No. 12-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

In Re WARREN LEE HILL, JR.,

Petitioner.

PETITION FOR A WRIT OF HABEAS CORPUS IN A CAPITAL CASE

"[T]he state of Georgia will execute a mentally retarded man when it carries out the execution of Warren Lee Hill. There is no question that Georgia will be executing a mentally retarded man because *all* seven mental health experts who have ever evaluated Hill, both the State's and Hill's, now unanimously agree that he is mentally retarded. * * * If the Supreme Court means that the mentally retarded cannot be constitutionally executed, and Hill has now shown beyond any reasonable doubt that he is mentally retarded, a congressional act cannot be applied to trump Hill's constitutional right not to be executed."

In re Hill, Case No. 13-10702, Slip Op. at 39, 50 (11th Cir. Apr. 22, 2013) (Barkett, J., dissenting) (emphasis original)

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QUESTION PRESENTED FOR REVIEW

CAPITAL CASE

Without this Court's intervention, the State of Georgia will execute a man who has now been found to be mentally retarded by every single mental health expert to have examined him, in violation of this Court's holding in *Atkins v. Virginia*, 536 U.S. 304 (2002), that the Eighth Amendment categorically bars the execution of those suffering mental retardation.

This case presents the extraordinary circumstance that each and every mental health expert the State of Georgia presented in state habeas proceedings to rebut Mr. Hill's substantial proof of mental retardation has since repudiated his initial finding that Mr. Hill has borderline intellectual functioning and now concludes that Mr. Hill is, in fact, mildly mentally retarded. It was precisely the existence of conflicting expert testimony that previously led the state and federal courts to find that Mr. Hill had failed to prove mental retardation under Georgia's uniquely high burden of proof beyond a reasonable doubt (though finding that he had proven it by a preponderance of the evidence). Yet, despite this new evidence showing unanimous agreement among the seven mental health professionals who have examined Mr. Hill that he has mental retardation, the Georgia state courts, the Georgia Board of Pardons and Parole, and a divided panel of the Eleventh Circuit have refused even to permit a hearing to determine whether this new evidence establishes Mr. Hill's ineligibility for the death penalty.

This case thus presents the extraordinary and rare situation satisfying the criteria set forth in this Court's Rule 20 for the Court's exercise of its original habeas jurisdiction, "that the writ will be in aide of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Given these exceptional, indeed unprecedented circumstances, should this Court exercise its authority either to consider the case through the exercise of its original habeas jurisdiction or to transfer the case to the district court to address the merits, in order to prevent the fundamental miscarriage of justice that would result from the execution of one who is actually innocent of the death penalty?

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No. 12-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

In re WARREN LEE HILL, JR.,

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PETITION FOR A WRIT OF HABEAS CORPUS IN A CAPITAL CASE

Petitioner, Warren Lee Hill, Jr., respectfully petitions this Court to exercise its original habeas jurisdiction to review this case and grant appropriate relief pursuant to its authority under 28 U.S.C. §§ 1651(a), 2241(a) or 2254 (a), or, in the alternative, to transfer this application for habeas corpus to the district court for hearing and determination in accordance with the Court's authority under 28 U.S.C. § 2241(b).

INTRODUCTION

The question before this Court is whether Petitioner Warren Hill deserves an opportunity to show that he is innocent of the death penalty and ineligible for execution because each of the state's mental health witnesses, who previously testified that he is not mentally retarded, has since repudiated his earlier opinion and now agrees with Mr. Hill's experts that Mr. Hill is, in fact, mentally retarded. Thus, the edifice on which the state courts built their findings that Mr. Hill had failed to prove his mental retardation beyond a reasonable doubt (though finding that he had proven his disability by a preponderance of the evidence) has now collapsed. Without an

opportunity to have the state experts' revised opinions considered in a court of law, Mr. Hill will be executed in violation of the United States Constitution despite the fact that all mental health experts who have examined him find that he is mentally retarded.

Every court to which Mr. Hill has petitioned in an effort to present this new and compelling evidence has denied him an opportunity to prove the merits of his claim. The Georgia State Board of Pardons and Parole has likewise refused to reopen proceedings in light of this evidence. This Court accordingly is Mr. Hill's last and only hope to avoid an execution that is flat-out prohibited by the Eighth Amendment.[1]

In *Felker v. Turpin*, 518 U.S. 651, 661-62 (1996), this Court held the AEDPA did not "deprive this Court of appellate jurisdiction in violation of Article III, § 2," because the Act "does not repeal our authority to entertain a petition for habeas corpus." This Court's Rule 20.4(a) "delineates the standards under which we grant such writs," *id*. at 665, *i.e*., "the petitioner must show exceptional circumstances ... and must show that adequate relief cannot be obtained in any other form or from any other court."

Petitioner's claim "materially differs from numerous other claims made by successive habeas petitioner's" before this Court. *Felker*, 518 U.S. at 665. This Court's promise in *Felker* that "exceptional circumstances" would prompt this Court to act is an empty one if not even Mr. Hill's circumstances are exceptional.[2]

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[1] On May 20, 2013, in an abundance of caution, Mr. Hill filed a petition for writ of *certiorari* from the Georgia Supreme Court's order of February 19, 2013, denying a certificate of probable cause to review the superior court's dismissal of Mr. Hill's third habeas petition in *Hill v. Humphrey*, Butts Co. Superior Court Case No. 13-V-111. Should the Court conclude that it has *certiorari* jurisdiction, this provides an alternative avenue for this Court's review.

[2] *See In re Warren Lee Hill, Jr.*, Eleventh Circuit Case No. 13-10702, Appendix 11 at 38 n.20 (noting that "our decision does not leave Hill without the ability to petition for a writ of habeas corpus. Hill may petition the Supreme Court directly for a writ of habeas corpus under

JURISDICTION AND OPINIONS BELOW

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

As required by Rule 20.4 and 28 U.S.C. §§ 2241 and 2242, Mr. Hill states that he has not applied to the district court because the circuit court prohibited such an application. *See* Appendix 11 (*In re Warren Lee Hill, Jr*., Eleventh Circuit Case No. 13-10702) (Order of April 22, 2013). Mr. Hill exhausted his state remedies for his claim that, based upon new evidence, he can now demonstrate his mental retardation beyond a reasonable doubt when the state habeas court dismissed as procedurally barred his Petition for Writ of Habeas Corpus (Appendix 8 – Order of February 18, 2013 in *Hill v*. *Humphrey*, Butts Co. Superior Court Case No. 13-V-111), the Georgia Supreme Court denied his Application for Certificate of Probable Cause to Appeal (Appendix 9), and the Georgia Board of Pardons and Paroles denied his application for clemency (Appendix 12).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

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that Court's original jurisdiction" (citing *Felker*, 518 U.S., at 661-63, and *In re Davis*, 565 F.3d 810, 826-27 (11th Cir. 2009); *id*. at 51 n.8 (Barkett, J., dissenting) (observing that "notwithstanding this court's denial of his application, Hill still may petition the Supreme Court for a writ of habeas corpus under its original jurisdiction," but stressing that "the potential availability of this alternative avenue for relief does not . . . mean that federal courts do not have the authority or responsibility to enforce the constitutional mandates of the Supreme Court through the equitable remedy of habeas") (citations omitted).

