UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH WAYNE EASTRIDGE,
Inmate #179-164
2240 Hubbard Rd.
Youngstown, OH 44505

MICHAEL A. DIAMEN, a/k/a
SALVATORE M. INFANTOLINO, AND
3384 Coral Springs Drive
Coral Springs, FL 33065

JOSEPH NICK SOUSA
2111 Cowan court
Fredericksburg, VA 22401

v.

UNITED STATES OF AMERICA

Civ. Action No. 00-3045 (RCL)

REPLY TO THE UNITED STATES' OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

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In their original submission, Petitioners presented new evidence that, together with the evidence at trial, proves they did not commit the murder for which they were convicted twenty-five years ago. Petitioners also presented valid constitutional challenges to the conduct of their trial that, in conjunction with the compelling evidence of their actual innocence, warrant vacating their convictions.

The Government's opposition never takes issue with the merits of Petitioners' constitutional claims. Instead, the Government contends that the evidence of Petitioners' innocence is insufficient, and asserts that this Court lacks jurisdiction to entertain the petition. The Government's statement of the evidence, however, is inaccurate and highly misleading, as the actual trial record indisputably reveals. Further, the Government's jurisdictional argument flows entirely from a mischaracterization of the grounds for the petition's position that this Court has jurisdiction to hear their claims, and therefore largely fails to address the arguments that Petitioners actually assert.

For the reasons that follow, this Court should grant Petitioners an evidentiary hearing and thereafter vacate Petitioners' convictions.

I. THE GOVERNMENT'S ARGUMENT IS FOUNDED ON MISCHARACTERIZATIONS OF THE TRIAL RECORD.

An essential part of Petitioners' request for relief is their actual innocence. The new evidence proffered by Petitioners and the trial record together virtually compel the conclusion that they were wrongly convicted. The Government claims that Petitioners "all but ignore much of the physical evidence" at trial and "grossly understat[e] the government's evidence." Gov't Br. at 32. It is the Government, however, that misstates the evidence. By ignoring the actual

record," the Government repeatedly portrays as inculpatory evidence that in fact exonerates Petitioners.

A. The Blood Evidence Is Not as Represented by the Government.

The Government seeks to leave the impression that the blood evidence pointed to Petitioners as participants in the murder. The opposite is true – the actual blood evidence in the record is highly exculpatory:

- The Government asserts that blood in the car was "in both the front and back seats." Gov't Br. at 15. In fact, the record shows that blood was confined to the area immediately surrounding Stephen Jones (including the left rear seat of the car, the left rear door panel, a very small amount on the back of the front seat, and small scrapings from the center back seat and rear left seat).[2] Tr. at 563-65,568-69, 1219, 1243.[3]
- The Government states that Diamen had blood near a tear in his pants, with blood on the newspapers on the floor and on his seat. Gov't Br. at 32-33; id. at 15. In fact, the record shows that bloody newspapers were found only in the rear seat near Jones, Tr. at 562,1219, and there was no blood on the front seat at all. Perhaps the Government's confusion stems from the fact that it erroneously places Diamen in the

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[1] The Government apparently chose to use as its fact source statements made in earlier Government briefs instead of referring to the trial record itself. The result is highly misleading.

[2] Jones is the one person in the car who did in fact participate in the murder. He admitted doing so by recanting his earlier testimony in an affidavit submitted by Petitioners, and in that affidavit confirmed that Petitioners were not among the three other participants in the murder. See Affidavit of Stephen Jones, Ex. I: 4.

[3] The Government chose not to file any portions of the trial transcripts. Petitioners have filed an additional set of exhibits, which provide additional portions of the transcript not reproduced in Petitioners' original Exhibit II. The entire trial transcript is available.

rear left seat. See Gov't Br. at 32. The trial record shows Diamen was sitting in the front right passenger seat. Tr. at 662.[4]

- In its eagerness to tie Diamen's small blood stain to the murder, the Government fails to mention that the blood near the tear in Diamen's pants was Diamen's own blood. Tr. at 628-29 (testimony of the Government's serologist). No blood connected to the victim was ever found on Diamen.
- Using a similar approach, the Government notes more than once that Sousa had "blood on his shirt." Gov't Br. at 32; id. at 15. It fails to mention, however, that this blood trace was too small to type because it was only "the-fifth of the size of a dime'' or "half the size, maybe, of an eraser on a wooden pencil." Tr. at 587 (testimony of the Government's serologist).
- The Government states that the Government's serologist at trial "indicated that the decedent's blood type appeared on the weapons and clothing of several [petitioners]," Gov't Br. at 34 (quoting United States v. Eastridge, 110 Wash. L. Rep. 1181, 1186 (D.C. Super. Ct. 1982) (alteration in original)). This is blatantly inaccurate. The trial transcript shows that the serologist gave no such testimony. Rather, as discussed above, a preliminary test showed the decedent's blood type only on Jones (a later test was inconclusive), see Tr. at 545-58;[5] the blood stain on Diamen was his own blood, Tr. at 628-29; and the drop of blood on Sousa was too small to type, Tr. at 587-89.

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[4] This means that Sousa was driving the car, Diamen was in the front passenger seat, Jones was in the rear left seat (behind the driver, where the blood and bloody newspapers were found), and Eastridge was in the rear right seat. Tr. at 662.

[5] In stark contrast to the lack of any significant blood on Petitioners, Jones was covered in blood – it was on his jeans' jacket and boots, and had soaked all the way through his jeans to his long johns. Tr. at 544-61.

