No. 22-

IN THE

Supreme Court of the United States

LAMONT MCKOY,

Petitioner,

v.

TODD ISHEE, SECRETARY, NORTH CAROLINA DEPARTMENT OF ADULT CORRECTION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Section 2254(e)(1) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") requires federal courts to presume that state court factual findings are correct unless rebutted by clear and convincing evidence. After AEDPA was adopted, this Court held in *House v. Bell*, 547 U.S. 518, 539 (2006), and *McQuiggin v. Perkins*, 569 U.S. 383, 396–97 (2013), that the *Schlup* actual innocence gateway survived the passage of AEDPA when a first federal habeas petition is brought seeking consideration of defaulted claims based on a showing of actual innocence. This petition presents three questions related to § 2254(e)(1) and this Court's actual innocence gateway precedent:

1. Whether the presumption of correctness under § 2254(e)(1) requires a determination on a factual issue by a state court or whether merely presenting a factual issue to a state court is sufficient.
2. Whether a federal court should accord a state court decision a presumption of correctness under § 2254(e)(1) where a due process violation denied the state court an effective opportunity to hear the underlying factual issue.
3. Whether deference under § 2254(e)(1) is owed by a federal court considering the *Schlup* actual innocence gateway to state court findings of fact given that § 2254(e)(1) heightens the burden on petitioner to overcome the state court findings by clear and convincing evidence when the *Schlup* gateway standard requires only a preponderance.

PARTIES TO THE PROCEEDING

Petitioner, who was the Petitioner-Appellant in the Fourth Circuit, is Lamont McKoy, a former prisoner of the State of North Carolina.

Respondent, Todd Ishee, who was the Respondent-Appellee in the Fourth Circuit, is Secretary of the North Carolina Department of Adult Correction.[1]

[1] Todd Ishee is the current Secretary of the North Carolina Department of Adult Correction. The caption has been amended to reflect that Mr. Ishee is the correct Respondent in his current position.

RELATED PROCEEDINGS

McKoy v. Hooks, No. 20-6598, U.S. Court of Appeals for the Fourth Circuit. Judgment entered December 13, 2022. Order denying the petition for rehearing *en banc* denied January 11, 2023.

McKoy v. Hooks, No. 5:16-hc-02262-FL, United States District Court, Eastern District of North Carolina, Final judgment dismissing the petition for writ of habeas corpus entered March 30, 2020.

State v. McKoy, No. P15-757, Court of Appeals of North Carolina, Petition for Writ of Certiorari denied October 19, 2015.

State v. McKoy, No. 90 CRS 11412, Cumberland County Superior Court, Order denying second Motion for Appropriate Relief entered December 4, 2014.

State v. McKoy, No. 416P02, Supreme Court of North Carolina, Pro Se Petition for Writ of Certiorari dismissed denied February 27, 2003.

State v. McKoy, No. P98-633, Court of Appeals of North Carolina, Pro Se Petition for Writ of Certiorari dismissed August 1, 2002.

State v. McKoy, No. 90 CRS 11412, Cumberland County Superior Court, Order denying first Motion for Appropriate Relief entered September 28, 2001.

State v. McKoy, Supreme Court of North Carolina, No. 458A91, Opinion following direct appeal finding no error on June 25, 1992. Judgment entered on July 15, 1992.

State v. McKoy, No. 90 CRS 11412, Cumberland County Superior Court, Jury Verdict entered finding Petitioner guilty of first-degree murder on May 2, 1991.

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[1] The March 30, 2020 Order was initially sealed, but was unsealed by the district court on April 8, 2020, and is now public and unredacted.

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OPINION BELOW

The decision of the U.S. Court of Appeals for the Fourth Circuit affirming the dismissal of the Petitioner's 28 U.S.C. § 2254 Petition, which was not reported in the Federal Reporter, is available at 2022 WL 17592123 and is reproduced at Appx. 1a-10a.[2]

JURISDICTION

The Fourth Circuit's opinion issued on December 13, 2022. A petition for rehearing *en banc* was denied on January 11, 2023. (Appx. 83a.) This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Subsection (e)(1) of Section 2254 of Title 28 of the United States Code provides: "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

INTRODUCTION

Petitioner Lamont McKoy is innocent. He likely would have been found innocent by his trial jury but for the State of North Carolina's perversion of the adversarial process. At trial, the State knew that it was presenting a materially false theory of Myron Hailey's murder in Fayetteville, North Carolina, because law enforcement officers were present at the exact location, during the exact time, where the State alleged Petitioner killed Hailey. The State suppressed this evidence at trial and throughout the state court post-conviction proceedings. By concealing this

[2] For clarity, the Supreme Court Appendix required by Rule 14(1)(i) is abbreviated as "Appx." The citations to "JA" are to the joint appendix filed in the U.S. Court of Appeals for the Fourth Circuit.

exculpatory evidence for decades, the State has been able to oppose Petitioner's claims of innocence in the state proceedings unrestrained by the truth. And now, given the errors committed by the Fourth Circuit, the State has been rewarded for its efforts.

To prove Petitioner's involvement in the alleged shooting at trial, the State offered the testimony of a single purported eyewitness whom the police characterized as a "crack head." This witness, who admitted on two occasions that his testimony was false, is relied on by the State to place the shooting in the Haymount Hill section of Fayetteville, North Carolina. Because there was no physical evidence linking Petitioner to the crime, the State also offered Petitioner's ambiguous responses to police accusations to bolster its case against Petitioner, even though the context makes the flippant and dismissive tone clear.

After Petitioner's conviction, a joint state and federal task force conducting an independent investigation of a violent Fayetteville street gang, the Court Boys, developed credible evidence, that Court Boys gang member William Talley was responsible for Hailey's death. Evidence developed by the task force implicating Talley in Hailey's murder was presented to a federal jury. As a result of the evidence gathered by the task force investigation, and additional evidence presented at the habeas hearing below, Petitioner has offered evidence that *ten* people provided remarkably consistent accounts of Talley killing Hailey in the Grove View Terrace housing complex in Fayetteville; some of the witnesses even acknowledged that another person in Fayetteville (the Petitioner) was wrongly convicted of the murder.

For decades, the State concealed a key fact—the first two tips received by the detectives, within days of Hailey's murder, implicated Talley in Hailey's death, not Petitioner. The tips were suppressed at trial and through state court post-conviction litigation, during which prosecutors argued there was insufficient evidence to connect Talley to Hailey's death. The concealment of

these tips can likely be attributed to the corruption of one of the two detectives assigned to review Hailey's murder; testimony presented at Petitioner's habeas hearing shows that the detective, who was subsequently convicted of corruptly protecting drug gangs, actively protected Talley's gang, the Court Boys.

Despite this evidence, the United States Court of Appeals for the Fourth Circuit concluded that Petitioner could not overcome the *Schlup* gateway because of ambiguous statements he made to the investigating officer and because the jury supposedly found the state's lone fact witness credible. First, regarding the alleged statements, the Fourth Circuit erroneously concluded that 28 U.S.C. § 2254(e)(1) required it to accept as fact that these ambiguous statements were a confession, even though the state court never made a determination on that factual issue in disregard of the clear statutory text under § 2254(e)(1). Significantly, there is *no* state court finding to this effect; rather, the "finding" cited by the Fourth Circuit is the State Supreme Court's holding on direct appeal that sufficient evidence had been presented to the jury for it to conclude Petitioner's statements amounted to an admission.

Second, regarding the state's lone "eyewitness," Bobby Lee Williams, the Fourth Circuit again presumed facts against Petitioner on the erroneous basis that the factual issue was presented to the state court, even though the state court never made a factual determination on the issue. The new evidence that the police were present at the exact location where Petitioner is alleged to have shot Hailey—at the exact time when the witness says Petitioner fired the shots—completely discredits his testimony. Williams's testimony is further undermined by new evidence that, although Williams testified that he went with Hailey inside a neighborhood arcade before Hailey was murdered, the record shows the arcade was closed.

Third, regarding the overwhelming evidence that another person, Talley, was responsible for Hailey's murder, the Fourth Circuit incorrectly accorded deference under § 2254(e)(1) to a state court determination that violated Petitioner's due process rights. The state's suppression of contemporaneous tips identifying Talley as Hailey's murderer denied the state court an effective opportunity to decide the factual issue before it. That the state court found that there was an insufficient connection between Talley and Hailey is of no impact when the state suppressed this exact evidence throughout the entirety of the state court proceedings. To reward the state with a presumption of correctness for a clear violation of Petitioner's due process rights would be repugnant to the constitution.

The Fourth Circuit never conducted the analysis this Court's precedent requires during consideration of the *Schlup* gateway, and it wrongly denied Petitioner of his due process rights to fully present his constitutional claims. This Court should grant this Petition, summarily reverse the decision below, and remand the case for further proceedings consistent with the precedents that were ignored.