The Fourteenth Amendment to the United States Constitution states, in relevant part: **"**Nor shall any State deprive any person of life, liberty, or property, without due process of law ...." U.S. Const. amend. XIV.

STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

Section 17-7-131 of the Georgia Code provides in pertinent part:

> (a)(3) "Mentally retarded" means having significantly subaverage general intellectual functioning resulting in or associated with impairments in adaptive behavior which manifested during the developmental period. * * *
>
> (c)(3) The defendant may be found "guilty but mentally retarded" if the jury, or court acting as trier of facts, finds beyond a reasonable doubt that the defendant is guilty of the crime charged and is mentally retarded. If the court or jury should make such finding, it shall so specify in its verdict.

Rule 20 of the Rules of the Supreme Court of the United States provides in pertinent part:

> 1. Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. To justify the granting of any such writ, the petition must show that the writ will be in aid of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court.
>
> * * *
>
> 4.(a) . . . To justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court. This writ is rarely granted.

STATEMENT OF FACTS

The question of Mr. Hill's mental retardation has always been close because he functions and tests in the range of mild mental retardation. Nonetheless, the case could have been resolved long before reaching this Court had it arisen in any jurisdiction other than Georgia, which alone among the states and federal government requires a capital defendant to prove his ineligibility for

execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), by proof beyond a reasonable doubt. Although that standard of proof is not at issue here, its particularly poor fit when applied to a close case of mental retardation such as Mr. Hill's has led to the situation presented here, where this Court serves as Mr. Hill's last and only resort to avoid an unconstitutional execution.

A. In Initial State Habeas Proceedings, Warren Hill's Mental Health Experts Diagnosed Him With Mild Mental Retardation Based On His Consistently Low I.Q. Scores And Adaptive Deficits, While The State's Mental Health Experts Opined That He Has Borderline Intellectual Functioning, The Level Of Intellectual Impairment Just Above Mental Retardation.

Warren Hill has never been able to live on his own. Until early adolescence, he could not undertake basic self-care, such as brushing his teeth or bathing, without supervision by his younger sister Peggy. Described by several of his teachers as "the slowest student in the class," he managed to graduate from high school at the age of nineteen only because Peggy oversaw and often completed his homework, and because his teachers chose to socially promote him due to the lack of special educational resources in the public schools he attended as an African-American child in the then racially segregated South. Even today, at the age of 52, Warren Hill functions at roughly the 6th grade level, consistent with mild mental retardation. Although, for a few years, he managed to perform adequately in the highly structured life of the military,[3] this was only for as long as the duties of his rank required no more than compliance with orders and the completion of repetitive and simple tasks. Once the demands of the Navy became too challenging, Mr. Hill decompensated under the stress arising from his limited coping skills.[4]

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[3] As the Superior Court noted, Mr. Hill "minimally passed the entrance exam" for military service. Appendix 4 at 5.

[4] *See*, *e.g.*, *Hill v. Schofield*, Case No. 1:04-CV-151 (M.D.Ga.) - Respondent's Exhibits 76-79, 100, 103 (State habeas transcripts and Petitioner's state habeas court briefing).

Based on proof of these and other adaptive deficits, and undisputed evidence of "significantly subaverage general intellectual functioning" reflected in consistent I.Q. scores around 70, Mr. Hill's four mental health experts testified at the initial state court habeas proceedings that Mr. Hill satisfies Georgia's criteria for establishing mental retardation.[5] The State presented contrary evidence from three mental health experts from Central State Hospital: Thomas H. Sachy, M.D., a neuropsychiatrist; James Gary Carter, M.D., a forensic psychiatrist; and Donald W. Harris, Ph.D., a clinical psychologist. *See* Appendices 1-3. The state's evaluators effectively found that Mr. Hill's I.Q. of 70 showed significantly subaverage intellectual functioning, but concluded that Mr. Hill has borderline intellectual functioning, rather than mental retardation, in light of his adaptive skills. *See* Appendix 4 (Order of May 13, 2002, in *Hill v. Head*, Butts Co. Superior Court Case No. 94-V-216) at 3; Appendices 1-3.

B. In Light Of The Conflicting Expert Opinions, The State Habeas Court Found That Mr. Hill Had Not Proven His Mental Retardation Beyond A Reasonable Doubt, But That He Would Have Prevailed If The Preponderance Of The Evidence Standard Applied.

The state habeas court found that Mr. Hill's I.Q. satisfied, beyond a reasonable doubt, the "significantly subaverage general intellectual functioning" prong of Georgia's mental retardation statute, O.C.G.A. § 17-7-131(a)(3),[6] but ruled that Mr. Hill had not proven the diagnosis of mental retardation overall because he had not shown sufficient deficits in adaptive functioning beyond a reasonable doubt. *See* Appendix 4 at 6. However, the court also found that, were the

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[5] *See* O.C.G.A. § 17-7-131(a)(3).

[6] The state habeas court found that "[a]ll quantitative I.Q. assessment results, except one, fall within the 'mild mental retardation' range especially when allowing for variance" and the Court accordingly "finds that the petitioner has satisfied criterion (A) . . . beyond a reasonable doubt." Appendix 4 at 4.

burden of proof merely a preponderance of the evidence, it would find that Mr. Hill is mentally retarded. Appendix 6 (Order of November 19, 2002, in *Hill v. Head*, Butts Co. Superior Court Case No. 94-V-216) at 9. The court's findings and its rejection of Mr. Hill's mental retardation claim were affirmed on appeal and left undisturbed in subsequent state appellate and federal habeas corpus proceedings challenging the constitutionality of Georgia's beyond-a-reasonable doubt standard of proof.[7]

C. All Three Of The State's Mental Health Experts Have Since Repudiated Their Original Findings, On The Basis Of Developments In The Field Of Psychology And Their Consideration Of Evidence From The State Habeas Proceedings They Had Not Previously Reviewed, And Have Come To Agree With Mr. Hill's Experts That Mr. Hill Has Mild Mental Retardation.

Mr. Hill recently obtained new, previously unavailable evidence that undermines the rationale on which the state courts' rejection of the mental retardation claim was predicated. That evidence, the revised opinions of the State's mental health experts and the now-unanimous expert belief that Mr. Hill is mildly mentally retarded, firmly establishes Mr. Hill's mental retardation -- and hence ineligibility for the death penalty -- beyond a reasonable doubt.