In short, the blood evidence involving Petitioners is completely inconsistent with participation in a murder the witnesses characterized as involving "[a] great deal of blood, an excessive amount of blood." Tr. at 906 (testimony of Sergeant John Horn).[6] Other than two small instances of blood traces untied to the murder, there was no blood on Diamen's or Sousa's hands, boots, or elsewhere on their bodies or clothing.[7] Tr. at 543-95, 588-90, 758. There was no blood on Eastridge at all. Tr. at 591-92,626 (testimony of the Government's serologist).

B. The Knife Evidence Is Not as Represented by the Government.

The Government likewise tries to create the appearance that it was proved at trial that knives possessed by, or somehow associated with, Petitioners were tied to the murder. Again, the reverse is true – the only knives ever connected to Petitioners were demonstrably not used as murder weapons:

- The decedent's blood type appeared on none of Petitioners' "weapons." The only knife that had blood stains on it at all – stains which were too small to type, Tr. at 529,1454-58 – was a 12-inch Puma hunting knife found in a backyard near the site of the murder. This knife was never connected to Petitioners. But it matches the description of the large bowie knife owned by one of the unprosecuted Pagans (Chesley Barber) who Petitioners' newly-proffered evidence shows was one of the murderers. See Affidavit of Kathy Hafferman ("Hafferman Aff."), Ex. I 11, ¶ 5; see also Affidavit of Stephen Jones ("Jones Aff."), Ex. I 4, ¶ 13("[T]he other person

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[6] By all accounts, Battle's death was very bloody. See, e.g., Tr. at 349 (testimony of John White, the first witness to the body) (Battle's body was "bleeding profusely"); Tr. at 971 (testimony of Sergeant Richard Scott) (stating that there was "quite a bit of blood").

[7] Although the Government makes much of the clothing found in the trunk of the car (which was never admitted into evidence at trial) in an apparent attempt to link Petitioners to the murder, Gov't Br. at 34-35 & n.20, the Government fails to note that there was no blood on any of this clothing and it was consequently of no evidentiary value.

[Barber] started to stab Battle with his large Bowie knife."). Moreover, Chesley Barber matches the description of the chaser with the knife. Tr. at 427, 443, 494Z-495; Hafferman Aff. ¶ 4.

- The Government represents that this blood-stained knife was "found the following day in a location where petitioner Diamen had been seen." Gov't Br. at 32 n.16. This is blatantly wrong. The knife found on the grassy bank where Diamen had reportedly been sitting was marked Government Exhibit 3E at trial. Tr. at 625-26,1229, 1498-99. The blood-stained Puma knife, however, was marked Government Exhibit 3A. It was found in a backyard near the site of the murder, not where Diamen had been seen sitting. Tr. at 528-29,625-26.
- The Government likewise misrepresents the evidence when it states that a knife sheath was found "on the sidewalk near where Eastridge's car had been parked before the murder." Gov't Br. at 33. This, once again, is totally wrong. The record shows that the sheath was found near the spot where the Richter car was parked. Tr. at 1565; Map, Ex. I 1. The sheath fit the Puma knife (Exhibit 3A) and did not match any of Petitioners' knives. Tr. at 67, 1230. If anything, the blood-stained Puma knife and the presence of the sheath near the Richter car support Petitioners' description of the events of that night – that Chesley Barber, John Woods, Charles Jennings, and Stephen Jones murdered Battle and Petitioners were never at the murder scene.[8/]
- Contrary to the impression the Government tries to create, no trial evidence tied any of Petitioners' knives to the crime. The knife found under Sousa's seat was dusty and

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[8/] The Government also mentions that "popcorn [was] found on the sidewalk" near where Eastridge's car had been parked. Gov't Br. at 33. The popcorn was actually found scattered from 43rd Street to Wisconsin Avenue. Tr. at 913-14. In any event, the popcorn is irrelevant to the question of Petitioners' involvement in Battle's death.

had no blood on it. Compare Tr. at 1267 & Trial Exhibit 3B **with** Gov't Br. at 32. The knife recovered from Eastridge was a small Ranger Junior folding knife with no traces of blood on it. Compare Tr. at 1067, 1070-72, 1080 & Trial Exhibit 3D **with** Gov't Br. at 33. The knife found on the grassy bank where Diamen is said to have been sitting (Exhibit 3E), did not have any blood on it and was never connected to the murder. Tr. at 625-26, 1229,1498-99.

In short, like the blood evidence, the knife evidence helps to exonerate Petitioners. The only knives that could be associated with them did **not** have any blood on them[9] – and the only knife ever found with blood stains on it (the 12-inch Puma hunting knife) was never connected to any of the Petitioners.

C. Other Important Evidence Is Mischaracterized.

The Government also mischaracterizes other key exculpatory evidence in the trial record:

- The Government notes that Eastridge had a whiskey bottle on the car floor near him, and states that "a witness had seen someone jogging down Wisconsin Avenue, toward the decedent, during the chase, carrying a whiskey bottle." Gov't Br. at 33 (emphasis added). Exactly the opposite is true. Stephen Maday testified at trial that the person with the whiskey bottle jogged north on Wisconsin Avenue, in the opposite direction of Battle's chasers. Tr. at 1826, 1841. Maday testified without contradiction that the person with the whiskey bottle was **not** one of the chasers. Tr. at 1832. At trial, the Government admitted that Eastridge was the person with the bottle – the same person

[9] When the police arrested Jones, his knife was still on him, in its sheath with no blood on it. Tr. at 625-26. This provides further support for Jones's affidavit, in which he admits having participated in the murder by tackling and punching Battle, but not by stabbing him. Jones Aff. ¶¶ 13-15.