STATEMENT OF THE CASE

A. Myron Hailey's Murder

On the morning of January 26, 1990, Myron Hailey was found shot dead in his car, which had come to rest on a roadside embankment in Fayetteville, North Carolina. (JA 1448–49; JA 68–70.) The police concluded that Hailey was not murdered at the crash site, but that he was shot at another location and his body was found where the car came to rest. (JA 1148–49; JA 68–70.) The police immediately focused their investigation on the Haymount Hill section of Fayetteville ("Haymount Hill"), where Petitioner lived. (JA 71.) Petitioner was ultimately arrested and convicted for Hailey's murder. (JA 1776.)

B. Petitioner's Trial and Conviction

As described above, the State's case rested on a single fact witness and Petitioner's ambiguous statements to meet its burden and establish Petitioner's guilt. The State presented no physical evidence connecting Petitioner to Hailey's death.

1. Testimony of Bobby Lee Williams

The State relied almost entirely on the inherently inconsistent and incredible testimony of a single witness, Bobby Lee Williams. Williams claimed that Petitioner shot at Hailey as Hailey drove away from the intersection of Bryan and Branson Streets in Haymount Hill, and then fired a second, fatal shot at the next street over after Petitioner ran on foot to intercept Hailey's fleeing car.[3] (JA 1509–12.) Williams, a parolee at the time and described by the police as a "crack head," provided an incredible account of the purported shooting, which new evidence shows was indisputably false. (*Id.*) Among other things detailed below, Williams testified that, shortly before Hailey's murder, he and Hailey searched for Petitioner inside a neighborhood arcade that was still open. (JA 1506.) In fact, the arcade closed at about 9:30 p.m. that night. (JA 73.) At around 9:00 p.m., Hailey was returning items of clothing at a store about 35 miles from Haymount Hill. (JA 1731.) Williams's timeline of events was factually impossible.

2. Testimony of officer Michael Ballard

The State also put forward the testimony of the lead investigating officer, Michael Ballard. (JA 1589–1601.) Ballard's testimony was mainly offered to bolster the credibility of

[3] As extensively discussed in Petitioner's prior briefing, to accomplish such a feat, Petitioner would have had to exceed Olympic sprinter speeds over 780 feet of unimproved and dark path (with a delayed start) to intercept the vehicle, which travelled 870 feet on paved roadways (with a head start.). (*See, e.g.* JA 318.) Sergeant Tracy Campbell confirmed the impossibility that someone could traverse that path in time to intercept the fleeing car. (*See* JA 2091, 2094.)

Williams. (*See* JA 1590–96, where Ballard recounted Williams's account.) But Ballard also testified to the ambiguous exchange with Petitioner, which he later claimed in federal post-conviction proceedings that he believed the exchange to be an admission of guilt. (*Compare* JA 1596–1601 *with* JA 2171–73.) That exchange amounted to Ballard making a series of assertions and Petitioner responding to every statement with the three-word phrase, "I know it." (JA 104–05.) After his exchange with Petitioner, Ballard's contemporaneous notes show he "asked Petitioner if he would take a polygraph test *so we could eliminate him*."[4] (JA 215 (emphasis added).) When Petitioner refused, Ballard replied that an "innocent man would want to take a polygraph and have his picture taken to prove he was telling the truth." (*Id.*) Ballard also submitted a felony investigative report to the district attorney's office after this exchange and noted that "[a]ll defendants made incriminating remarks during their interviews, *except* McKoy. . . ."[5] (JA 154 (emphasis added); JA 2217.) Finally, Ballard reported to Hailey's family, just four days after his exchange with Petitioner, that there was "minimal" evidence in the case. (JA 105; JA 2229.)

Ballard also testified at Petitioner's trial that he corroborated Williams's account through interviews of Petitioner's co-defendants, who were allegedly with Petitioner when Hailey was shot. (JA 1626–27.) However, Ballard knew at trial that this was not true as Charmaine Evans, the only co-defendant that at *any* point provided a statement incriminating Petitioner, did so under intense police pressure and vehemently disavowed the statement just days later.

[4] There is a discrepancy between the FPD Running Narrative and Ballard's handwritten notes regarding the polygraph. Only his handwritten notes indicate that Ballard asked Petitioner to take a polygraph "so we can eliminate him" at the conclusion of their exchange that is now held out as a purported confession. (*Compare* JA 105 (FPD Running Narrative) *with* JA 215 (Ballard's handwritten notes).)

[5] The other defendants were the individuals that Williams said were with Petitioner – their charges were dismissed and none testified at trial.

(*Compare* JA 117–20 (Evans Statement on March 20, 1990) *with* JA 121–34 (Evans Statement on March 23, 1990).) At the time, Evans was just sixteen-year-old and the police handcuffed him to a chair for eight hours while threatening him with a life sentence.[6] (JA 2000–01.) After Evans told the prosecutor that he would not testify for the State because "Lamont didn't do it," the State not only declined to call him as a witness, but later the same day jailed him for parole violations, where he remained through Petitioner's trial. (JA 2010–12.) Contrary to Ballard's trial testimony, no other co-defendant provided a statement incriminating Petitioner.

C. State Post-Conviction Proceedings

1. Joint task force investigation

Two years after Petitioner's 1991 conviction, the U.S. Attorney's Office in Raleigh formed a task force, comprised of federal, state, and local law enforcement personnel, to mount an extensive investigation into Cumberland County's gang-related activity ("Task Force").[7] After, and unrelated to, Petitioner's conviction, the Task Force developed credible evidence that William Talley, a member and "enforcer" of the Fayetteville-based Court Boys gang, murdered Hailey in connection with a drug transaction that occurred in the Grove View Terrace housing complex, a different neighborhood in Fayetteville. (JA 2443.) A total of ten witnesses identified Talley as the shooter that killed Hailey. (*See* JA 1891, 1894, 593–94, 1955–56, 613–14, 616–17, 619, 621–22.) Four of those witnesses were identified by law enforcement officers during the Task Force's investigation of the Court Boys; another four witnesses were identified after the Task Force's investigation, including two witnesses identified during the pendency of

[6] Anthony Lee Richardson also testified that he was handcuffed to a chair, although he did not make any statement incriminating Petitioner. (JA 2028.)

[7] The Task Force was made up of members of the FPD, the Cumberland County Sheriff s Department, the State Bureau of Investigation ("SBI"), the Federal Bureau of Alcohol, Tobacco, and Firearms ("BATF"), and the Secret Service. (JA 350–51.)

the district court proceedings; and the final two witnesses were from Crime Stopper tips received by the FPD in the days after Hailey was found murdered. These tips were first disclosed in March 2018 in response to a discovery order from the Honorable District Court Judge Terrence Boyle. The tips can be summarized as follows:

- The first tip, dated January 27, 1990 (one day after Hailey's murder), stated that the caller reported that "Rat-Rat [Talley] did the shooting . . . [and] Irvin Cook saw the shooting." (JA 1890.) This tip was forwarded to FPD Sergeant Calfee on February 1, 1990, stating: "Please check into the matter and respond within ten (10) days." (JA 1891.)
- The second tip, dated January 28, 1990 (two days after Hailey's murder), stated that "Rat-Rat [Talley] from Groveview Terr. [where Talley's Court Boys gang operated] . . . killed the subject in the vehicle on Rowan Street in the city this past week." (JA 1894.)

The other eight witnesses to Hailey's murder provided a remarkably consistent story. Several of these witnesses said that they saw Talley shoot at the back of a car and then saw that car the next morning crashed on the embankment on Rowan Street where Hailey's body was found – no other bodies were recovered in that area during the relevant time period. (*See, e.g.*, JA 619, 593–94; *see also* JA 631–40.) Some of the witnesses provided further specificity, including identifying Hailey by name and his car by make, model, and color, and telling investigators that they were aware that an individual from Haymount Hill was wrongly convicted for Hailey's murder. (*See, e.g.*, JA 1927, 1955–56.) A summary of what the ten witnesses saw is below.

Witness	Shooting in Grove View Terrace	Talley was the shooter	Talley shot at the back of a car	Car was found where Hailey's car was found	Car is a blue Honda Accord	Identified Hailey as the victim
January 27 Caller		✓				✓
January 28 Caller	✓	✓		✓		✓
Bernard McIntyre	✓	✓	✓		✓	✓
Kelly Debnam	✓	✓	✓	✓		
Ronald Perkins	✓	✓	✓	✓		◍
Anthony Perkins	✓	✓	✓	✓		
James Smith	✓	✓			✓	✓
Craig Roberts	✓	✓	✓	✓		◍
"Jane Doe"[8]	✓			✓	◐	
"John Doe"	✓			✓		

✓: Fully consistent
◍: Some details consistent
◐: Some details inconsistent

[8] "Jane Doe" and "John Doe" are used in place of the witness's names, which were sealed pursuant to a District Court Order.