This evidence began to emerge in July 2012, after a temporary stay of execution had been entered in Mr. Hill's case and following a flurry of publicity surrounding the prospect that Georgia might execute a mentally retarded defendant. At that time, Thomas Sachy, M.D., one of the state's three mental health expert witnesses in the state habeas proceedings, contacted Mr. Hill's counsel to express his fear that he had misdiagnosed Mr. Hill as a malingerer rather than

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[7] In a successive state habeas proceeding, litigated under warrant in 2012, the state habeas court reaffirmed that Mr. Hill had proven by a preponderance of the evidence that he is mentally retarded, but had fallen short in proving retardation under Georgia's uniquely high burden of proof - beyond a reasonable doubt. *See* Appendix 7.

an individual suffering mental retardation. Dr. Sachy asked to review materials connected with the mental retardation claim, including the transcripts of witness testimony to which Dr. Sachy had not been privy. After conducting an extensive review of the requested materials, Dr. Sachy repudiated his earlier conclusion that Mr. Hill is not mentally retarded. As he explained, his initial erroneous finding was the result of his lack of experience with mentally retarded patients and less sophisticated understanding, at the time of the initial evaluation, regarding the characteristics of mild mental retardation, combined with a rushed evaluation. *See* Appendix 1. Dr. Sachy also pointed to the more developed understanding within his profession about the scope of capabilities of mildly mentally retarded persons in particular. *Id*. In his affidavit, he states:

> [T]he totality of evidence shows that far from "malingering a cognitive disorder," Mr. Hill has had a cognitive disorder with adaptive skill deficits since early childhood. He consistently tested in the 2-3 percentile in childhood achievement and intelligence testing, consistent with mild mental retardation. There was no dispute in 2000 among the clinicians who had evaluated Mr. Hill that he has an IQ of approximately 70. There is also evidence of significant deficits in such areas of his functioning as self-care, functional academics, interpersonal skills, and home living since prior to age 18. I concur with Drs. Grant, Stonefeld, Toomer, and Dickinson in this respect. With respect to Mr. Hill's ability to acquire a driver's license, drive vehicles, hold a job, or have relationships with women, these are not outside the scope of the abilities of people with mild mental retardation.
>
> In 2000, my erroneous judgment that Mr. Hill was deliberately feigning a disorder, as well as the narrow scope of information I reviewed, resulted in my error in finding that Mr. Hill was not mentally retarded. However, having learned about and revisited the issues of malingering and mental retardation and having reviewed extensive additional materials from the court record in Mr. Hill's case, my conclusion now, to a reasonable degree of scientific certainty, is that Mr. Hill meets the criteria for mild mental retardation as set out in the DSM-IV-TR and as delineated by the American Association on Intellectual and Developmental Disabilities (AAIDD). That is: Mr. Hill has significantly subaverage general intellectual functioning associated with significant deficits in adaptive functioning, with onset before the age of 18.

Appendix 1 at 11-12.

Dr. Donald Harris also reconsidered his initial opinion in light of Dr. Sachy's revised opinion and a careful analysis of the record in Mr. Hill's case, including, again, critical testimony from the original state habeas hearing to which he had not been privy. In light of his review of the case, Dr. Harris has repudiated his former opinion, finding "to a reasonable degree of scientific certainty, that Mr. Hill does meet the criteria for mild mental retardation":

> In light of Dr. Sachy's recent conclusions and after thoroughly reviewing the materials in this case, I now find that the balance of the evidence is persuasive that Mr. Hill meets the criteria for mild mental retardation: that he has significantly subaverage intellectual functioning, associated with significant deficits in adaptive functioning, with onset before the age of 18....
>
> [I]n light of his documented level of functioning over time, and in light of advances in the understanding of mental retardation, especially in the mild category, I am willing to give more credence than I did in 2000 to the testimony of Mr. Hill's family members, friends, teachers and Navy associates. We in the clinical community now understand better that persons with mild mental retardation are capable of such things as holding a job, working under close supervision, buying and driving a car, and so forth. It is precisely because significant deficits in cognition, judgment, and impulse control can be masked by superficial functionality in cases of mild mental retardation that such persons may sometimes not be identified in court proceedings as being intellectually disabled. I believe this has happened in Mr. Hill's case.
>
> I now believe, to a reasonable degree of scientific certainty, that Mr. Hill does meet the criteria for mild mental retardation in that he has significantly subaverage intellectual functioning, associated with significant deficits in adaptive functioning, with onset before age 18. I therefore concur in the findings of Drs. Grant, Toomer, Stonefeld, Dickinson and Sachy in this case.

Appendix 2 at 4-5, 10-11.

Dr. James Gary Carter, lead Central State Hospital forensic psychiatrist, has also rejected his former opinion in light of Dr. Sachy's and Dr. Harris's revised opinions, his independent reconsideration of the case materials, and his increased understanding of intellectual disability. As Dr. Carter explains in his affidavit, the circumstances under which Mr. Hill was evaluated in

2000 were "extremely and unusually rushed. We were receiving background materials during the time of our evaluation and in the days immediately prior to our testimony." Appendix 3 at 2. As a result Dr. Carter "relied heavily on the reports of Dr. Harris and Dr. Sachy that [he] incorporated verbatim into [his] full Central State Hospital evaluation report dated December 11, 2000." *Id*. At the time of his evaluation, Dr. Carter "relied on the findings of Dr. Harris and Dr. Sachy in 2000 in making my conclusion at that time that Mr. Hill's profile did not fit mild mental retardation but rather borderline intellectual functioning" and their revised opinions today merit "similar[] . . . credence." *Id*. at 3.

Based on his consideration of the affidavits of Drs. Sachy and Harris, and his careful review of the case, Dr. Carter has concluded that Mr. Hill's profile is consistent with mild mental retardation:

> Twelve years after Mr. Hill's hearing, we in the psychiatric community know much more about developmental disabilities such as mental retardation. As the Supreme Court warned in its 2002 decision in Atkins v. Virginia, which banned the execution of mentally retarded persons, defendants who have mild mental retardation are at special risk of being under-identified in the criminal justice system because their superficial functionality (e.g., the ability to have relationships, drive a car, write a letter) can camouflage underlying deficits in cognition and judgment consistent with mental retardation.
>
> Similarly, in Mr. Hill's case, the evidence shows that Mr. Hill can function adequately in the community given adequate supports, even though he has mild mental retardation. He may be able to buy and drive a car and get a driver's license. Such performance does not mean that he is not mentally retarded. Clinicians, attorneys and courts may not immediately recognize the underlying deficits of individuals like Mr. Hill and others like him. Our rushed evaluation in 2000 was simply not conducive to an accurate assessment of Mr. Hill's condition under the circumstances.
>
> After careful review and with the acuity only hindsight affords, it is now my opinion, to a reasonable degree of scientific certainty, that Mr. Hill's correct diagnosis is mental retardation. In other words, he has significant sub average intellectual functioning, associated with significant deficits in adaptive skills, with onset before the age of 18.