Maday saw running in the opposite direction from those chasing the victim. Tr. at 2790.[10/]

- The Government incorrectly asserts that a witness identified Petitioners and Jones as part of the group that harassed Battle before his death. Gov't Br. at **13.** In fact, not one of the trial witnesses identified Petitioners as having been part of any group other than the Richter group. Tommy Motlagh never described Petitioners as chasers or harassers of Battle. He identified them only as having been at his club. Tr. at **4951, 495X.**
- Contrary to the Government's contention, the forensic evidence does not corroborate Willetts's testimony that Eastridge and Sousa "sliced" the decedent's ear and "cut off" his nose. Tr. at **1663-64;** Gov't Br. at **33.** The deputy medical examiner who testified about the autopsy results made no mention of any wounds to the decedent's ear, and his description of the wounds to decedent's nose in no way suggests that it was "cut off." Tr. at **1883-86.**

In sum, the Government's inaccurate, revisionary statement of the evidence at trial does nothing to undercut Petitioners' showing of actual innocence.

[10/] This is not the first time that the Government has mischaracterized the whiskey bottle evidence as inculpating Eastridge. At trial, one of the government prosecutors said during opening argument that the evidence would show that "one of the individuals chasing . . ." had a whiskey bottle. Tr. at *65.* At closing, the other government prosecutor argued that Eastridge had admitted handling the whiskey bottle, as if that implicated rather than exonerated him; the prosecutor then tied the whiskey bottle to the Government's misstatement on opening argument. Tr. at **2790** ("You remember that bottle . . ."). Eastridge's attorney's failure to make proper use of the whiskey bottle as a defense at trial constituted ineffective assistance of counsel. See Pet. at **62-63.**

II. THIS COURT HAS JURISDICTION TO ENTERTAIN THE PETITION UNDER SECTION 2241.

Under D.C. Code Ann. § 23-110 ("Section 23-110"), D.C. Courts have exclusive jurisdiction to hear D.C. prisoners' collateral attacks on their sentences unless it appears that Section 23-110 is "inadequate or ineffective to test the legality of [the prisoner's] detention." Section 23-110(g). Because D.C.'s highest court has interpreted and applied Section 23-110 in a manner that precludes consideration of an illegal detention that would be cognizable under Title 28 of the U.S. Code, Section 23-110 is "inadequate or ineffective" to test the legality of Petitioners' detention, and this Court has jurisdiction to hear their claims under 28 U.S.C. § 2441.

The Government attempts to characterize Petitioners' claims that Section 23-110 was inadequate or ineffective as nothing more than a dissatisfaction "with the result of their previous litigation." Gov't Br. at 24 n.13. Petitioners contend, however, that Section 23-110 was inadequate or ineffective not because they did not win, as the Government would have the Court believe, but because the D.C. Court of Appeals (1) precluded relief under Section 23-110 based on application of a limitations period for motions for a new trial under Rule 33, and (2) declined to apply to Section 23-110 the same miscarriage of justice exception set out by the U.S. Supreme Court in Schlup v. Delo, 513 U.S. 298 (1995), as would apply in federal cases. As a result, Section 23-110, as construed by D.C.'s highest court, provides relief that is not commensurate with the remedy offered pursuant to Sections 2254 and 2255 of Title 28 of the U.S. Code, and is to that extent "inadequate or ineffective" and no longer an exclusive remedy by its own terms.

A. The D.C. Court of Appeals Mischaracterized Petitioners' Section 23-110 Motion as a Motion for a New Trial.

The Government incorrectly characterizes Petitioners' Section 23-110 motion as being based "primarily on the ground that newly discovered evidence shows they are innocent of the

crimes for which they were convicted, not that a specific constitutional provision was violated at trial." Gov't Br. at 20. Thus, the Government argues, Petitioners' Section 23-110 motion was properly treated as a Motion for a New Trial Pursuant to Rule 33 of the Superior Court's Rules of Criminal Procedure.[11] However, although Petitioners have presented compelling new evidence that they have been incarcerated for a crime they did not commit, Petitioners do not ask this Court to vacate their convictions based on that new evidence alone. Instead, Petitioners seek relief on the basis of four independent constitutional violations, which require vacating the convictions in light of Petitioners' additional evidence of actual innocence.[12]

The Government ignores the four constitutional claims that form the basis for Petitioners' habeas corpus petition. Because Section 23-110 is properly used when a prisoner claims his sentence was "imposed in violation of the Constitution of the United States or the laws of the District of Columbia," D.C. Code Ann. § 23-110(a), Petitioners properly moved to vacate their sentences under Section 23-110.

The Government contends that Petitioners' constitutional claims cannot form the basis for their habeas corpus petition because the claims are not "unresolved," Gov't Br. at 21, and they therefore are barred by principles of res judicata. But where a prisoner satisfies the Schlup miscarriage of justice exception, his claims must be entertained regardless of any procedural obstacles, including res judicata, that otherwise would prevent the claims from being heard. See Kuhlmann v. Wilson, 477 U.S. 436,454 (1986) (the "ends of justice" require federal courts to

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[11] Because a Rule 33 motion must be brought within two years of final judgment, the majority held that Petitioners' motion was time barred.