2. Petitioner's *pro se* first Motion for Appropriate Relief

Petitioner learned of the Task Force evidence implicating Talley and wrote a letter to a Fayetteville police detective in August 1995. (JA 1886.) Petitioner implored the detective to do the right thing and not "cover [] up" that Talley murdered Hailey. (*Id.*). A memo was prepared in response to Petitioner's letter, in which a Fayetteville police officer stated that he was unable to locate in the Hailey homicide file the names William Talley or his street name "Rat Rat," which were referenced by Petitioner in his August 1995 letter. (JA 1901.)

Petitioner then filed a *pro se* Motion for Appropriate Relief ("MAR") with the Cumberland County Superior Court on April 3, 1998. Four of the five grounds that he raised were summarily dismissed without a hearing, while the fifth—ineffective assistance of appellate counsel[9]—was denied after counsel was assigned and a hearing held on September 21, 2001. At this hearing, limited evidence from the Task Force investigation was presented, but Petitioner's motion was ultimately denied because "the alleged new evidence of a shooting similar to the one for which the defendant was convicted would not be beneficial to the defendant in that the only similarity to the defendant's case is that a shooting in an automobile took place at some unknown date and time in the City of Fayetteville."[10] (JA 2600.) As detailed above, the state did not produce the two Crime Stopper tips stating that Talley shot Hailey until 2018, more than fifteen

[9] The transcript of Petitioner's first post-conviction evidentiary hearing is unclear regarding the claim being heard; the clearest statement of the claim considered is in the order granting the evidentiary hearing on Petitioner's first motion for appropriate relief, which describes it as an ineffective assistance of appellate counsel claim. (JA 2595.)

[10] Petitioner's counsel at this hearing made plain that he did not have the full scope of evidence related to Talley's involvement and sought a continuance. He noted on the record that he was struggling to obtain records related to the Task Force investigation because of "roadblocks" from the federal government. (JA 956; *see also* JA 360–61.)

years after the 2001 post-conviction hearing. As a result, the Cumberland County Superior Court did not have this evidence at the time it denied Petitioner's MAR.

Petitioner sought review of the denial of his MAR from both the North Carolina Court of Appeals and the North Carolina Supreme Court, but his *pro se* petitions were summarily denied by the appellate courts.

3. The State suppressed evidence that police were present at Bryan and Branson Streets when Petitioner allegedly shot Hailey

After his first MAR, Petitioner discovered that the State had suppressed exculpatory evidence, not provided to him during his trial, showing that Fayetteville police officers were stationed in Haymount Hill at the precise time and intersection that Williams claimed to have witnessed the shooting. A contemporaneous police incident card demonstrates that police were present at that location and time, and none of the officers present reported a shooting at that location.[11] (JA 337.) Retired Fayetteville Police Department ("FPD") Sergeant Tracy Campbell, one of the officers stationed at the intersection on the night of January 25, 1990 and early morning of January 26, 1990, met with Petitioner's counsel and provided details demonstrating that the case presented by the State at trial was impossible. (JA 346–47.)

4. Petitioner's second Motion for Appropriate Relief

On July 24, 2013, Petitioner filed a second MAR. Petitioner raised several constitutional claims related to the State's failure to disclose that police officers were present at the exact location and time that witnesses for the State testified Petitioner shot Hailey, including that the State failed to correct testimony that it knew to be false. Petitioner also

[11] The officers were dispatched to Haymount Hill in response to an earlier shooting that knocked out a transformer at 9:49 p.m. It is not disputed that this shooting was conducted by Dennis Fort, an unrelated individual. (JA 2341.)

obtained additional evidence from the Task Force investigation and raised claims based on the new evidence of his innocence. Despite the significance of the police presence at Bryan and Branson Streets, Petitioner's second MAR was summarily denied on December 4, 2014, without a hearing.

Petitioner then filed a Petition for Writ of Certiorari in the North Carolina Court of Appeals, which was summarily denied on October 19, 2015.

D. District Court Proceedings

On October 31, 2016, Petitioner filed a petition for relief from his conviction under 28 U.S.C. § 2254 in the United Stated District Court for the Eastern District of North Carolina, Western Division.

1. The State's suppression of evidence that Talley killed Hailey and Petitioner's amended habeas petition.

As noted above, the State produced for the first time on March 21, 2018 two Crime Stopper tips within days of Hailey's murder stating that Tally shot Hailey. On February 14, 2019, Petitioner amended his petition to include new evidence that supplemented his allegations under *Brady v. Maryland*, 373 U.S. 83 (1963), based on the exculpatory Crime Stoppers tips that the Fayetteville Police Department received within two days of the alleged murder, but which the State suppressed until March 2018, twenty-eight years after Hailey's death.

2. Evidentiary hearing

An evidentiary hearing was conducted on November 5-6 and 12, 2019, on whether Petitioner had established his actual innocence.

a. Sergeant Tracy Campbell's Testimony

At the evidentiary hearing, former FPD Sergeant Tracy Campbell testified that police arrived at Haymount Hill at 9:43 p.m. and remained until at least 12:41 a.m. (JA 2083.)

Sergeant Campbell explained that he was one of the officers dispatched to that area that night, as part of the FPD's emergency response team, and that it was the emergency response team's practice to "saturate an area" with at least ten officers. (JA 2072.) He added that he would keep his window down to listen to his surroundings and that he did not hear any shots fired in Haymount Hill that night. (JA 2087–88.) In fact, when Sergeant Campbell later learned that the State placed Hailey's murder at that time and location, he could not believe it – "like where in the world did it happen?" (JA 2074.), Sergeant Campbell's testimony flatly contradicts the trial testimony of the State's lone fact witness, Williams, and makes the State's case presented at trial impossible.

b. Cathy Howard's Testimony

Petitioner introduced testimony from the mother of Parker's child, Cathy Howard, who lived near the housing project where the Court Boys operated. (JA 1994–95.) Howard testified that Parker provided her with information to give to the Court Boys so that the Court Boys knew when the police were about to raid the housing project. (JA 1997.) Howard also testified that she and Parker had an affair, as well as a child, during this same time period. (JA 1995.)

c. Agent Scott Fox's Testimony

The State's case was further refuted by the testimony of former State Bureau of Investigation Agent Scott Fox. Agent Fox testified regarding the Task Force investigation, including that the witnesses implicating Talley in Hailey's death were considered credible, in part, because they voluntarily provided similar, independent statements despite being unable to converse and corroborate their accounts, and information provided was independently verified. (JA 1947–48.)

d. Magistrate Judge's Report and Recommendation and the District Court's Decision

On January 31, 2020, Magistrate Judge Robert T. Numbers II issued a memorandum and recommendation ("M&R") dismissing Petitioner's petition. (Appx. 24a-82a.) The M&R focused on Petitioner's "I know it" responses to the detective's allegations. While recognizing that "one interpretation" of Petitioner's responses was that they were a "flippant and dismissive response by a teenager," it concluded, quoting the North Carolina Supreme Court, that "[i]f the jury believed such evidence . . . it reasonably could have found that the defendant had admitted shooting the victim . . . ." (Appx. 76a.) The M&R then compared its conclusion that Petitioner had confessed to each other factual issue. (*Id.* at 77a–81a.)

Petitioner objected to the M&R on the basis that, among other things, it misapplied the actual innocence gateway. Petitioner argued that by concluding, in isolation, that there was a confession without considering other evidence—including evidence that Talley was responsible for Hailey's death—the magistrate judge failed to conduct the totality of the evidence review required by this Court. On March 30, 2020, United Stated District Court Judge Louise W. Flanagan adopted the magistrate judge's M&R, sustained one factual objection raised by Petitioner, and dismissed Petitioner's petition and denied a Certificate of Appealability. (Appx. 11a-23a.) Like the M&R, the district court concluded that Petitioner confessed in view of the North Carolina Supreme Court's opinion regarding the jury instructions in Petitioner's trial concerning admissions. (Appx. 17a.) Also like the M&R, the district court concluded that Petitioner had confessed based on an isolated review of Petitioner's statements without considering the totality of the evidence. (*Id.*)

E. Fourth Circuit Opinion

Petitioner appealed to the Fourth Circuit. After argument, the court entered an unpublished opinion on December 13, 2022. The opinion summarized the evidence offered in the district court to overcome the *Schlup* innocence gateway, including the evidence that "the Fayetteville Police Department had been dispatched to the intersection of Bryan and Branson Streets on the night of January 25, 1990, in connection with an unrelated shooting, and stayed at that location until after midnight." (Appx. 6a.) The opinion then acknowledged that this evidence called into question Williams's testimony that "the first shots were fired at that same intersection on the night of January 25, although police did not witness any shooting." (*Id*. at 6a-7a.) The opinion concluded, however, that the jury resolved the issue of Williams's credibility without considering the new evidence offered by Petitioner regarding the police presence at the exact time and location Williams placed the shooting. (*Id*. at 10a.)