Appendix 3 at 6-7.

The new testimony from Drs. Sachy, Harris and Carter was not reasonably available until after Dr. Sachy contacted Mr. Hill's counsel on July 23, 2012, informing him of the possibility that his prior conclusions about Mr. Hill had been in error. Until that time, Mr. Hill had no reason to believe that the prior state evaluations might be subject to revision.

The new evidence casts Mr. Hill's claim that he is categorically exempt from capital punishment due to mental retardation in a new and virtually unassailable light. While the existence of conflicting expert opinions had previously led the state habeas court to find that Mr. Hill had not established his mental retardation by proof beyond a reasonable doubt (though he had proven it by a preponderance of the evidence),[8] there is now a consensus among all experts who have evaluated Mr. Hill that he meets the criteria for mental retardation. There can now be no question that he has proven his mental retardation beyond a reasonable doubt. O.C.G.A. § 17-7-131(c)(3), (j).[9]

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[8] As Judge Barkett noted in her dissent in *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011), the state habeas court denied relief initially "*only because there was no unanimity of opinion by the experts*. Virtually all of the testifying experts personally met with Hill and reviewed essentially the same documentation, yet they disagreed about the meaning of Hill's behavior during his developmental period." *Hill*, 662 F.3d at 1374 (Barkett, J., dissenting) (emphasis in original).

[9] A majority of the Eleventh Circuit panel that rejected Mr. Hill's application to file a second habeas petition dismissively characterized this new evidence as mere recantations. *See* Appendix 11 at 11, 18. Judge Barkett, in dissent, recognized that the circumstances of this case are "extraordinary" and criticized the panel for "failing to acknowledge the very unusual circumstance of medical professionals unequivocally reversing their prior diagnoses and concluding [] to a reasonable degree of medical certain that Hill is mentally retarded. These experts not only have asserted that their prior testimony was unreliable but now have affirmatively stated that Hill *is* mentally retarded." *Id*. at 43 (emphasis in original).

PROCEDURAL HISTORY

Mr. Hill is a person in the custody of the State of Georgia under the terms of verdicts entered August 2, 1991, in the Superior Court of Lee County, Georgia. Pursuant to these judgments, Mr. Hill was convicted of murder and sentenced to death. The Supreme Court of Georgia affirmed Mr. Hill's convictions and death sentence on March 15, 1993. *Hill v. State*, 263 Ga. 37 (1993), *cert. denied*, *Hill v. Georgia*, 510 U.S. 950 (1993).

In April 1994, Mr. Hill filed a habeas corpus action in Butts County, Georgia, challenging his conviction and sentence. On May 21, 1997, the habeas judge issued a limited writ of habeas corpus, ruling solely on the basis of documentary submissions that Mr. Hill had submitted sufficient credible evidence of mental retardation to warrant a jury trial on the issue, pursuant to *Fleming v. Zant*, 259 Ga. 687 (1989). The Georgia Supreme Court reversed and remanded the mental retardation claim to the habeas court, directing it to decide whether Mr. Hill could prove his mental retardation beyond a reasonable doubt pursuant to O.C.G.A. § 17-7-131. *See Turpin v. Hill*, 269 Ga. 302 (1998).

Following a three-day hearing conducted in December, 2000, the state habeas court found that Mr. Hill had proven that he "meets the I.Q. criterion for a diagnosis of mental retardation .... beyond a reasonable doubt," but that he had not proven the existence of adaptive skill deficits beyond a reasonable doubt and thus had failed to establish his mental retardation beyond a reasonable doubt. *See* Order of May 13, 2002 (Appendix 4) at 3-4, 6.[10] Thereafter, prior to the court's final disposition of the habeas petition, this Court decided *Ring v. Arizona*, 536 U.S. 584

[10] The court subsequently clarified that it had found "that Petitioner had proved beyond a reasonable doubt that his IQ is approximately 70, but that reasonable doubt existed as to the presence of sufficient deficits in adaptive functioning." Order of November 19, 2002 (Appendix 6), at 2.

(2002), and *Atkins v. Virginia*, 536 U.S. 304 (2002). In its "Supplemental Final Order," dated September 16, 2002, which denied Mr. Hill's remaining claims, the state habeas court expressed concern that its prior ruling on the mental retardation claim was invalid under the *Ring* decision. Appendix 5 at 12-13.

Mr. Hill moved for reconsideration of the May 2002 ruling in light of the intervening decisions in *Ring* and *Atkins*. On November 19, 2002, the state habeas court granted the requested relief, finding that the "reasonable doubt" burden of proof was unconstitutional under *Atkins* because it allowed persons who are more likely than not mentally retarded to be executed. The court noted that the question of Mr. Hill's mental retardation "is an exceptionally close one under the reasonable doubt standard" and that, under a preponderance of the evidence standard, "this Court would find Petitioner to be mentally retarded." Appendix 6 at 9. The court granted a limited writ to allow a jury to determine whether Mr. Hill is ineligible for the death penalty because of mental retardation. *Id*. at 13.

Respondent appealed the November 19, 2002, order, but did not challenge the court's findings that Mr. Hill is mentally retarded by a preponderance of the evidence and that he has an I.Q. of 70 beyond a reasonable doubt. Following briefing and oral argument, the Georgia Supreme Court reversed the state habeas court's November 19, 2002, order. *Head v. Hill*, 277 Ga. 255 (2003). The decision reinstated the death sentence on the ground that Mr. Hill had not proven his mental retardation beyond a reasonable doubt, but left undisturbed the state habeas court's findings that Mr. Hill has an I.Q. of 70 and that he is mentally retarded by a preponderance of the evidence.

In federal habeas corpus proceedings, Mr. Hill did not allege that he could prove mental retardation beyond a reasonable doubt, but challenged the Georgia Supreme Court's holding that

the Eighth Amendment and due process were not offended by application of the beyond-a-reasonable doubt standard to a mental retardation claim brought under *Atkins*. The district court denied relief on this and other grounds on November 11, 2007.[11] *See Hill v. Hall*, Case No. 1:04-CV-151 (M.D.Ga. Nov. 7, 2007). On appeal, a panel of the Eleventh Circuit granted relief, ruling that the "reasonable doubt" burden of proof "eviscerates the command of the Eighth Amendment that the mentally retarded shall not be executed, and is therefore 'contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States.'" *Hill v. Schofield*, 608 F.3d 1272, 1283 (11th Cir. 2010) (citing 28 U.S.C. § 2254 (d)(1)).[12] On November 22, 2012, a majority of the *en banc* Court, by a 7-4 vote, rejected the panel's reasoning, ruling that the Georgia Supreme Court had not unreasonably applied *Atkins* in upholding application of the reasonable doubt standard to determine mental retardation claims. *Hill v. Humphrey*, 662 F.3d 1335 (11th Cir. 2011) (*en banc*), *cert. denied*, 132 S.Ct. 2727 (2012).