[12] The four constitutional violations are that the trial court's Rule (that no defendant could introduce evidence that would tend to implicate a codefendant) violated Petitioners' rights under the Fifth and Sixth Amendments; the prosecution's use of peremptory challenges to exclude white jurors violated Petitioners' Fifth Amendment right to due process; and Petitioners did not receive effective assistance of counsel as required by the Sixth Amendment. See infra Part III.

entertain procedurally barred petitions where the prisoner supplements his constitutional claim with a colorable showing of factual innocence). Because Petitioners satisfied the miscarriage of justice exception, the D.C. Court of Appeals was required to entertain their constitutional claims on the merits even though those claims had been previously adjudicated, and this Court likewise must consider those claims on the merits under this habeas petition.

B. The D.C. Court of Appeals Rendered Section 23-110 "Inadequate and Ineffective" by Failing To Apply the Miscarriage of Justice Exception.

1. Schlup establishes a miscarriage of justice exception enabling a petitioner who raises a colorable showing of actual innocence to receive a hearing on his constitutional claim.

In Schlup, the United States Supreme Court stated that a prisoner who raises a constitutional claim supplemented with a colorable showing of actual innocence must have his claims heard on the merits despite any procedural obstacles that otherwise would bar his claims. See Schlup, 513 U.S. at 316. Petitioners satisfied this exception. Thus, if their claims had been heard in federal court, the miscarriage of justice exception would have been applied to their motion, and their claims would have been entertained on the merits. The D.C. Court of Appeals, however, refused to apply the miscarriage of justice exception to Petitioners' claims, instead holding that their claims were procedurally barred – both by res judicata and by the two-year time limit for a motion for new trial under Rule 33. This rendered that court's application of Section 23-110 narrower than the comparable federal provisions under Title 28. Recognizing this, Judge Ruiz, writing in dissent, stated that the majority's error rendered Section 23-110 "'inadequate' and 'ineffective' when compared with the availability of habeas review in federal courts." Diamen v. United States, 725 A.2d 501,516 (D.C. 1999) (Ruiz, J., dissenting).

2. Petitioners' new evidence of innocence joined with their constitutional claims triggered the Schlup miscarriage of justice exception.

The Government contends that Petitioners do not satisfy the requirements of the miscarriage of justice exception because there is no connection between their newly discovered evidence and their constitutional claims. Thus, the Government argues, the D.C. Court of Appeals correctly applied the miscarriage of justice exception to Petitioners' motion, and Section 23-110 was not rendered inadequate or ineffective.

The Government's argument fails for two reasons. First, the new evidence proffered by Petitioners is in fact connected to Petitioners' constitutional claims. As set out in detail in the petition, the new evidence bears upon, and is critically important to, an informed understanding of why the due process deprivations suffered by Petitioners materially prejudiced their defense. The severe prejudice that resulted both from the trial court's Rule prohibiting defendants from eliciting testimony that might implicate a codefendant, for example, is crystallized by new evidence showing that this Rule barred Petitioners from defending themselves with evidence that would have revealed the truth: that their codefendant was guilty of the crime but they were not. The new evidence also reveals crucial weaknesses in Dorothy Willetts's testimony that were not presented to the jury because of the failure of Petitioners' trial counsel to discover that evidence and use it to impeach her testimony. In light of the D.C. Superior Court's statement that Willetts's testimony was "extremely damaging" to Petitioners' case, United States v. Eastridge, 110 Wash. L. Rep. 1181, 1187 (D.C. Super. Ct. 1982), the new evidence demonstrates the prejudice that resulted from the incompetence of Petitioners' trial counsel.

Second, even if Petitioners' new evidence were not linked to the constitutional infirmities they raise, Schlup does not require that a prisoner's new evidence have any such connection to his constitutional claims as a prerequisite for applying the miscarriage of justice exception. See

United States v. Roman, 938 F. Supp. 288,292 (E.D. Pa. 1996) (the new evidence of actual innocence "need not be directly related to the substantive claims the defendant is .presenting because the claims themselves need not demonstrate that he is innocent") (emphasis added) (citation omitted). The Government provides absolutely no support for its argument that a connection is required, other than citations to the D.C. Court of Appeals' decision in this case, which Petitioners, and the dissenting judge, contend was erroneous.

A reading of Schlup itself demonstrates that the Supreme Court did not intend to require a link between the evidence of actual innocence and the prisoner's constitutional claims. The Court explained the purpose of the actual innocence requirement:

> To ensure that the fundamental miscarriage of justice exception would remain "rare" and would only be applied in the "extraordinary case," while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.

Schlup, 513 U.S. at 321. The Court stated that tying the exception to a prisoner's innocence reflects the "concern about the injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system." Id. at 325. Thus, the miscarriage of justice exception is driven by the belief that fundamental notions of justice do not comport with the idea of procedurally barring an innocent man from raising his constitutional claim. Whether or not there is a sufficient link between the evidence of innocence and the constitutional violation (a vague and somewhat artificial concept at best, as the instant case illustrates) has no bearing on achieving a just result, which was the avowed purpose the Court sought to achieve.[13]

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[13] Additional support is found in the Court's statement that, for purposes of the miscarriage of justice exception, the actual innocence determination must be made "in light of all the evidence," including evidence that was properly excluded or was unavailable during the trial. Id. at 328 (internal quotation and citation omitted). The Court stated: the "standard is intended to focus the inquiry on actual innocence. In assessing the adequacy of the petitioner's showing,

C. Petitioners Satisfy the Actual Innocence Requirement of the Miscarriage of Justice Exception.

Petitioners' newly discovered evidence, when viewed in tandem with the facts presented at trial, satisfies the actual innocence requirement of the miscarriage of justice exception. Although the Government asserts that Petitioners' demonstration of innocence is insufficient, the Government is incorrect for three reasons: (1) it misstates the standard by which a prisoner must establish his actual innocence under Schlup; (2) it wrongly minimizes the importance of Petitioners' newly discovered evidence; and (3) it relies heavily on mischaracterizing the evidence presented against Petitioners at trial. The Government's mischaracterizations of the trial record were discussed above. See supra Part I. The remaining two points are discussed below.