The opinion also cited the North Carolina Supreme Court's decision on direct appeal as a state court finding of fact that Petitioner had confessed, which Petitioner had to rebut by clear and convincing evidence under 28 U.S.C § 2254(e)(1). The opinion does not cite to a specific determination or factual finding by the N.C. Supreme Court, rather it cited generally the N.C. Supreme Court's decision finding that the trial court did not err in instructing the jury that it can determine what weight to give the ambiguous responses made by the Petitioner to the lead investigator's allegations. The opinion does not analyze the new evidence offered to determine whether Petitioner did, in fact, rebut the presumption under § 2254(e)(1).

Finally, the Fourth Circuit adopted the state court's conclusion from Petitioner's first MAR that Petitioner presented evidence of Talley's involvement in a similar shooting, but that the Talley shooting "might also have been a distinct circumstance . . . suggesting two different incidents." (Appx. 9a.) The opinion does not consider the two tips concealed from Petitioner for

more than two decades that identified the Talley incident as the shooting that resulted in Hailey's death.

The Fourth Circuit, relying on the deference it afforded under § 2254(e)(1), affirmed the district court's decision without addressing Petitioner's argument that the district court failed to conduct the appropriate totality of the evidence review. Petitioner sought rehearing *en banc* by the Fourth Circuit due to the panel's failure to consider the totality of evidence. The Petition for Rehearing was denied on January 11, 2023.

REASONS FOR GRANTING THE WRIT

First, the Fourth Circuit erred in its interpretation of § 2254(e)(1) by presuming it applied to all factual issues presented to a state court against Petitioner, regardless of whether the state court determined the factual issue. While evidence was presented related to Petitioner's ambiguous statements and Williams's credibility, no state court ever made a determination on either factual issue. Additionally, the Fourth Circuit never factored into its analysis of these factual issues the significant exculpatory evidence that another person was responsible for Hailey's murder, or that the police were present at the time and place that the State placed the shooting.

Second, this Court should review the Fourth Circuit's decision to make clear that deference under 28 U.S.C. § 2254(e)(1) is inappropriate where the state court's determination was based on an incomplete factual record as a result of a violation of the petitioner's due process rights. Here, the state court's determination that there was an insufficient connection between Talley and Hailey's murder resulted from the State's suppression of contemporaneous tips making that precise connection. Additionally, the state court did not have the suppressed evidence that FPD officers were present at the exact location during the exact time where the

State's lone witness placed the shooting, which certainly would have been relevant to its assessment of the evidence against Petitioner.

Finally, although several circuit courts have applied 28 U.S.C. § 2254(e)(1) to the *Schlup* Gateway, this Court should consider whether applying the heightened clear and convincing standard is appropriate given the unambiguous holding in *McQuiggin* that the *Schlup* Gateway survived the passage of AEDPA unrestricted, a holding rooted in the intent of Congress. *See McQuiggin v. Perkins*, 569 U.S. 383, 397 (2013) (finding the heightened clear and convincing standards found in 28 U.S.C. § 2244(b)(2)(B)(ii) and § 2254(e)(2) did not govern a first habeas petition for federal relief.) Because these circuits are imposing a new restriction on the Gateway under AEDPA and making it more difficult for potentially innocent defendants to have their constitutional claims considered on the merits, this Court should hold that, under its precedent, the application of § 2254(e)(1) is inappropriate in these circumstances.[12]

For these reasons, this Court should grant the petition and summarily reverse the Fourth Circuit and remand for proceedings consistent with the Court's precedent or allow the petition and clarify that deference should not be afforded under § 2254(e)(1) where state court proceedings violated a petitioner's due process rights or when a federal court is applying the *Schlup* gateway.

[12] The *Schlup* Gateway requires a court to make a probabilistic determination, based on a preponderance of the evidence, about what a reasonable, properly instructed jury would do "in light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Thus, it follows that factual determinations that did not benefit from the new evidence because of inadequate state court proceedings should be viewed with skepticism as it is weighed.

I. THE FOURTH CIRCUIT IGNORED THE DETERMINATION REQUIREMENT UNDER 28 U.S.C. § 2254(E)(1) AND ERRONEOUSLY RESOLVED FACTUAL ISSUES AGAINST PETITIONER

The Fourth Circuit disregarded the clear statutory requirement of 28 U.S.C. § 2254(e)(1) that "a determination of a factual issue made by a State court . . . shall be presumed to be correct." Instead of evaluating whether a state court *made* a determination of a factual issue, as required by § 2254(e)(1), the Fourth Circuit evaluated whether the parties' arguments were "*considered"* by a state court. (Appx. 9a (emphasis added) ("As to the first contention about Petitioner's confession, we note that this argument was already considered by the jurors who convicted Petitioner and the North Carolina Supreme Court on direct appeal, *see McKoy*, 417 S.E.2d at 246, and therefore such a determination of fact must 'be presumed to be correct'").) The Fourth Circuit made this legal error for two separate factual issues: (i) whether Petitioner confessed; and (ii) whether Williams's testimony was credible.

A. The Fourth Circuit Did Not Properly Evaluate Whether Petitioner Confessed Under § 2254(e)(1)

1. The Fourth Circuit improperly deferred to a nonexistent state court finding that Petitioner confessed.

The Fourth Circuit cited the North Carolina Supreme Court and the trial court jury for its application of 2254(e)(1) and determination of the factual issue of whether Petitioner confessed. (Appx. 9a.) However, that citation was incorrect as the North Carolina Supreme Court, expressly stated that it was not making any factual determinations as it related to a purported confession, noting that "it was solely for the jury to determine whether [Petitioner] in fact had made any admission." (*Id.* (citing *State v. McKoy*, 417 S.E.2d 244, 247 (N.C. 1992).) At issue on appeal before the North Carolina Supreme Court was the question of whether the trial court

erred in providing a jury instruction on admissions.[13] Petitioner argued that this instruction included an impermissible expression of opinion on the evidence. *McKoy*, 417 S.E.2d at 246. The North Carolina Supreme Court disagreed, holding that the instruction "does not constitute an expression of opinion on the evidence." *Id.* at 246–47. In doing so, the North Carolina Supreme Court did not make any factual determinations. *Id.* This is consistent with the accepted principle that the credibility, accuracy and weight afforded a purported confession rests "exclusively" with the jury. *Crane v. Kentucky*, 476 U.S. 683, 688 (1986) (holding, in a unanimous opinion, that the circumstances surrounding a defendant's statements to law enforcement are germane to the credibility, reliability, accuracy and weight afforded those statements, all of which are matters exclusively for the jury).

As for the jury, it returned a general verdict, without any specific factual determinations. (JA 1775–76.) The verdict simply stated the ultimate conclusion of the jury—"the defendant is guilty of first degree murder under the first degree felony murder rule." (*Id.*) The jury never made a factual determination as to whether Petitioner's statements constituted a confession. As a result, the Fourth Circuit's opinion runs counter to clear precedent from this Court that § 2254(e)(1) "pertains only to state-court determinations of factual issues, rather than decisions." *Miller-El v. Cockrell*, 537 U.S. 322, 341 (2003). Similarly, while addressing the predecessor to § 2254(e)(1), pre-AEDPA § 2254(d),[14] this Court explained that the presumption of correctness for

[13] This instruction, identified as instruction 104.60 in the North Carolina Pattern Jury Instruction for criminal cases, states: "There is evidence which tends to show that the defendant has admitted the facts relating to the crime charged in this case. If you find that the defendant made that admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it." *McKoy*, 417 S.E.2d at 246; *State v. Graham*, 164 N.C. App. 412, 595 S.E.2d 814 (2004).

[14] Prior to AEDPA, 28 U.S.C. § 2254(d) stated: "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of

state court factual findings in a habeas proceeding does not apply to "the ultimate question" decided by a state court, which contains a "uniquely legal dimension." *Thompson v. Keohane*, 516 U.S. 99, 110 (1995) (quoting *Miller v. Fenton*, 474 U.S. 104, 106 (1985)). Here, the necessary factual predicate was not present, and the Fourth Circuit's expansion of § 2254(e)(1) to include any factual issue heard by a state court, regardless of whether there was a determination on that factual issue, was clearly an erroneous interpretation of the statutory text.

2. The Fourth Circuit ignored objective evidence establishing that Petitioner did not confess.

The Fourth Circuit's error is compounded here because the objective contemporaneous evidence establishes that Petitioner did not confess. The Fourth Circuit acknowledged this reality at oral argument. Judge Niemeyer stated, "I must say the most troubling part for me . . . is what is purported to be a confession. I've never seen a confession like that." (*https://www.ca4.uscourts.gov/OAarchive/mp3/20-6598-20221028.mp3* at 30:26–30:35 (last accessed March 30, 2023).) Judge Traxler similarly stated that the purported confession was, on its face, "vague and uncertain" and "not a direct admission to the commission of the crime." (*Id.* at 33:54–36:20). In fact, even the Respondent declined to refer to Petitioner's statements as a confession at oral argument. (*Id.* at 38:05–38:12 ("I don't believe the State has ever referred to [Petitioner's comments] as a confession but as an admission, an incriminating remark.")).