On July 3, 2012, a warrant issued in the Superior Court of Lee County setting Mr. Hill's execution for a window from July 18 to July 25, 2012. On July 16, 2012, the Georgia Board of Pardons and Paroles denied Mr. Hill's petition for clemency. *See* Appendix 12.

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[11] Mr. Hill did not raise the issue of whether he is mentally retarded beyond a reasonable doubt. As the state habeas court had suggested in its November 19, 2002 Order, that claim could not prevail in the face of conflicting expert opinions. *See* Appendix 6 at 9 n. 4 (noting that the case was "exceptionally close" under the reasonable doubt standard precisely because "'if a trained psychiatrist [or psychologist] has difficulty with the categorical "beyond a reasonable doubt" standard, the untrained, lay juror – or indeed, even a trained judge – who is required to rely on expert opinion could be forced by the criminal law standard of proof to [find no mental problems where they in fact exist]'") (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)).

[12] Judge Barkett noted that even Respondent conceded during oral argument that application of the reasonable doubt standard "will result in the execution of some mentally retarded offenders." *Hill*, 662 F.3d at 1371 n.7 (Barkett, J., dissenting).

On July 18, 2012, Mr. Hill filed a second Petition for Writ of Habeas Corpus in state habeas court, alleging that Mr. Hill is mentally retarded and again challenging the application of the reasonable doubt standard to mental retardation claims based on intervening case law. The court denied the Petition on July 19, 2012, on the merits, reaffirming its prior finding that Mr. Hill "has an I.Q. of 70 beyond a reasonable doubt and that he meets the overall criteria for mental retardation by a preponderance of the evidence," but not beyond a reasonable doubt. *See* Appendix 7 (Order in *Hill v. Humphrey*, Butts Co. Superior Court Case No. 12-V-658). The Georgia Supreme Court denied Mr. Hill's Application for a Certificate of Probable Cause to Appeal (CPC) on July 23, 2012.[13]

That same day, the Georgia Supreme Court granted a stay of execution and granted CPC in a separate civil action challenging the state's lethal injection protocol. *See Hill v. Owen*, Georgia Supreme Court Case No. S12W1812 (Order of July 23, 2012). On February 4, 2013, following briefing and oral argument, the Georgia Supreme Court dismissed the stay of execution and denied relief in *Hill v. Owen*, 292 Ga. 380 (2013).

The next day, February 5, 2013, the Lee County Superior Court issued a warrant for Mr. Hill's execution, scheduling it to occur between February 19 and 26, 2013.

On February 15, 2013, Mr. Hill filed a third Petition for Writ of Habeas Corpus in state habeas court, raising the claim that he is mentally retarded beyond a reasonable doubt and introducing as new evidence supporting that claim the revised opinions of all three of the State's expert witnesses (*see* Appendices 1-3) finding that Mr. Hill is mildly mentally retarded. The state habeas court dismissed the petition as procedurally barred on February 18, 2013. *See*

[13] This Court denied Mr. Hill's petition for writ of *certiorari* to review the Georgia Supreme Court's denial of a CPC on the mental retardation claim in that case on February 19, 2013. *Hill v. Humphrey*, 133 S. Ct. 1324 (2013).

Appendix 8 (Order in *Hill v. Humphrey*, Butts Co. Superior Court Case No. 13-V-111). On February 19, 2013, the Georgia Supreme Court in a 5-2 decision denied Mr. Hill's Application for a Certificate of Probable Cause to Appeal. *See* Appendix 9.[14] (A petition for writ of certiorari has been filed with this Court seeking review of that decision.)

Mr. Hill immediately filed an application in the Eleventh Circuit seeking permission to file a second habeas corpus petition raising the claim that the new evidence establishes that he is mentally retarded beyond a reasonable doubt and thus innocent of the death penalty. The Eleventh Circuit entered a stay of execution and ordered further briefing on the issue. *See* Appendix 10. In the original and supplemental briefing, Mr. Hill argued that he satisfied the requirements of 28 U.S.C. § 2244 (b) because he was seeking to raise a new claim – that he is mentally retarded beyond a reasonable doubt – based on previously unavailable evidence establishing his actual innocence of the death penalty and that the AEDPA had not displaced the federal courts' traditional equitable powers to ensure justice in an appropriate case.[15]

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[14] 28 U.S.C. § 2254 does not constrain this Court's review of Mr. Hill's claim as raised in this Petition. Mr. Hill has clearly satisfied the restrictions placed on habeas corpus review by 28 U.S.C. § 2254. He first presented his claim to the state courts and has accordingly satisfied the exhaustion requirement set forth in § 2254(b). Moreover, § 2254(d)'s restrictions on relief apply only to "any claim that was adjudicated on the merits in State court proceedings" and accordingly have no bearing here, where the state courts refused to consider the merits of the claim.

[15] Mr. Hill argued that the language of § 2244 (b)(2)(B)(ii) was ambiguous and could not be read to clearly articulate a congressional intent to overrule this Court's holding in *Sawyer v. Whitley*, permitting the litigation of otherwise barred claims where the petitioner demonstrated he was "actually innocent of the death penalty." Mr. Hill further urged that this Court's decisions demonstrated that the AEDPA should not be read to abrogate the federal courts' equitable powers to ensure justice in an appropriate case. *See* Brief in Support of Petitioner's Application to File a Second Petition for Writ of Habeas Corpus at 16-30 (*In Re Warren Lee Hill, Jr.*, Case No. 13-10702).

Following briefing by the parties, a divided panel of the Eleventh Circuit denied leave to file a second habeas petition in the district court on April 22, 2013. *See* Appendix 11 (*In Re Warren Lee Hill, Jr*., Eleventh Circuit Case No. 13-10702) (Order of April 22, 2013). The majority ruled that Mr. Hill did not satisfy the criteria for filing a second or successive petition set forth in 28 U.S.C. § 2244 (b). It concluded that Mr. Hill's application did not satisfy § 2244(b)(1) because Mr. Hill had previously litigated the same claim in his initial habeas proceeding. Appendix 11 at 15-24. It further ruled that, regardless, Mr. Hill's mental retardation claim did not meet the narrow criteria set forth in § 2244(b)(2) because the claim established only that Mr. Hill was actually innocent of the death penalty and not that "no reasonable factfinder would have found [him] guilty of the underlying offense." *Id*. at 24-34. The majority additionally refused to consider whether equitable principles should inform its construction of § 2244. It instead ruled that the AEDPA had abrogated this Court's decision in *Sawyer v*. *Whitley*, 505 U.S. 333, 345 (1992), which authorized federal courts to address the merits of a second or successive petition challenging a death sentence under the miscarriage of justice (or "actual innocence") exception where the petitioner presented "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."