The Government misstates the standard by which a prisoner must establish actual innocence under Schlup. According to the Government, a prisoner must present new evidence that "unquestionably" demonstrates his innocence before his otherwise procedurally-barred claims can be heard on the merits. Gov't Br. at 31. This rigorous standard, however, applies only to a free-standing claim of actual innocence (one that is untied to any claim of a constitutional violation at trial) brought pursuant to Herrera v. Collins, ***506*** **U.S.** 390 (1993). As the Supreme Court explained in Schlup, when a prisoner presents evidence of actual innocence in conjunction with constitutional violations in order to satisfy the miscarriage of justice

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therefore, the district court is not bound by the rules of admissibility that would govern at trial." Id. at 327. The Court's emphasis that the focus of the inquiry is on innocence and not on procedural rules of admissibility suggests that all evidence of innocence should be considered, and belies any contention that only evidence linked to the constitutional violation can serve as a gateway for the prisoner's constitutional claim. Instead, the Court strongly suggested that the point of the exception is to allow an innocent person – no matter what evidence he proffers to demonstrate his innocence – to bring his constitutional claim and be set free. It is the evidence of innocence, not any link between the evidence and a constitutional violation, that serves as the driving force behind the miscarriage of justice exception.

exception, a lower standard applies. In such instances, the prisoner must only demonstrate that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." Schlup, 513 U.S. at 327-28.

The Government also understates the significance of Petitioners' newly discovered evidence. The case against Petitioners at trial consisted essentially of two pieces of evidence: (1) shortly after the murder took place, Petitioners were found in a car along with Jones, who was covered with Battle's blood, and (2) Dorothy Willetts testified that Eastridge and Sousa told her they killed a black man in D.C. The new evidence strongly refutes both pieces of the Government's case.

The Government's initial response to the new evidence is simply to dismiss the testimony of all affiants as incredible. See Gov't Br. at 37, 41, 42, 44. In the context of serious constitutional concerns about the trial, and the prospect of a gross injustice having occurred, to dismiss the testimony of multiple affiants on credibility grounds without ever hearing any testimony to enable an informed judgment on credibility is unconscionable. See United States v. 1998 BMW "I" Convertible, 235 F.3d 397, 400 (8th Cir. 2000) ("Because there [were] disputed factual issues and witness credibility determinations to be resolved, we conclude that the district court was required to conduct an evidentiary hearing.") (citation omitted); see also Sneed v. Smith, 670 F.2d 1348, 1353-54 (4th Cir. 1982) (district court erred in failing to conduct an evidentiary hearing where petitioner presented affidavits and respondent attempted to undermine the credibility of the affiants).

The Government also repeatedly discounts the significance of the new testimony. But a comparison of the new evidence and the trial record leaves it clear that this testimony, if true, totally undermines the case against Petitioners.

1. The affidavits critically undercut the key Dorothy Willetts trial testimony.

By overstating the trial evidence against Petitioners, the Government discounts the importance of the Dorothy Willetts testimony. When the weaknesses in the physical evidence are viewed accurately, Willetts's testimony becomes crucial to the case against Petitioners.[14] This renders Petitioners' supporting affidavits refuting Willetts's testimony all the more important.

The new testimony shows that numerous witnesses present to hear Sousa's and Eastridge's alleged acknowledgement of participation in the murder in fact heard no such thing. The Government argues that this could be because Petitioners "confided to Willetts . . . instead of telling anyone else who might care to know or listen." Gov't Br. at **42.** But this explanation squarely conflicts with the Government's position at trial and the Willetts testimony. The Government stated at trial that the incriminating statements allegedly made by Sousa and Eastridge were "discussed and admitted within the hearing of witnesses." Tr. at **68** (emphasis added); see also Statement of Dorothy Willetts ("Willetts Statement"), Ex. I **12** at **2** ("[Sousa] just kept on ranting and raving about the cutting. It is like he wants everyone [sic] attention on him."). In the course of her trial testimony and pre-trial statement, Willetts identified eleven other people who were there when Eastridge and Sousa allegedly made incriminating statements. Petitioners' new evidence is that every one of those people who was interviewed denies **ever**

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[14] Judge Moultrie recognized the importance of Willetts's testimony. In his March **1982** opinion regarding Eastridge's Section **23-110** motion, he noted:

> Only one person, Mrs. Willetts, offered testimony which directly implicated the petitioner in the murder of the decedent Battle. . . . Because of the lack of direct evidence, this testimony appeared extremely damaging to the petitioner and Sousa.

Eastridge, **110** Wash. L. Rep. at **1187.**

hearing incriminating statements by Petitioners.[15] This striking unanimity, which was never presented to the jury, severely undercuts the most damaging testimony introduced against Petitioners at trial.