The sentiment expressed during oral argument is logical when confronted with the objective evidence. Petitioner's statements consisted of three words: "I know it." He repeated

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a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit-- [listing eight exceptions]."

those three words in response to each and every question put to him by a police investigator during a traffic stop, including to a question that included a factual premise that the State knew was false. (*Compare* JA 104–05 (Petitioner replied "I know it" when the investigator asked if his motivation was "because he [Hailey] ripped you off") *with* JA 1506–09 (Williams testified that Hailey paid for cocaine).)

Contemporaneous actions and notes further demonstrate that Petitioner did not confess. Immediately after giving his three-word answers, Petitioner told the investigator "I ain't saying anything." (JA 104–05.) The investigator then responded by asking Petitioner if he "was *innocent*," and requested Petitioner take a polygraph to "*eliminate*" him and "prove he was telling the truth." (JA 215.) Just four days after Petitioner made those statements, the investigator reported to the decedent's family that "there [was] minimal evidence in the case." (JA 105.) And, the investigator's report, which was turned over to the district attorney's office, noted that "[a]ll defendants made incriminating remarks during their interviews, *except* McKoy. . . ." (JA 154 (emphasis added).) In sum, there was no confession. There was no determination of a factual issue on this point and the Fourth Circuit committed error by claiming to defer to one.

B. The Fourth Circuit Erroneously Found Williams Testimony Credible Under § 2254(e)(1)

The Fourth Circuit made the same legal error in rejecting Petitioner's evidence that the State's lone fact witness provided false testimony. Instead of evaluating whether a state court decided the factual issue, as required by § 2254(e)(1), the Fourth Circuit only assessed whether the parties' arguments about Williams's credibility were considered by jurors, concluding that "as to McKoy's challenge to Williams's credibility, that issue was appropriately resolved by the jury, apparently against McKoy." (Appx. 10a.) The Fourth Circuit expressly recognized that it could not determine what conclusions of fact the jury made, and yet, it still construed facts

against Petitioner. (*Id.*) This is not the legal standard established by Congress in 2254(e)(1) or the legal standard established by this Court's precedent.

While the Fourth Circuit presumed that Williams was a credible witness under its erroneous reading of § 2254(e)(1), it acknowledged that Petitioner presented new evidence that "called into question Williams's testimony that the first shots were fired at the same intersection" that police were stationed. (Appx. 6a.) It also recognized that there were "other inconsistencies and impracticalities with respect to the timeline provided by Williams when testifying." (Appx. 6a–7a.)

Police were present at the same intersection where Williams said the first shot was fired at Hailey. Williams testified the first shot was fired at the intersection of Bryan and Branson Streets. (JA 1506-07, 1516.) A Fayetteville Police Department ("FPD") incident card, however, shows that an FPD emergency response team had been dispatched to the intersection of Bryan and Branson Streets that same night following an unrelated shooting incident.[15] (JA 337.) At the federal evidentiary hearing, Sergeant Campbell testified that he was one of the FPD officers that was dispatched to the area. He explained that the police emergency response team's practice was to "saturate an area" with at least 10 police officers working in pairs in unmarked police cars. (JA 2072.) He further testified that, while monitoring an area, he kept his window down to listen to what people were saying. (JA 2074.) He said that he heard no shots fired during that night and that, if shots had been fired, he believed he would have heard them. (JA 2087–88.) He added that if people were working drugs on the corner of Bryan and Branson Streets (as Williams alleged), he would have seen them. (JA 2083.) When Sergeant Campbell later heard

[15] Police had been dispatched to that intersection at 9:49 p.m. on January 25 in connection with an unrelated, earlier shooting that knocked out a transformer. (JA 337; JA 98-99; JA 2074.) It is not disputed that this shooting was carried out by Dennis Fort. (*See* JA 2341.)

that the state placed Hailey's shooting at the corner of Bryan and Branson Streets, he said the reaction was "like where in the world did it happen?" (JA 2074.)

As for the timing, Sergeant Campbell explained that the FPD incident card showed that the police arrived at the intersection of Bryan and Branson Streets at 9:43 p.m. and stayed until at least 12:41 a.m. the following day. (JA 2083.) He added that the FPD emergency response team typically remained on scene until the end of their shift, which usually lasted through 1:00 a.m., or later. (JA 2072; JA 2080.) This flatly contradicts the timeline that the State presented for the shooting. During the investigation and then later at trial, the State repeatedly identified the night of January 25, 1990 for the timing of the shooting.

For example, in the investigative report, Ballard wrote that the crime had been committed on "January 25, 1990 between the hours of 2300 & 2400." (JA 144.) And, at trial, Williams testified that he met Hailey "the night of 25th of January." (JA 1504.) This date was so ubiquitous at trial that, when responding to a motion by Petitioner's trial counsel to bring the jury to the corner of Bryan and Branson Streets, even the court stated, "Well, the date involved here is the 25th of January, 1990." (JA 1720.) Additionally, Williams anchored the timing of his testimony around his and Hailey's search for Petitioner, which included entering a local arcade but not seeing Petitioner among the people there, even mentioning the arcade more than 30 times during his testimony. (JA 1506.) As referenced in the lead detective's file, it is uncontested that the arcade closed at about 9:30 p.m.[16] (JA 73.)

The Fourth Circuit recognized that "[Petitioner] highlighted other inconsistencies and impracticalities with respect to the timeline provided by Williams when testifying," but

[16] The word "arcade" is not explicitly used in the police narrative, but, the record makes clear—and it is not disputed by Respondent— that Mary Ann Quinn informed the investigator that the arcade closed at 9:30 p.m. on the night in question. (JA 73.)

improperly presumed that Williams's testimony was credible based on an incorrect application of § 2254(e)(1). (Appx. 7a). Had the Fourth Circuit properly considered Williams's credibility in light of the evidence now known, it, just like any reasonable juror, would have concluded that Williams was not credible, and thus the State's case would be left barren, with no supporting evidence.

C. The Fourth Circuit Failed to Weigh the Totality of Evidence by Erroneously Deferring to Nonexistent State Court Findings Under § 2254(e)(1)

A federal court must review a gateway actual innocence claim based on the totality of the evidence, new and old, to make a probabilistic determination as to whether no reasonable juror could find Petitioner guilty beyond a reasonable doubt. *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Here, the Fourth Circuit improperly deferred to factual findings never determined by the state court. As a result of its improper application of § 2254(e)(1), the Fourth Circuit failed to consider the totality of the evidence in evaluating Petitioner's claim of actual innocence. The Court should have weighed Petitioner's statements to the police investigator and Williams's testimony with all of the evidence now known. Examining the evidence in its totality, it is clear that no reasonable juror would find that Petitioner's statements constitute a confession and that Williams's testimony—disproven by law enforcement testimony—could not be credible.

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT DEFERENCE UNDER § 2254(e)(1) IS UNWARRANTED WHERE A PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED DURING STATE COURT PROCEEDINGS.

Petitioner's due process rights were violated as a result of the state's suppression—before trial and throughout the post-conviction state court proceedings—of the Talley tips and evidence showing that police were present on Haymount Hill. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) ("[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective

of the good faith or bad faith of the prosecution."); *see also United States v. Bagley*, 473 U.S. 667, 667 (1985). The Talley tips were not just material *Brady* evidence – they were the critical missing link that would have unraveled the state court's determinations of fact. Specifically, that the state court found that there was an insufficient connection between Talley and Hailey is of no impact when the state suppressed the exact evidence proving that link. Under these circumstances, to reward the state with a presumption of correctness under § 2254(e)(1) in light of a clear violation of Petitioner's due process rights would be repugnant to the constitution.

A. No Deference is Afforded to State Court Determinations Under § 2254(e)(1) When the Determination Follows a Due Process Violation.

This Court has held that no deference is accorded to a state court's decision in habeas proceedings where that decision is based on a violation of the petitioner's due process rights that resulted in a deficient evidentiary record. *See Panetti v. Quarterman*, 551 U.S. 930, 947-48 (2007). In *Panetti*, no deference was due under § 2254(d)(1) because the state court failed to provide the petitioner "an opportunity to be heard" in violation of his right to procedural due process. *Id.* The petitioner in *Panetti* made a threshold showing of insanity, which entitled him to "basic requirements [that] include[d] an opportunity to submit evidence and argument." *Id.* at 950. By failing to provide these basic opportunities to the petitioner, the state court violated the petitioner's due process rights and unreasonably applied federal law. *Id.* at 947-49, 952-53. This Court therefore accorded the state court decision no deference. *Id*. at 948. It explained that "[w]hen a state court's adjudication of a claim is dependent on an antecedent unreasonable application of federal law, the requirement set forth in § 2254(d)(1) is satisfied. A federal court must then resolve the claim without the deference that AEDPA otherwise requires." *Id.* at 953.