Judge Barkett dissented, observing that "[t]here is no question that Georgia will be executing a mentally retarded man because *all* seven mental health experts who have ever evaluated Hill, both the State's and Hill's, now unanimously agree that he is mentally retarded," and noting the "perverse consequence" of applying the AEDPA to require "a federal court [to] acquiesce to, even condone, a state's insistence on carrying out the unconstitutional execution of a mentally retarded person." Appendix 11 at 39, 40.

Judge Barkett took issue with the majority's dismissal of Mr. Hill's new evidence "as mere recantations, failing to acknowledge the very unusual circumstance of medical professionals unequivocally reversing their prior diagnoses and concluding [] to a reasonable degree of medical certain that Hill is mentally retarded." Appendix 11 at 43. She further argued that "Congress cannot have intended [in the AEDPA] to preclude federal habeas relief for an individual who is constitutionally ineligible for execution," and that, while "[c]laims of freestanding actual innocence of the underlying offense and categorical ineligibility for the death penalty" may not "'fit neatly into the narrow procedural confines delimited by AEDPA,'"[16] they "cannot be subject to AEDPA's restrictions when doing so will ensure that the U.S. Constitution is violated." *Id*. at 46-47.

As Judge Barkett explained, this Court "has not always adhered to a strict construction of 28 U.S.C. § 2244, particularly when determining whether a claim is subject to the restrictions on filing a 'second or successive' habeas petition," Appendix 11 at 47,[17] and further observed that this Court "has refused to construe AEDPA in a way that would undermine the 'equitable principles [which] have traditionally governed the substantive law of habeas corpus.'" *Id*. at 49 (quoting *Holland v*. *Florida*, 130 S. Ct. 2549, 2560 (2010)). Accordingly, she disagreed with the majority both that "we must 'interpret[] AEDPA's statutory silence' regarding claims that an offender is categorically barred from receiving a sentence of death 'as indicating a congressional

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[16] Quoting *In re Davis*, 565 F.3d 810, 827 (11th Cir. 2009) (Barkett, J., dissenting). Judge Barkett's position was subsequently vindicated by this Court in *In re Davis*, 130 S. Ct. 1, 1 (2009), an original habeas petition this Court "transferred to the United States District Court for the Southern District of Georgia for hearing and determination."

[17] Judge Barkett went on to discuss this Court's decisions in *Stewart v*. *Martinez-Villareal*, 523 U.S. 637 (1988), and *Panetti v*. *Quarterman*, 551 U.S. 930 (2007). Appendix 11 at 47-49.

intent to close courthouse doors that a strong equitable claim would ordinarily keep open,'" or that Congress would have intended AEDPA to preclude a federal court from hearing the claim of a juvenile or mentally retarded offender who obtains, albeit after the conclusion of his prior federal habeas proceedings, irrefutable proof that his status constitutionally bars his execution forever." *Id*. at 50.

In both the majority and dissenting opinions, the Eleventh Circuit judges pointed out that the decision denying permission to initiate a second federal habeas corpus action did not preclude Mr. Hill from seeking relief from this Court in a Petition for Writ of Habeas Corpus per *Felker v*. *Turpin*. *See* Appendix 11 at 38, 51.[18]

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[18] In *Felker v*. *Turpin*, this Court noted that while 28 U.S.C. § 2244 may not circumscribe the Court's authority to grant relief by way of an original habeas action, it nonetheless "inform[s] our consideration of original habeas petitions." *Felker*, 518 U.S., at 662-63. As Mr. Hill argued in the Eleventh Circuit, § 2244 does not preclude this Court's consideration of the question presented here.

To the extent that 28 U.S.C. § 2244 informs this Court's consideration of an application for original habeas corpus review, it should not be read to limit consideration of Mr. Hill's claim. The Eleventh Circuit was wrong to conclude that the compelling facts showing Mr. Hill's innocence of the death penalty do not satisfy the criteria set forth in that statute. Moreover, given the equitable nature of habeas corpus, the statute should not be deemed to constrain this Court's authority to prevent a fundamental miscarriage of justice.

As an initial matter, the Eleventh Circuit majority was simply wrong to hold that Mr. Hill's claim was barred under § 2244 (b)(1), which provides that "[a] claim presented in a second or successive habeas corpus petition under section 2254 that was presented in a prior application shall be dismissed." *See* Appendix 11 at 15-24. As Judge Barkett explained in her dissenting opinion, the panel majority erred in concluding that Mr. Hill's initial petition raised the claim that he is mentally retarded by proof beyond a reasonable doubt: "When his prior federal petition is considered in its entirety it is clear that Hill's argument was limited to a challenge to Georgia's insuperably high burden of proof for mental retardation. This Court's (now-vacated) panel opinion also confirms that the *only* claim before this Court was the purely legal claim of whether Georgia's standard of proof was an unreasonable application of or contrary to *Atkins*. Our en banc decision addressed the same question." Appendix 11 at 46-47 n. 7 (Barkett, J., dissenting).

Nor should § 2244 (b)(2)(B) be read to preclude relief. That section states that the facts underlying a claim presented in a second or successive petition should "be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." The Eleventh Circuit majority concluded on the basis of this language that Mr. Hill's claim failed to satisfy § 2244(b)(2)(B) because, as a claim going only to sentencing, it does not establish that "no reasonable factfinder would have found [Hill] *guilty of the underlying offense*." Appendix 11 at 26 (emphasis in original). Instead, the panel majority concluded, *Sawyer*'s miscarriage of justice exception to the abuse of the writ doctrine did not survive enactment of the AEDPA. *Id*. at 34-38. In so ruling, the majority failed to consider ambiguities in the statute that render its language and meaning less than clear, and did not construe the statute in light of the equitable principles that have traditionally informed a federal court's habeas powers. *See, e.g*., *Munaf v*. *Geren*, 553 U.S. 674, 693 (2008) ("Habeas corpus is 'governed by equitable principles.'") (citation omitted).

It is not as clear as the panel majority believed that Section 2244 (b)(2)(B)(ii)'s language only applies to guilt-phase innocence claims. That statute borrowed the standard for establishing innocence of the "underlying offense" from *Sawyer v*. *Whitley*, which had held that "actual innocence of the death penalty" sufficient to permit the filing of a second or successive petition required "clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." 505 U.S., at 336. Prior to AEDPA's enactment, this Court had limited *Sawyer*'s actual innocence test to the context in which it arose – capital sentencing. *See Schlup*, 513 U.S. at 327 (holding that the pre-*Sawyer* actual innocence standard – "that it is more likely than not that no reasonable juror would have convicted [petitioner] in light of the new evidence" – applies to claims of guilt-phase related claims of actual innocence, rather than *Sawyer*'s higher burden of proof by clear and convincing evidence). In borrowing *Sawyer*'s language, Congress apparently chose to legislatively overrule *Schlup* in this regard. *See, e.g*., *Rivas v*. *Fischer*, 687 F.3d 514, 541 n. 36 (2d Cir. 2012) (noting that "with respect to both second and successive petitions and the availability of evidentiary hearings, Congress rejected the *Schlup* standard and reverted to the *Sawyer* standard when it enacted § 2244(b)(2)(B) and § 2254 (e)(2)").