2. Jones's new admission that he participated in the murder with three persons other than Petitioners greatly undermines the case against Petitioners.

Stephen Jones now admits under oath what he denied at trial (and, because of the Rule, Petitioners were unable to subject to cross-examination): that he did, in fact, participate in the murder with three other people, and that those people were not Petitioners. The Government minimizes the significance of this new evidence only by asserting it is inherently incredible, not worth even "looking him in the eye" and subjecting him to cross-examination to test his truthfulness. The primary support for this contention – that Jones was disbelieved by the jury at trial when he denied participating in the murder and therefore should be disbelieved now when he admits his participation – is both illogical and circular. The fact that the jury disbelieved Jones's trial testimony in no way affects his current affidavit. Jones's new affidavit, which subjects him to the threat of a perjury prosecution, is fundamentally consistent with the result reached by the jury in all respects save one: the identity of the three chasers other than Jones. Jones's new testimony is also buttressed by supporting affidavits of Grayson, Lurz, and Richter, which recount inculpatory statements made by two of the other three chasers identified by Jones, and by the Gianaris affidavit, which establishes that no more than four individuals were involved in the murder.

The Government also argues that Jones' affidavit is incredible because Jones is an admitted liar.[16] Gov't Br. at 37 ("There is simply no reason for this Court to now attach any

[15] Willetts's husband declined to be interviewed, so his recollection is not known. All ten other witnesses deny that Sousa and Eastridge made the admissions Willetts claimed.

credence to Mr. Jones's affidavit when by his own admission he previously lied under oath during the trial to the very same facts he now recants."). Such a raw credibility determination should be made on the basis of live testimony, not a written submission. See, e.g., Sneed, 670 F.2d at 1353-54 (holding that the district court erred by making credibility determinations on the basis of affidavits alone, without an evidentiary hearing); see also Hill v. Bever, 62 F.3d 474, 484 (3d Cir. 1995) ("[T]he district court erred by making credibility determinations from its de novo review of the record without the benefit of having viewed the witnesses' demeanor.").

3. The Lurz, Grayson, and Richter affidavits substantially support the case that other Pagans committed the murder.

The Government does not address the corroborative or cumulative effects of the Lurz, Grayson, and Richter affidavits, but instead characterizes them as inadmissible hearsay that were properly ignored by the D.C. courts. The Government twice misses the mark. First, the self-inculpatory statements by Jennings and Woods (who are both dead) that are recounted in the affidavits fall within the "declaration against penal interest" exception to the hearsay rule. Fed. R. Evid. 804(b)(3). Second, the Government's position on these affidavits assumes that Petitioners may only produce evidence that would be admissible at trial as proof of their innocence. This is wrong. The Supreme Court has stated that all evidence, regardless of admissibility, should be considered in determining whether a prisoner satisfies the actual innocence requirement of the miscarriage of justice exception. See Schlup, 513 U.S. at 327-28.

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[8] The Government calls into question the "Pagan Code" and its relation to Jones's trial testimony and affidavit. Gov't Br. at 38-40. Any suspicions about the Pagan Code are quelled by the fact that Jones – who admits in his affidavit to lying at trial to protect himself and his friends – has no incentive to lie here in an affidavit that is voluntary, admits perjury and exposes him to possible prosecution, and is on behalf of persons he did not like.

4. The Gianaris affidavit makes it clear that there were at most four participants in the murder.

Petitioners also found a new witness never interviewed by the police who provided crucial new exculpatory testimony. Mr. Gianaris, a bystander who witnessed the key events, testifies that at most four people attacked Battle. In conjunction with the growing evidence that it was three other Pagans who attacked the deceased along with Jones, this provides critical support that Petitioners could not have participated.

The Government challenges Gianaris's description as after-the-fact, "equivocal in nature," and "directly inconsistent" with the evidence at trial. Gov't Br. at 44. On the first point, there is no indication in the affidavit that the memory of Gianaris is suspect. The best test for that would be to hear his live testimony, which the Government for some reason strongly resists. The second ground mischaracterizes the affidavit. Gianaris expressed uncertainty only as to whether there were three or four men – an ambiguity that does not in any way harm Petitioners' case.[12] Gianaris plainly states he does not believe there were more than four men. Affidavit of John S. Gianaris, Ex. I 10, ¶ 3. As to the third ground, the Government never describes how the Gianaris affidavit contradicts the trial evidence. In fact, the affidavit seems to support the jury's verdict that four white men – including Jones – chased and murdered Battle, while also supporting Petitioners' theory that they were not involved in Battle's death.

* * *

When Petitioners' new evidence of innocence is viewed together with the evidence that the Government presented at trial, no reasonable juror would conclude that Petitioners were guilty beyond a reasonable doubt. As Judge Ruiz stated, Petitioners have presented

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[12] Three men have confessed to the murder of Battle. It can hardly undermine Petitioners' case that Gianaris may have seen only three men.

"compelling" evidence that they were convicted of a crime they did not commit. Diamen, 725 A.2d at 527 (Ruiz, J., dissenting).

III. PETITIONERS' CONSTITUTIONAL RIGHTS WERE VIOLATED AT TRIAL.

The Government does not contest the merits of Petitioners' constitutional claims. A review of these claims leads inescapably to the conclusion that the trial was not "free of nonharmless constitutional error." Schlup, 513 U.S. at 316. Petitioners' convictions should therefore be vacated.