At issue in *Panetti* was the state court determination on incompetency, a purely factual issue subject to § 2254(e)(1). *Compare Panetti*, 551 U.S. at 941 (stating that the state court

"finds that petitioner has failed to show, by a preponderance of the evidence, that he is incompetent to be executed") *with Demosthenes v. Baal*, 495 U.S. 731, 735 (1990) (holding "under § 2254's presumption of correctness, the state court's factual finding as to Baal's competence is binding on a federal habeas court"); *see also Panetti*, 551 U.S. at 978 (J. Thomas, dissenting). The *Panetti* majority recognized that factual findings derived from a proceeding that violated the due process rights of the petitioner cannot be valid. *See id.* at 952. The dissent similarly recognized the requirement for due process. *Id.* at 977-98. The dissent explained the two-part due process inquiry: (1) evaluating whether the proceedings comported with due process; and (2) determining whether deference under both § 2254(d) and § 2254(e)(1) was appropriate based on whether the state court fact findings comported with due process. *Id.* at 977-78 ("Because the state court did not unreasonably apply Justice Powell's procedural analysis, we must defer to its determination that Panetti was competent to be executed.").

Panetti's holding that there is no deference under AEDPA when a petitioner's due process rights have been violated has been expressly applied to § 2254(e)(1). For example, citing § 2254(e)(1), in *Simon v. Fisher*, the Fifth Circuit recognized that while state court factual findings are typically afforded deference, "when a petitioner's due process rights are violated in state competency proceedings, he or she is entitled to an evidentiary hearing in federal district court to resolve the claims de novo." *Simon v. Fisher*, 641 Fed. Appx. 386, 388 (5th Cir. 2016) (citing *Panetti* at 551 U.S. at 948-52).

B. Multiple Circuit Courts Agree that the Factual Record in State Court can be So Deficient that State Court Determinations of Fact Cannot be Accorded Deference.

Even in the absence of a due process violation, multiple circuit courts have held that a factual record can be so deficient that a state court's determination on that record cannot be

accorded deference under § 2254(e)(1). For example, in *Fahy*, the Third Circuit considered whether it should "accord a presumption of correctness to a determination of voluntariness where the judge explicitly refused to consider any evidence of coercion" and "failed to adequately probe into [the petitioner's] knowledge of the rights that [the state court] asserted he was waiving." *Fahy v. Horn*, 516 F.3d 169, 185 (3rd Cir. 2008). The court concluded that where the factual record was so deficient, as was the case in that instance, "the findings by that court concerning waiver are too unreliable to be considered 'factual determinations.' They are not, therefore, entitled to the presumption of correctness." *Id*. at 183.

In making this holding, the *Fahy* court considered the fact that the passage of AEDPA lowered federal standards relevant to the state court's fact-finding process and evidentiary record. *Fahy*, 516 F.3d at 182. It agreed with a commentator that "§2254(e)(1) departs from prior law, but only to substitute general notions of procedural regularity and substantive accuracy for detailed statutory standards." *Id.* at 182-83. In other words, AEDPA did not dispense "with a federal court's rudimentary responsibility to ensure that it is deciding a constitutional claim based on factual findings that were . . . anchored in a sufficient evidentiary record." *Id.* The Third Circuit further noted that failing to account for these general standards would "provide an incentive to state courts to bypass usual judicial procedures designed to ensure accuracy for the sake of convenience, expediency, or otherwise." *Id.* at 183, n.15.

Like the *Fahy* Court, other courts have held that § 2254(e)(1) "does not necessarily require us to apply the same deference when the state court has failed even to consider the evidence." *Wilson v. Workman*, 577 F.3d 1284, 1296 (10th Cir. 2009) *overturned on other grounds as recognized in Lott v. Trammell*, 705 F.3d 1167 (10th Cir. 2009); *see also Teti v. Bender*, 507 F.3d 50, 59 (1st Cir. 2007) (quoting *Lambert v. Blackwell*, 387 F.3d 210, 239 (3d

Cir. 2004) (finding that where the fact finding process underlying a state court decision is deficient, this "might be a consideration while applying deference under § 2254(d)(2) and § 2254(e)(1)"); *see also Sharpe v. Bell*, 593 F.3d at 378 (4th Cir. 2010) ("the character of the process upon which the state court based its conclusion may have some bearing on whether a petitioner's showing amounts to 'clear and convincing' evidence that the state court erred").

The Fifth and Eight Circuits have, in cases not presenting a due process violation, declined to review the extent of evidence considered by a state court in making a determination of fact under § 2254(e)(1). *Valdez v. Cockrell*, 274 F.3d 941, 948, 968 (5th Cir. 2001); *Smulls v. Roper*, 535 F.3d 853, 862 (8th Cir. 2008). These circuits have not evaluated a case in which the evidentiary record is deficient as a result of a due process violation, as is the case here. Thus, all circuits faced with state evidentiary records so deficient as to amount to a due process violation have concluded that deference to such state court findings is unwarranted.

C. Petitioner's Due Process Rights were Violated and the Resulting State Court Findings of Fact Deserve No Deference Under § 2254(e)(1)

Petitioner's due process rights were violated throughout the state court post-conviction proceedings. This Court's decision in *Brady* required the State to turn over the Talley tips and the evidence showing that police were present at the exact time and location the State alleged that Petitioner shot Hailey before his trial; yet, these facts were concealed from Petitioner not only at trial, but also throughout the state post-conviction proceedings. Petitioner was entitled to an adequate state court process to vindicate his rights, free from the ongoing suppression of evidence that he should have received at trial. *See District Attorney's Office v. Osborne*, 557 U.S. 52, 68 (2009) (stating that state postconviction relief procedures must be adequate to vindicate substantive rights). Petitioner sought to bring his constitutional claims in state court. (*See* Appx. 6a.) He also sought a state court evidentiary hearing and moved for discovery to obtain any

remaining favorable evidence in the State's file. (JA 1046.) He was denied a hearing and discovery, which prevented him from presenting the new evidence in state court that was kept from the trial jury. (JA 1323.) The denial of discovery prevented him from learning that the State had suppressed the Talley tips for more than two decades since Petitioner was convicted.

While the Fourth Circuit erroneously applied § 2254(e)(1) to presume that Talley was not responsible for Hailey's murder, it recognized that Petitioner "buttressed" his state court evidence with additional evidence from the Task Force investigation and the previously suppressed Talley tips. (Appx. 9a.) According to the Fourth Circuit, this was Petitioner's "most persuasive argument." (*Id.*) As noted above, with the tips, there were ten witnesses linking Talley to Hailey's murder. These witnesses provided a remarkably consistent account of Talley shooting Hailey while he drove out of Grove View Terrace in his car. The state court never had an opportunity to consider all this evidence because the tips were suppressed.

Additionally, while the Fourth Circuit presume that Williams was credible under its erroneous application of § 2254(e)(1), it conceded that the evidence of the FPD presence at the intersection of Bryan and Branson Streets on the night of January 25, 1990, called into question Williams's testimony at trial. (Appx. 6a.) Again, the state court did not have an opportunity to consider this evidence during post-conviction proceedings and its impact on Williams's credibility, as the information was suppressed by the State through Petitioner's first MAR and Petitioner was denied a hearing after filing his second MAR.

Under these circumstances no deference should be afforded to state court findings under § 2254(e)(1), as Petitioner was denied due process in state court to effectively present his claims.

III. APPLICATION OF DEFERENCE UNDER § 2254(e)(1) TO *SCHLUP GATEWAY ANALYSES* IS CONTRARY TO THIS COURT'S PRECEDENT AND ELEVATES THE *SCHLUP* STANDARD FROM A PREPONDERANCE STANDARD TO THE CLEAR AND CONVINCING STANDARD RESERVED BY CONGRESS FOR SUCCESSIVE PETITIONS UNDER 28 U.S.C. § 2244(b)(2)(B)(ii).