Beyond this, the meaning of the statute is not so clear. As the Ninth Circuit pointed out in *Thompson v*. *Calderon*, 151 F.3d 918, 923 (9th Cir. 1998), in reaching the opposite conclusion from the Eleventh Circuit, "the standard in §2244 (b) applies to all habeas petitions, not just capital habeas petitions. For that reason, it would not have made sense for Congress to adopt, without any changes, the *Sawyer* standard referring to eligibility 'for the death penalty,' since the statute would have to apply to cases where the petitioner did not receive the death penalty." On that basis, as well as the fact that "the 'underlying offense' in a death penalty case is capital murder rather than merely homicide,'" the Ninth Circuit ruled that a claim that the petitioner "is ineligible for the death penalty . . . states a claim under § 2244(b)." *Id*. at 924.

Moreover, irrespective of 2244 (b)(2)(B)(ii)'s language, AEDPA should not be read to prevent this Court – or other federal courts – from reaching the merits of a claim where to do so

This Petition follows.

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would result in a fundamental miscarriage of justice. In interpreting AEDPA's provisions, this Court has noted its willingness to look to the "implications for habeas practice." *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644 (1998). Specifically, this Court has expressly avoided interpreting the statute in a way that would "produce troublesome results," "create procedural anomalies," and "close [the Court's] doors to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent." *Castro v. United States*, 540 U.S. 375, 380-81 (2008); *see also Panetti*, 551 U.S. at 946 (eschewing a literalist interpretation of section 2244(b) in favor of one that avoided "troublesome results" and that did not "close [federal courts] to a class of habeas petitioners seeking review without any clear indication that such was Congress' intent"); *Martinez-Villareal*, 523 U.S. at 644 (rejecting literal reading of section 2244(b) to avoid "perverse" results).

As the Court recently stated, AEDPA seeks to eliminate delays in the federal habeas review process "without undermining basic habeas corpus principles and while seeking to harmonize the new statute with prior law." *Holland*, 130 S. Ct. at 2562; *see also Slack v. McDaniel*, 529 U.S. 473, 483 (2000) ("AEDPA's present provisions … incorporate earlier habeas corpus principles."). "When Congress codified new rules governing this previously judicially managed area of law, it did so without losing sight of the fact that the 'writ of habeas corpus plays a vital role in protecting constitutional rights.'" *Holland*, 130 S. Ct. at 2562 (citing *Slack*, 529 U.S. at 483). *See also Kuhlmann v. Wilson*, 477 U.S. 436, 449, 451-52 (1986) (applying "the ends of justice" exception to successive claims, even though Congress had eliminated the exception from section 2244 (b) in 1966).

These principles provide further grounds for this Court's exercise of its extraordinary jurisdiction in order to prevent a fundamental miscarriage of justice. To hold otherwise would amount to a suspension of the writ, contrary to Article I, § 9 of the U.S. Constitution. Failing to allow a Petitioner to demonstrate innocence of the death penalty on the basis of previously unavailable evidence is unlike other permissible restrictions on the availability of the writ in that it is not a codification of a previously existing limitation and it falls outside the "compass of [the] evolutionary process" defining the scope of the writ. *Felker*, 518 U.S. at 664. An interpretation like that made by the Eleventh Circuit would result in a class of individuals categorically exempt from capital punishment, who had not failed to pursue their rights diligently, nevertheless being executed.

REASONS FOR GRANTING THE WRIT

A. Mr. Hill's Case Presents Exceptional Circumstances That Warrant Exercise Of This Court's Discretionary Powers Under *Felker v. Turpin* and Rule 20.

In *Felker*, *supra*, this Court held that the AEDPA "has not repealed our authority to entertain original habeas petitions," subject to the standards delineated in Supreme Court Rule 20.4(a), requiring a showing of "'exceptional circumstances warranting the exercise of the Court's discretionary powers.'" *Felker*, 518 U.S. at 661, 665 (quoting Supreme Court Rule 20.4(a)), This case is the exceptional one to which *Felker* alludes, and it calls for an exceptional exercise of this Court's discretionary powers under Rule 20 to ensure that the State of Georgia does not commit a fundamental miscarriage of justice by executing Warren Lee Hill.

The case is exceptional for several reasons.

First, the factual circumstances of this case are remarkable – and to an unusual degree. Not one, not two, but all three of the State's mental health experts have come to agree with Mr. Hill's four mental health experts that Mr. Hill is mildly mentally retarded. Mr. Hill only became privy to the possibility that the new expert testimony was available when Dr. Sachy contacted his counsel after a stay of execution had been entered in July 2012. *See* Appendix 1. What had been a classic "battle of the experts" that precluded relief under Georgia's high burden of proof[19] has now given way to an accord in Mr. Hill's favor. In light of the unanimous expert consensus, Mr.

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[19] "After a lengthy hearing, the state habeas trial court found that Hill had proven beyond a reasonable doubt that he had an IQ indicating mild mental retardation. Yet, it also found that Hill had not demonstrated sufficient 'deficits in adaptive skills functioning' beyond a reasonable doubt, *only because there was no unanimity of opinion by the experts*. Virtually all of the testifying experts personally met with Hill and reviewed essentially the same documentation, yet they disagreed about the meaning of Hill's behavior during his developmental period." *Hill*, 662 F.3d at 1374 (Barkett, J., dissenting) (emphasis in original).

Hill clearly satisfies the diagnostic criteria for mental retardation under Georgia law beyond a reasonable doubt. The new evidence is both compelling[20] and goes to the heart of a question that is literally a matter of life and death for Mr. Hill.

Second, this case is exceptional because, as this Court noted in *Schlup v. Delo*, 513 U.S. 298, 321 (1995), "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." For this reason, "[e]xplicitly tying the miscarriage of justice exception to innocence thus accommodates both the systemic interests in finality, comity, and conservation of judicial resources, and the overriding individual interest in doing justice in the 'extraordinary case.'" *Id*. at 322 (citation omitted). Those cases, like Mr. Hill's, that advance compelling

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[20] While the Eleventh Circuit majority dismissed the new evidence as mere recantation, as Judge Barkett pointed out in her dissent, that each of the State's "medical professionals [has] unequivocally revers[ed] their prior diagnoses and conclud[ed] to a reasonable degree of medical certainty that Hill is mentally retarded" is, to the contrary, "extraordinary." Appendix 11 at 43. *See, e.g*., *Ex parte Henderson*, 246 S.W.3d 690 (Tex. Ct. Crim. App. 2007) (staying execution and remanding for hearing to address new evidence that state's expert witness repudiated prior opinion that child's injuries could not have resulted from a fall). As Judge Price observed in a concurring opinion in *Henderson*:

> This case differs from the situation in which a lay witness later claims that his or her trial testimony was mistaken or untrue – an ordinary recantation. . . . [H]ere we have a situation in which the State's expert, upon whose opinion testimony the essential element of culpable mental state hinges, has now withdrawn his earlier expert opinion in light of new scientific developments and has replaced it with a new, presumably better informed, expert opinion.

