Mize v. Hall*, 532 F.3d 1184, 1196 n.9 (11<sup>th</sup> Cir. 2008).

## **ARGUMENT**

### **I. THE 1995 NATIONAL DEFUNDING OF FEDERAL RESOURCE CENTERS AND THE 1996 ENACTMENT OF AEDPA CONVERGED IN A "PERFECT STORM" AT A CRITICAL STAGE IN MR. DAVIS' STATE HABEAS PROCEEDINGS.**

In evaluating the standards for review of Mr. Davis' Second Petition for a Writ of Habeas Corpus based upon a freestanding claim of actual innocence under

*Herrera v. Collins*, 506 U.S. 390 (1993), the Court can and should consider the significance and timing of two national events causing a devastating impact on preparation of Mr. Davis' state habeas case. First, in the summer of 1995, the U.S. Congress decided to eliminate federal funding to post-conviction defender organizations across the country, including the Georgia Resource Center, which specialized in providing legal representation to indigent death row inmates during the state and federal habeas corpus review process.<sup>1</sup> While the effects of the funding elimination were widespread, the Georgia Resource Center and Mr. Davis were particularly adversely impacted.

Indeed, this abrupt termination of funding after the September 30, 1995 end of the fiscal year decimated the Georgia Resource Center, which at the time was representing Mr. Davis in the state habeas process. The Center lost seventy percent of its operating budget and consequently, six attorneys, three investigators and one support staff member were laid off or left due to the sudden budget crisis.<sup>2</sup> Only two lawyers remained at the Center to handle a "crushing caseload" of at least 79

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<sup>1</sup> Continuing Appropriations for FY 96, Pub. L. No. 104-91, 110 Stat 7 (1996). Passage of the final appropriations bill was delayed until January of 1996. For a discussion of Congress' decision to end funding for resource centers, see Roscoe C. Howard, Jr., *Symposium: Federalism and the Criminal Justice System: The Defunding of the Post Conviction Defense Organizations as a Denial of the Right to Counsel*, 98 W. Va. L. Rev. 863 (1996).

<sup>2</sup> Affidavit of Mary Elizabeth Wells, ¶¶ 6-8 (attached as Exhibit A).

death row proceedings and appeals, including that of Mr. Davis.<sup>3</sup> As set forth in Section II, *infra*, Mr. Davis was unduly affected by that crushing load.

Second, in 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act (AEDPA) to, *inter alia*, expedite the pace of federal habeas corpus review in death penalty cases.<sup>4</sup> The Act requires the filing of a federal habeas corpus petition within one year of the conviction becoming final, essentially resulting “in petitions for habeas corpus review in state courts having to be filed within that one year period.”<sup>5</sup> The sharp decline in the Georgia Resource Center’s revenue due to the withdrawal of federal funding, combined with the one year statute of limitations due to the passage of AEDPA, already had raised significant

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<sup>3</sup> *Id.* at ¶¶ 12- 23. *See Davis v. Thomas*, 266 Ga. 835, 471 S.E.2d 202 (1996)(describing how the loss of federal funding impacted the Resource Center’s representation of Mr. Davis in his state habeas case). *See also* Brendan Low, *Will Georgia Kill an Innocent Man?*, Time, July 13, 2007; Bill Rankin and Alan Judd, *Witnesses Recant; Law Stymies Death Row Appeal*, The Atlanta Journal-Constitution, September 21, 2003.

<sup>4</sup> Pub. L. No. 104-132, 110 Stat. 1214 (1996)(codified in various sections of 28 U.S.C.); For a description of the effects of AEDPA’s filing restrictions, see Bryan A. Stevenson, *The Politics of Fear and Death: Successive Problems in Capital Federal Habeas Corpus Cases*, 77 N.Y.U. L. Rev. 699 (2002), and James S. Liebman, *Symposium: Road Blocks to Justice: Congressional Stripping of Federal Court Jurisdiction: An “Effective Death Penalty”? AEDPA and Error Detection in Capital Cases*, 67 Brooklyn L. Rev. 411 (2001).

<sup>5</sup> Georgia Department of Audits and Accounts, Performance Audit Operations Division, Special Examination (requested by the Senate Appropriations

concerns about the adequacy of representation for Georgia death row inmates during the 1995 to 1996 time frame, as set forth in numerous public sources.