Congress established a "clear and convincing" evidence requirement in *Schlup* gateway cases for second and successive petitions. *See House v. Bell* 547 U.S. 518, 539 (2006) (finding the clear and convincing standard inapplicable to first habeas petitions seeking consideration of defaulted claims based on a showing of actual innocence); *see also McQuiggin v. Perkins*, 569 U.S. 383, 396 n.1 (2013) (reiterating that the clear and convincing standard does not apply to first habeas petitions seeking review based on actual innocence). Despite the plain language of Congress, circuit courts have used § 2254(e)(1) to heighten the standard on *first* time habeas petitioners from a preponderance of the evidence to clear and convincing. *See Sharpe*, 593 F.3d at 378; *see also Reed v. Stephens*, 739 F.3d 753, 772–73 (5th Cir. 2014); *Storey v. Roper*, 603 F.3d 507, 524 (8th Cir. 2010); *Fontenot v. Crow*, 4 F.4th 982, 1034–35 (10th Cir. 2021). This Court should grant this petition to make clear that, under its precedent, § 2254(e)(1) should not be used as a backdoor means to heighten the *Schlup* gateway standard and deny petitioners who have presented credible evidence to "raise[] sufficient doubt about [their] guilt" from receiving review of the merits of their constitutional claims. *Schlup*, 513 U.S. at 316.

Habeas corpus, at its core, has always been viewed by this Court as an equitable remedy. *Id.* at 319. The importance of this equitable inquiry led this Court in 1986 to reject the argument that amendments to the habeas statute by Congress in 1966 required the Court to abandon its "ends of justice" inquiry before dismissing a successive petition. *Kullmann v. Wilson*, 477 U.S. 436, 451 (1986). This Court reaffirmed this principle in *McQuiggin* where it concluded that the *Schlup* gateway survived the passage of AEDPA "intact and unrestricted" when federal courts are considering first habeas petitions. 569 U.S. at 397. This Court also made clear that its

equitable authority would not be displaced absent the "clearest command" from Congress. *Id.* (citing *Holland v. Florida*, 560 U.S. 631, 646 (2010)).

Congress did command that the clear and convincing standard be applied to actual innocence cases, but it specifically reserved that higher standard for second or successive habeas petitions under 28 U.S.C. 2244(b)(2)(B)(ii). In contrast, the *Schlup* gateway requires a determination of whether the facts presented to a habeas court establish by a preponderance of the evidence that no reasonable juror would find a petitioner guilty. 513 U.S. at 326-27. In making that determination, the court must consider the "totality of the evidence" to assess the reasonable juror's likely decision. *Schlup*, 513 U.S. at 327. Applying deference under § 2254(e)(1) distorts the totality of evidence assessment by making certain facts essentially unassailable and beyond court review unless the higher, clear and convincing standard is met first. This approach improperly heightens the burden on petitioners at this gateway stage contrary to this Court's precedent and Congress's mandate that only second or successive petitions must meet the higher, clear and convincing standard.

Petitioner's case highlights the severe consequences of applying the heightened standard to gateway claims of actual innocence. During the investigation into Hailey's murder, the lead investigator questioned Petitioner in his police car. To every statement made by the investigator, including telling Petitioner that his name came up in the investigation, Petitioner replied "I know it." (JA 104–05.) As the Fourth Circuit panel knew, there is no written or oral statement in the record where Petitioner confesses to the crime. (*See supra* I.A.2.) The "I know it" refrain is all there is.

In post-conviction litigation, Petitioner offered several pieces of evidence to establish that the statements were not a confession, including a report from the investigator to whom Petitioner

made the "I know it" statements. (*See, e.g.*, JA 154.) That report, which was submitted after the statements were made, includes the notation that, unlike others who were interviewed, Petitioner had *not* made any incriminating statements during his interview. (*Id.*) That evidence, and the fact that police were present at the exact time and location at which the State's lone fact witness claimed the murder occurred, was never presented to the jury at trial.

Despite all the evidence presented in federal court demonstrating the factual impossibility of the State's case against Petitioner, the Fourth Circuit ruled that the state court previously concluded Petitioner confessed, and that Petitioner had failed to rebut that finding by clear and convincing evidence. (Appx. 9a.) The Court's approach burdened Petitioner with overcoming by clear and convincing evidence the purported factual finding that he confessed. That is a misapplication of the applicable law, as contemplated by this Court and Congress, his burden under *Schlup* and *McQuiggin* was to demonstrate by a preponderance of evidence that the totality of the evidence was sufficient to pass through the *Schlup* gateway and obtain relief from the statute of limitations for bringing his claims under 28 U.S.C. § 2244(d)(1). As discussed above, applying the heightened clear and convincing standard conflicts directly with this Court's precedent under *House* and *McQuiggin*, and with § 2244(b)(2)(B)(ii), which reserves the more exacting clear and convincing standard for second and successive petitions, not a first habeas petition raising a claim of actual innocence. *House*, 547 U.S. at 539 (explaining that the clear and convincing standard did not apply because petitioner presented "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence"); *McQuiggin*, 569 U.S. at 396 ("Congress thus required *second-or-successive* habeas petitioners attempting to benefit from the miscarriage of justice to meet a higher level of proof ('clear and convicing'). . . ." (emphasis added)).

This Court has received a clear command from Congress. That is, Congress mandated that the clear and convincing standard be applied to actual innocence cases, but reserved that standard for second or successive habeas petitions under 28 U.S.C. 2244(b)(2)(B)(ii). The *Schlup* gateway requires a determination of whether the facts presented to a habeas court establish by a preponderance of the evidence that no reasonable juror would find a petitioner guilty. 513 U.S. at 326-27. The application of the *Schlup* standard is inextricably intertwined with the facts because the *Schlup* gateway requires that the totality of the evidence be considered when assessing a reasonable juror would react. 313 U.S. at 327. However, applying deference under § 2254(e)(1) distorts the weighing of the totality of evidence by making certain facts unassailable and beyond court review unless a higher, clear and convincing standard is met first. This approach heightens the burden on petitioners and defies Congress's instructions that only second or successive petitions must meet the higher, clear and convincing standard.

Petitioner's case highlights the application and consequences of the heightened standard on claims of actual innocence. The Fourth Circuit concluded that there was a state court finding that Petitioner confessed. The evidence the state court purportedly relied on is ambiguous statements of "I know it" made by Petitioner while being accused by an investigator. (JA 104–05.) Petitioner responded to every question asked of him with the same refrain. (*Id.*) As the Fourth Circuit panel was keenly aware, there is no written confession or unequivocal statement anywhere in the record where Petitioner says he killed Hailey. (*See supra* I.A.2.) Petitioner offered several pieces of evidence in post-conviction litigation to establish that the statements were not a confession, including a report from the investigator who was in the police vehicle when Petitioner made his "I know it" statements. (*See, e.g.*, JA 154.) The report, submitted *after the alleged statements*, reveals that, in the opinion of the investigator, Petitioner did *not* make

incriminating statements during interviews. (*Id.*) That evidence, and the fact that police were present at the exact time and location the State's long witness placed the crime, was never presented to the jury at trial.

Despite all the evidence presented in federal court, the Fourth Circuit determined that the state court previously concluded Petitioner confessed and that Petitioner had not rebutted the finding by clear and convincing evidence. Petitioner was thus forced to overcome a purported factual finding that he confessed as he argued that the totality of the evidence was sufficient to pass through the *Schlup* gateway and obtain relief from the statute of limitations for bringing his claims under 28 U.S.C. § 2244(d)(1). Of course, had all the evidence been weighed under the preponderance standard, it is unlikely that Petitioner's ambiguous statements would have been viewed as a confession to begin with, especially with the objective evidence presented to show that the investigator did not contemporaneously believe the exchange to be an admission. The heightened clear and convincing standard thrust upon Petitioner conflicts directly with this Court's precedent under *House* and *McQuiggin,* and with § 2244(b)(2)(B)(ii), which reserves the more exacting clear and convincing standard for second and successive petitions, not a first habeas petition raising a claim of actual innocence. *See House*, 547 U.S. at 539 (explaining that the clear and convincing standard did not apply in that case because it was "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence"); *see also McQuiggin*, 569 U.S. at 396 ("Congress thus required *second-or-successive* habeas petitioners attempting from the miscarriage of justice exception to meet a higher level of proof ('clear and convincing evidence')." (emphasis added)). Where a first petition is presented raising actual innocence as a gateway to review of a petitioner's claims on the merits, the totality of evidence should be reviewed under a single—preponderance standard—to make a

probabilistic determination of how a reasonable juror would respond to *all* the evidence available to the habeas court. *See Schlup* at 329.

Finally, the notions of comity and federalism, important to this Court's habeas jurisprudence, are not served by the approach taken here. Habeas corpus "guards against extreme malfunction in the state criminal justice systems." *Harrington v. Richter*, 562 U.S. 86, 102-103 (2011) (internal citation omitted). It is an extreme malfunction of the state court criminal justice system when evidence is withheld from the jury and throughout state court post-conviction proceedings, leaving the Fourth Circuit helpless to do anything about it. This Court should review the Petition to make clear that § 2254(e)(1) is inapplicable to the *Schlup* gateway analysis and should not be used to elevate the standard in the already rare circumstances when a petitioner can demonstrate that his conviction has resulted in a fundamental miscarriage of justice because of constitutional error at trial.