A. The Court's Rule Prohibiting Defendants from Eliciting Testimony that Might Implicate Codefendants Violated Petitioners' Fifth and Sixth Amendment Rights.

From the beginning of the trial, the court prohibited Petitioners from presenting evidence or testimony that might "bring into play any other defendant." Voir Dire Tr. at 150 (regarding oral argument); accord Tr. at 601 (regarding testimony). The effect of the court's Rule was devastating:

- It precluded Petitioners from presenting the truth – their best defense.[18]
- When enforcing this Rule by limiting cross-examination – especially of Pamela Heim and Dorothy Willetts – the trial court violated Petitioners' Fifth Amendment right to present "evidence that someone other than [themselves] committed the charged crimes," Johnson v. United States, 552 A.2d 513,516 (D.C. 1989) and Petitioners'

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[18] For this reason, Petitioners alternatively move for vacation of their convictions on the basis of the trial court's failure to sever their trials from that of codefendant Stephen Jones. See United States v. Gambrill, 449 F.2d 1148,1163 (D.C. Cir. 1971) ("[T]he difference in the amount of evidence against each defendant, when considered in light of the other elements present in the case, is a factor which supports our conclusion that . . . severance should be granted . . ."); United States v. Leonard, 494 F.2d 955,966 (D.C. Cir. 1974); United States v. Bolden, 514 F.2d 1301,1310 (D.C. Cir. 1975) (severance is proper when the evidence against one defendant is far more damaging than the evidence against the other).

Sixth Amendment right to confront and cross-examine all government witnesses against them. See Delaware v. Van Arsdall, 475 U.S. 673,679 (1986).

- Petitioners' rights under the Due Process Clause were violated because the court prohibited counsel from pointing to the wealth of evidence against codefendant Jones while pointing out the dearth of evidence against Petitioners.
- Petitioners' counsel were rendered ineffective under the Sixth Amendment by precluding them from exercising independent judgment and from employing a blame-shifting strategy. & Strickland v. Washington, 466 U.S. 668,692 (1984) (stating that "state interference with counsel's assistance" is tantamount to "constructive denial of the assistance of counsel") (citation omitted).

To date, no court has ever specifically addressed the constitutionality of the trial court's Rule.[19] The only judge that considered the constitutionality of the Rule, Judge Ruiz, concluded it violated Petitioners' Fifth and Sixth Amendment rights. See Diamen, 725 A.2d at 528 (Ruiz, J., dissenting) ("[T]he complete prohibition during trial on any unconsented questions that might incriminate a codefendant hampered cross-examination into bias and undermined appellants' ability to present a defense to a degree that clearly implicates the Fifth and Sixth Amendments."). This court should hold that the trial court's Rule, which prevented Petitioners from presenting the truth to the jury, was unconstitutional.

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[19] This issue was apparently among those summarily rejected without any discussion in a footnote in the direct appeal in 1979. There is no way of knowing what grounds the court may have had to do so, or whether it was in fact considered and rejected. See Sousa v. United States, 400 A.2d 1036,1038 n.1 (D.C. 1979) ("We have examined the multitude of other contentions made by appellants and find them to be without merit.").

B. The Prosecution's Use of Peremptory Challenges To Exclude White Jurors from the Jury Violated Petitioners' Fifth Amendment Due Process Rights.

The prosecution at trial used peremptory challenges to strike all prospective white jurors from the jury. Given that Petitioners are white and the decedent was black, and that this case was framed as being racially-motivated, the Government's use of peremptory challenges was improper and violated Batson v. Kentucky, 476 U.S. 79 (1986). Batson should be retroactively applied to Petitioners' case because the Government's use of peremptory challenges to remove all whites from the jury goes to the fundamental fairness of the proceeding, and because this case involved an interracial crime where the defendants have a good-faith, colorable claim of innocence. See Sawyer v. Smith, 497 U.S. 227,242 (1990) (noting that retroactivity is appropriate where the new rule (1) goes to the fundamental fairness of the proceeding, and (2) "significantly improve[s] the pre-existing fact-finding procedures [that] are to be retroactively applied on habeas") (quoting Desist v. United States, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting)).

C. Petitioners Were Deprived of Their Sixth Amendment Right to Effective Assistance of Counsel.

Petitioners' constitutional rights were violated at trial by the failure of defense counsel to provide effective assistance as required by the Sixth Amendment. See Strickland, 466 U.S. 668 (1984) (establishing two-part test for ineffective assistance of counsel). Petitioners' counsel failed effectively to impeach Willetts's testimony, even though – as shown above – the testimony was at once so damning and so questionable as to its veracity. No reasonable counsel would have failed to attempt to locate the impeachment witnesses, see id. at 691. Nor would reasonable counsel have performed such an ineffective examination of the two impeachment witnesses that were brought to the stand, or failed to press the exculpatory value of the Government's admission that Eastridge was the person with the whiskey bottle. In light of the weakness of the

Government's evidence of their guilt, Petitioners were greatly prejudiced by the deficient performance of their counsel.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the original petition, this Court should grant their petition for habeas corpus and vacate their convictions.

Respectfully submitted,

Andrew Weissman (by DJA)

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused a true and correct copy of the foregoing "Reply to the United States' Opposition to the Petition for Writ of Habeas Corpus," to be mailed this 31st day of October, 2001, via regular mail, postage prepaid to:

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June **4,2001**

Mr. Earl Eastridge
674 Kings Highway
Fredericksburg, VA **22405**

Dear Mr. Eastridge:

Below is a brief summary of our involvement in Wayne's case. **I** have also attached another letter we did a few years ago which may be of help. Please let me know if there is anything else that you need.