While the post-conviction defender organizations in other states with the death penalty experienced service delivery problems due to the 1995 defunding and the 1996 AEDPA restrictions, the situation in Georgia was far more dire. As the Georgia Department of Audits emphasized in its 2005 review of the Resource Center, Georgia lacks “a statutory mandate that death-sentenced inmates be provided with legal representation in post conviction-proceedings” which made the proper functioning of the non-profit Resource Center all the more critical to the Georgia criminal justice system. Georgia Audit Report, *supra* n.5, at 6-7; *Id.* at 9 (“All of the 38 states that have the death penalty provide for some level of post-conviction representation to death-sentenced inmates. . . .Georgia is unique in that it relies on a private non-profit entity to provide this service.”); *Id.* at 10 (“Exhibit 3” is a chart depicting how other states, unlike Georgia, provide post-conviction representation to indigent death-sentenced inmates, *i.e.*, through mechanisms such as public defender offices, assigned counsel, and local administration).

In short, the elimination of federal funding to the Georgia Resource Center, combined with the enactment of AEDPA speeding up the federal habeas review

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Committee) The Georgia Appellate Practice and Educational Resource Center, Inc., Report 06-05, October 2005 (hereinafter, “Georgia Audit Report”).

process, created a juggernaut that had the potential to be catastrophic for indigent death row inmates, and, as set forth in II, *infra*, proved to be so in Mr. Davis' case.

**II. GIVEN THE RESOURCE CENTER'S ADMITTED LACK OF SUBSTANTIVE STATE HABEAS REPRESENTATION, EQUITY FAVORS CONSIDERATION OF MR. DAVIS' *HERRERA* CLAIM.**

While, as set forth above, the combined impact of the defunding of the Federal Resource Centers and the passage of AEDPA's new limitations on habeas corpus were expected to, and did have a dramatic impact on the availability of the writ of *habeas corpus*, the public record demonstrates a particularly devastating impact on the case of Troy Anthony Davis. In particular, Mr. Davis' case was at a critical stage -- the first state habeas proceedings -- when Congress defunded the resource centers, defunding had a direct and immediate effect on Mr. Davis' innocence claim. While Mr. Davis did not have a right to *effective* assistance of habeas counsel under *Coleman v. Thompson*, 501 U.S. 722 (1991), the admitted performance of his state habeas counsel was so deleterious (and indeed harmful to his case) that the equities favor review of his current *Herrera* actual innocence claim by this Court.

In September, 2002, Mary Elizabeth Wells, a former attorney with the Georgia Resource Center, provided an affidavit in Mr. Davis' case. (*See* Affidavit of Mary Elizabeth Wells, Exhibit A attached.) In that affidavit, Ms. Wells describes the chilling consequences of Congressional defunding of the Georgia

Resource Center. For example, Ms. Wells describes that Mr. Davis' initial state petition in 1994 was merely a "skeletal" petition that Jeff Ertel, an attorney who was then employed by the Resource Center, filed "with boilerplate claims and language" and that "is not preceded by any investigation whatsoever" as was the procedure of the Resource Center at the time "solely to stave off an impending execution." *Id.* at ¶ 3. When the case was assigned to a judge a year later, counsel conceded that the Resource Center still had conducted "no substantive work" on the case, and sought time to find alternative counsel. *Id.* at ¶ 4. After a July 20, 1995 scheduling hearing, the Resource Center was permitted three months to conduct discovery, but not granted additional time to find alternative counsel. *Id.*

As Ms. Wells explains in her affidavit, within a short time after that hearing, the Resource Center experienced a dramatic impact to its already resource-strapped operations. On September 1, 1995, the Resource Center was notified that its federal funding would not be renewed, and indeed that all federal funding would be depleted by the end of the month. *Id.* at ¶ 6. In the ensuing personnel cutbacks, numerous employees, including six staff attorneys, resigned or were laid off. *Id.* at ¶ 7. Among those attorneys, Jeff Ertel, Mr. Davis' primary counsel, resigned on August 23, 1995, in the midst of Mr. Davis' discovery proceedings. *Id.* The Resource Center was reduced to two attorneys, with a commitment of "direct

involvement” in the cases of 79 individuals of the 113 on Georgia’s death row. *Id.* at ¶ 14.