Id. at 694 (Price, J., concurring). Following remand and an evidentiary hearing, the trial court found that the expert's re-evaluation was credible and constituted a material exculpatory fact, and that Henderson had proved by clear and convincing evidence that no reasonable juror would have convicted her of capital murder. *Ex parte Henderson*, 384 S.W.3d 833, 834 (Tex. Ct. Crim. App. 2012) (*per curiam*). The Texas Court of Criminal Appeals accepted the trial court's factual findings and remanded for a new trial. *Id*.

claims of "actual innocence of the death penalty" certainly do not appear any more common than those challenging convictions and may, in fact, be even more unusual.[21]

Third, this case is exceptional because, on these facts, it is truly remarkable that the case has not been resolved in Mr. Hill's favor long before reaching this Court.[22] Indeed, had this case been tried in any other jurisdiction, Mr. Hill would almost certainly have prevailed on his claim of mental retardation long ago, inasmuch as the state habeas court expressly found that Mr. Hill had proven his mental retardation by a preponderance of the evidence.[23] Likewise, had this case been litigated in another circuit, such as the Ninth, Mr. Hill would have been given an opportunity to present his new evidence in a federal courthouse to prove his ineligibility for execution without the need to ask this Court to exercise its original habeas jurisdiction. *See, e.g.*, *Thompson v. Calderon*, 151 F.3d 918, 923 (9th Cir. 1998) (*en banc*) (holding that § 2244 should

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[21] Undersigned counsel has found no cases in which the *Sawyer* test was satisfied on the basis of new evidence and only one case in which a habeas petitioner's procedural default was excused due to a finding of actual innocence of the death penalty under *Sawyer*. *See Magwood v. Patterson*, 664 F.3d 1340, 1347 (11th Cir. 2011) (following this Court's opinion vacating and remanding, Eleventh Circuit granted sentencing relief, noting that "even if Magwood's claim is procedurally defaulted, he is the rare capital defendant who meets *Sawyer*'s actual innocence exception and his procedural default is excused"). *Magwood* did not involve any new evidence conclusively undermining death-eligibility, but rather found *Sawyer*'s test was met due to the technicality that the sole aggravating factor on which the death sentence was based was not included in the list of statutory aggravating factors that Alabama's capital sentencing statute identified as the exclusive bases for capital sentencing. *See id*. at 1346-47.

In *Schlup*, this Court noted that circuit court decisions in which a petitioner had satisfied "any definition of actual innocence" existed, but that the Court's "independent research confirms that such decisions are rare." *Schlup*, 513 U.S. at 321 n.36. The same can be said here.

[22] While this Court noted in *Herrera v. Collins*, 506 U.S. 390, 415 (1993), that "[e]xecutive clemency has provided the 'fail safe' in our criminal justice system," that avenue has been closed to Mr. Hill. *See* Appendix 12.

[23] Georgia remains unique in imposing the "reasonable doubt" standard on persons claiming death ineligibility under *Atkins*.

be read to encompass claims of actual innocence of the death penalty under *Sawyer*). That claims such as Mr. Hill's are exceptionally rare is, moreover, evidenced by the fact that original habeas petitions make up an infinitesimal portion of this Court's docket.[24]

B. Mr. Hill's Last Hope For An Opportunity To Prove His Ineligibility for Execution On The Basis Of Newly Available And Compelling Evidence Lies With This Court.

This Court's power to grant an extraordinary writ is very broad but reserved for exceptional cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 260 (1947). Title 28 U.S.C. § 2244 (b)(3)(E) prevents this Court from reviewing the court of appeals' order denying Mr. Hill leave to file a second habeas petition by appeal or writ of certiorari. The provision, however, has not repealed this Court's authority to entertain original habeas petitions, *Felker*, 518 U.S. at 660, nor has it disallowed this Court from "transferring the application for hearing and determination" to the district court pursuant to 28 U.S.C. § 2241(b).

Rule 20 of this Court requires a petitioner seeking a writ of habeas corpus to demonstrate that (1) "adequate relief cannot be obtained in any other form or in any other court;" (2) "exceptional circumstances warrant the exercise of this power;" and (3) "the writ will be in aid of the Court's appellate jurisdiction."

This Court is Mr. Hill's last resort. He has not applied to the district court because the circuit court of appeals prohibited such an application. *See* Appendix 11. Mr. Hill exhausted his state remedies for his claim that, based upon new evidence, he can now demonstrate his mental retardation beyond a reasonable doubt when the state habeas court dismissed as procedurally

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[24] *See, e.g.*, Table A-1, Cases on Docket, Disposed of, and Remaining on Docket, 2007 Through 2011 (reflecting that during the period 2007-2011, original habeas petitions made up between 0.044% and 0.065% of this Court's docket), *available at* http://www.uscourts.gov/ uscourts/Statistics/JudicialBusiness/2012/ appendices/A01Sep12.pdf.

barred his Petition for Writ of Habeas Corpus (Appendix 8), the Georgia Supreme Court denied his Application for Certificate of Probable Cause to Appeal (Appendix 9) and the Georgia Board of Pardons and Paroles denied his applications for clemency. *See* Appendix 12. In this case, there is no "fail safe"[25] available to prevent a miscarriage of justice.

This case thus presents the extraordinary and rare situation satisfying the criteria set forth in *Felker*, 518 U.S. at 665, and in this Court's Rule 20 for the Court's exercise of its original habeas jurisdiction, "that the writ will be in aide of the Court's appellate jurisdiction, that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court."

Given the weight of the evidence in this case—so overwhelmingly in favor of a finding of mental retardation that there is *no longer any contrary expert opinion*—the execution of Mr. Hill is unquestionably prohibited by the constitution of the United States and the principles of justice upon which the Eighth Amendment is based. This Court must act and provide Mr. Hill a forum in which to establish his mental retardation beyond a reasonable doubt.

CONCLUSION

The petition for a writ of habeas corpus should be granted. Alternatively, the petition should be transferred to the district court to consider the new evidence and make a determination on the merits of Mr. Hill's claim that he is mentally retarded beyond a reasonable doubt.

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[25] *Herrera*, 506 U.S. at 414.

This 22nd day of May, 2013.

Respectfully submitted,

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No. 12-_____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2012

In Re WARREN LEE HILL, JR.,

Petitioner.

CERTIFICATE OF SERVICE

This is to certify that I have served a copy of the foregoing document this day by hand delivery/electronic mail, on counsel for Respondent directed to:

Beth Burton, Esq.
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This 22nd day of May, 2013.

_____
Attorney