For the past seven-and-a-half years, the law firm of Wilmer, Cutler & Pickering ("WC&P") has sought to have Mr. Eastridge's conviction vacated on the basis of new evidence uncovered by Centurion Ministries that demonstrates that Mr. Eastridge is innocent of the crime for which he was convicted. It is our opinion that Mr. Eastridge has spent **25** years in prison for a crime he did not commit.

Centurion Ministries (a public interest organization dedicated to seeking relief for the imprisoned innocent) **has uncovered** strong evidence demonstrating that Mr. Eastridge **is** innocent of the original crime for which he was convicted. In November **1995,** on Mr. Eastridge's behalf, WC&P outlined this evidence in a letter to the D.C. Board of Parole. (*See* letter from Alyza **D.** Lewin to Ms. Margaret Quick, dated November **17, 1995,** attached). During the oral argument on appeal of the lower court's denial of Messrs. Eastridge, Sousa and Diamen's joint motion to vacate their convictions, the government itself conceded that "it is certainly reasonable to conclude" that Messrs. Eastridge, Sousa and Diamen were not the actual stabbers. ***See*** March **20, 1997** Oral Argument Tr. at **62** (before Judges Ferrin, Ruiz and Kern). Without further explanation or support, the government stated that it was continuing to oppose Messrs. Eastridge, Sousa and Diamen's joint motion to vacate their convictions because there was evidence that they aided and abetted the attack. Although the D.C. Court of Appeals was divided with regard to whether Mr. Eastridge's petition was procedurally barred, all three judges on the panel agreed that, at a minimum, Petitioners had "presented a non-frivolous claim that they have spent many years behind bars for a crime that they did not commit." *Diamen, et. al. v.*

U.S., 725 A.2d **501,** (D.C.Cir. **1999).** Petitioners filed for rehearing en banc of the D.C. Court of Appeals decision denying their appeal on procedural grounds, which was denied in September **1999.** In December 2000, WC&P filed a petition for habeas corpus relief with the United States District Court for the District of Columbia. That petition is pending.

Sincerely,

Sara E. Emley

Enclosure

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November 17, 1995

Ms. Margaret Quick
Chairperson
D.C. Board of Parole
300 Indiana Avenue, N.W.
Washington, D.C. 20001

Re: Parole Interview for Joseph Wayne Eastridge (Inmate No. 179-164) -- Lorton Minimum Security Facility, Lorton, Virginia

Dear Ms. Quick:

Wilmer, Cutler & Pickering represents Joseph Wayne Eastridge on a pro bono basis, with respect to his 1976 first-degree murder conviction in United States v. Eastridge, No. 53483-75 (D.C. Sup. Ct.).

On April 7, 1995, we filed on behalf of Eastridge a Motion to Vacate Convictions and Request for Evidentiary Hearing with the D.C. Superior Court (a copy of which is enclosed with this letter). The Petition presents substantial evidence not available at trial which establishes that Eastridge and two of his codefendants (Nick Sousa and Michael Diamen) are innocent of the murder for which they were convicted. In light of the fact that Eastridge will be interviewed for parole in the near future, I thought it important that you be aware of the new evidence that has been uncovered by Centurion Ministries (a public interest organization dedicated to seeking relief for the imprisoned innocent) during their five-year investigation of the matter.

The newly-available evidence outlined in the Petition includes:

- New testimony establishing that Eastridge, Sousa and Diamen were not at the site of the stabbing, including the testimony of John Gianaris, a previously undiscovered eyewitness, who has stated in a sworn affidavit that there were no more than four men present during the attack on Battle, and that the car in which Eastridge, Sousa and Diamen were stopped and arrested was never at the scene of the stabbing;

- A sworn statement by Stephen Jones, another codefendant, in which he exonerates Sousa, Eastridge and Diamen, confesses to the crime, recants his contrary trial testimony, and identifies individuals other than Sousa, Eastridge and Diamen as the actual murderers.

- Statements from ten witnesses refuting Dorothy Willetts' key testimony at trial in which Willetts alleged that Sousa and Eastridge had admitted to committing the murder. All ten of the individuals listed by Willetts as present at these "confessions," claim the alleged admissions never happened.

- Affidavits from three witnesses, Michael Grayson, Raymond Lurz, Jr. and Richard Richter, identifying six separate occasions during which two of the actual murderers -- John Woods and Charles Jennings -- confessed to the crime, declared Sousa, Eastridge and Diamen to be innocent, and identified themselves and Chesley Barber as the real murderers.

The Petition also presents several legal grounds supporting vacation of Sousa's sentence, including: (1) the absence at trial of newly discovered evidence of his innocence: (2) the prosecution's use of race-based peremptory challenges during jury selection; (3) the violation of Sousa's constitutional right to introduce evidence of his innocence (including a bar against evidence implicating co-defendants); (4) ineffective assistance of defense counsel; and (5) potential government misconduct.

Nick Sousa, Wayne Eastridge and Michael Diamen have been incarcerated for over 19 years for a murder that the evidence shows they did not commit. I am enclosing a copy of the Petition and accompanying exhibits so that you may review all of the facts when evaluating Sousa's parole eligibility.

Sincerely,

Alyza D Lewin

Alyza D. Lewin