The cut-backs had a devastating effect on Mr. Davis’ case. As Ms. Wells concedes, state habeas is “the post-conviction stage that requires the largest commitment of work and resources because it is the stage when all new claims must be raised and factually developed.” *Id.* at ¶ 15. Nevertheless, the Resource Center was sole counsel for thirteen inmates in state habeas, including Mr. Davis, and was overwhelmed on numerous other cases, including two cases with execution warrants that received higher priority at the Center. *Id.* at ¶¶ 17-22. Indeed, during that period, the Center’s only apparent involvement in Mr. Davis’ case was to apply for and litigate a request for a continuance to the Georgia Supreme Court. *Id.* at ¶ 23.

In short, as Ms. Wells has conceded, the Georgia Resource Center suffered such operational limitations that “[t]he work conducted on Mr. Davis’ case was akin to triage, where we were simply trying to avert total disaster rather than provide any kind of active or effective representation.” *Id.* at ¶ 32. Ms. Wells characterized Mr. Davis’ case as having become a “catastrophe[.]” because of the Center’s financial and personnel crisis and caseload demands at the time. *Id.* at ¶ 22. She also conceded that, even though the case was in the critical stage of fact development, it was not deemed to be “in crisis” so that “no substantive work was

conducted on the case” for at least six months of that year. *Id.* at ¶ 33. She admitted that this “is certainly not an appropriate way to litigate habeas corpus cases.” *Id.*

In sum, Ms. Wells concedes that the preparation of Mr. Davis’ case was a catastrophe, the Center’s prehearing investigation was “cursory at best” and that despite knowing that “Mr. Davis’ very real case for innocence” needed far more investigation, the hiring of expert witnesses, and factual development, the Center merely submitted cursory declarations and subpoenaed the two trial attorneys. *Id.* at ¶ 34. Only seven years later, in federal habeas proceedings, would she concede the lack of thoroughness in the Center’s representation of Mr. Davis. However, she also states in that affidavit that the Center “could have declared a caseload conflict in Mr. Davis’ case [and] “refused to represent him” but that this course of action was rejected as unethical. *Id.* at ¶ 33.

The results of counsel’s self-described failures in investigating and litigating Mr. Davis’ habeas claims in the state courts, and the subsequent findings in the federal courts of procedural default of his claims, is a matter of record before this Court. But whether or not Mr. Davis’ state habeas counsel made the correct ethical choices in first, failing to provide him with a modicum of representation, and second, failing to withdraw because it could not do so, should not, in the view of *Amici*, affect the evaluation of his actual innocence claim.

In the catastrophic circumstances of this particular case, because habeas corpus, is “at its core, an equitable remedy,” and because Mr. Davis raises a freestanding *Herrera* claim which necessarily, if so proved, would render his conviction both a constitutional violation and a miscarriage of justice, any procedural default should be excused. *See, e.g. Schlup v. Delo*, 513 U.S. 298, at 318-19 (recognizing the validity of “judicially managed equitable considerations” in successive petitions involve the potential for a “fundamental miscarriage of justice”); *Mize v. Hall*, 532 F.3d 1184, 1196 n.9 (11<sup>th</sup> Cir. 2008)(“if a petitioner in fact has a freestanding innocence claim, he would be entitled to have all his procedural defaults excused as a matter of course”). Such a determination would not only permit the sum total of Mr. Davis’ new evidence to be evaluated under the stringent standards governing successive petitions, but also would advance the interests of justice in not elevating procedural defaults over the potential constitutional interests of Mr. Davis in having his *Herrera* claim heard.

### **CONCLUSION**

For the reasons set forth herein, *Amici Curiae* hereby request that this Court consider the historical and equitable circumstances set forth above that severely impacted the proper presentation of Mr. Davis’ habeas corpus claims in state court habeas proceedings.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(5)(A), Counsel for Amicus Curiae hereby certifies that the size and style of type used in this brief is TIMES NEW ROMAN, 14 POINT.

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day caused a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE ON BEHALF OF PETITIONER TROY ANTHONY DAVIS to be served via Federal Express upon the following:

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November 15, 2008