CONCLUSION

For the reasons described herein, this Court should grant the petition and summarily reverse the Fourth Circuit and remand for proceedings consistent with the Court's precedent or allow the petition and clarify that deference should not be afforded under § 2254(e)(1) where state court proceedings violated a petitioner's due process rights or when a federal court is applying the *Schlup* gateway.

Respectfully submitted,

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APPENDIX

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* The March 30, 2020 Order was initially sealed, but was unsealed by the district court on April 8, 2020, and is now public and unredacted.

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6598

LAMONT MCKOY,

Petitioner - Appellant,

v.

ERIK A. HOOKS,

Respondent - Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Louise W. Flanagan, District Judge. (5:16-hc-02262-FL)

Argued: October 28, 2022 Decided: December 13, 2022

Before WILKINSON and NIEMEYER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Affirmed by unpublished opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkinson and Senior Judge Traxler joined.

ARGUED: Jamie Theodore Lau, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Appellant. Kimberly Nicole Callahan, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Evan Glasner, Wrongful Convictions Clinic, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina; John P. Nowak, Amanda Pober, Mark Russell Sperling, PAUL HASTINGS LLP, New York, New York, for Appellant. Joshua H. Stein, Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

NIEMEYER, Circuit Judge:

In May 1991, a North Carolina state court jury convicted Lamont McKoy of first-degree murder for the shooting of Myron Hailey. Over 25 years later, in October 2016, McKoy filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254 in the district court, requesting that the court vacate his conviction. In his petition, McKoy alleged that the State violated his constitutional rights by failing to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), and by failing to correct the false testimony of a key eyewitness in violation of *Napue v. Illinois*, 360 U.S. 264 (1959), and *Giglio v. United States*, 405 U.S. 150 (1972). Those claims, however, were procedurally barred based on the one-year statute of limitations and the exhaustion requirements that apply to federal habeas petitions filed by persons convicted in state court. *See* 28 U.S.C. §§ 2244(d)(1), 2254(b)(1)(A). But, based on some new evidence, McKoy contended that the court should consider the merits of his claims pursuant to the Supreme Court's decision in *Schlup v. Delo,* 513 U.S. 298 (1995) (authorizing abusive or successive habeas petitions to be heard on the merits after making a prescribed showing of actual innocence), because his new evidence establishes that he is actually innocent of Hailey's murder. Following a lengthy evidentiary hearing, the district court denied McKoy's petition under *Schlup*, concluding that, when considering all of the evidence, a reasonable juror could still have voted to convict McKoy of murder.

In considering McKoy's challenge to the district court's ruling, we are mindful of the Supreme Court's directive that "the *Schlup* standard is demanding and permits review only in the extraordinary case." *House v. Bell*, 547 U.S. 518, 538 (2006) (cleaned up).

While we acknowledge that McKoy's new evidence of his actual innocence merits careful review, we conclude nonetheless that the totality of the evidence does not rise to the level of satisfying the exacting fact-intensive standard in *Schlup*, which is necessary for the actual-innocence gateway. Accordingly, we affirm the district court's order dismissing McKoy's § 2254 petition.

I

On the morning of January 26, 1990, Myron Hailey's body was found slumped over in the driver's seat of his car. The car was located down an embankment in Fayetteville, North Carolina, and there were two bullet holes in the car's rear end. Hailey had been struck by one of the two .357 caliber bullets that pierced the rear of his car, apparently while he was driving away from the shooter. Investigators concluded that the shooting happened elsewhere in Fayetteville — about two miles away — and that Hailey died while driving away due to blood loss from the gunshot wound. McKoy was charged with Hailey's murder, tried, and convicted.

At McKoy's trial, which began in April 1991, the State relied primarily on two categories of evidence. First, it provided testimony from an eyewitness, Bobby Lee "Strawberry" Williams, Jr., who testified that he saw McKoy fire multiple shots at the rear of Hailey's car in the Haymount Hill neighborhood of Fayetteville. Williams testified that he was with Hailey on the night of January 25, 1990, when the two men confronted McKoy for selling Hailey fake cocaine. Williams stated that after ensuring that McKoy exchanged real drugs for the fake cocaine, he walked away. Soon thereafter, however, he heard a

gunshot coming from the intersection of Bryan and Branson Streets, where he had left Hailey and McKoy, and he turned around and walked back towards the intersection. He then saw McKoy and two or three other individuals running down a path away from the intersection towards Davis Street, one block over. Williams followed, and when he arrived at Davis Street, he saw McKoy shooting at Hailey's car. A spark came from the car's rear and then the car began to swerve. The car was found approximately two miles away from that location with Hailey inside, dead.

Second, the State presented testimony from Officer Michael Ballard of the Fayetteville Police Department who testified regarding his involvement in the murder investigation. He testified to a conversation that he had with McKoy in March 1990, after McKoy had been stopped by other officers for an unrelated traffic violation. After coming to the scene of the traffic stop, Officer Ballard asked to speak with McKoy, and the two had a discussion in Ballard's car. Officer Ballard testified as follows regarding their exchange:

> I then stated the night you shot Myron Hailey, you did so because he ripped you off. McKoy replied with a smile on his face, I know it. I stated that Hailey got into his car and started driving away, and he shot him, bamb, bamb. McKoy replied, I know it. I then said you, Ant Lee, Cat, Charmain ran through the path, came out the corner of Davis and Arsenal [and] when Hailey turned down Davis, you shot again, and Hailey started swerving from side to side. McKoy replied, I know it.

Officer Ballard then stated that McKoy remarked, "I ain't saying anything," and when he asked McKoy if he was innocent of what the witnesses were saying, McKoy did not reply. As McKoy was leaving Officer Ballard's car, McKoy commented that the police did not

"even know what kind of bullet it was," and when Ballard replied that it was a .357, McKoy "immediately quit smiling" and exited the vehicle.

Following a four-day trial, the jury convicted McKoy of first-degree murder, and the court sentenced him to life in prison. McKoy appealed to the Supreme Court of North Carolina, arguing on direct appeal that the trial court committed reversible error by giving the jury an instruction on admissions, suggesting that there was "evidence which tend[ed] to show that the defendant has admitted the facts relating to the crime charged." *State v. McKoy*, 417 S.E.2d 244, 246 (N.C. 1992). The Supreme Court of North Carolina affirmed McKoy's conviction, finding that if the jury believed Officer Ballard's testimony that McKoy gave the repeated answers of "I know it," it reasonably could have found that McKoy had admitted shooting Hailey. *Id*.

In April 1998, McKoy filed a Motion for Appropriate Relief in a North Carolina Superior Court, asserting various grounds for relief. While the court dismissed four of McKoy's claims without a hearing, it ordered an evidentiary hearing on his claim of the ineffective assistance of appellate counsel, which focused on whether McKoy's counsel learned of new evidence that came to light after McKoy's conviction, pointing to William Talley as the perpetrator of Hailey's murder. At the hearing in September 2001, the court received and considered evidence of eyewitness statements discussing Talley's involvement in a similar shooting but ultimately dismissed McKoy's claim, finding that there was not enough similarity between the alleged Talley shooting incident and the evidence presented in the McKoy prosecution to help McKoy's case. The North Carolina

Court of Appeals and the Supreme Court of North Carolina both denied McKoy's petitions for a writ of certiorari.

In July 2013, McKoy filed a second Motion for Appropriate Relief in a North Carolina Superior Court raising claims similar to those made by McKoy in his present § 2254 petition, and in December 2014, the Superior Court denied McKoy's second Motion for Appropriate Relief on procedural grounds. McKoy appealed this decision to the North Carolina Court of Appeals, which denied review of his petition in October 2015.

Finally, on October 31, 2016, McKoy filed this habeas petition in the district court under 28 U.S.C. § 2254, ultimately relying on *Schlup* to justify the court's consideration of his defaulted claims. In his effort to demonstrate actual innocence, McKoy again presented evidence pointing to Talley as the actual perpetrator of Hailey's murder. The evidence included statements from multiple eyewitnesses — uncovered by a joint federal-state investigation into gang activity in Fayetteville — who described a shooting at the Grove View Terrace public-housing complex in Fayetteville, in which Talley fired multiple shots at the rear of a car as it drove away following a drug deal. Some of those eyewitnesses suggested that this was the same shooting that led to McKoy's conviction. McKoy also presented evidence that an emergency response team of the Fayetteville Police Department had been dispatched to the intersection of Bryan and Branson Streets on the night of January 25, 1990, in connection with an unrelated shooting, and had stayed at that location until after midnight. This evidence called into question Williams's testimony that the first shots were fired at that same intersection on the night of January 25, although the police

did not witness any shooting. McKoy also highlighted other inconsistencies and impracticalities with respect to the timeline provided by Williams when testifying.

Following a three-day evidentiary hearing before a magistrate judge, the judge concluded that McKoy had not made the requisite showing of actual innocence to allow his claims to proceed on the merits. In a thorough, 59-page memorandum, the magistrate judge provided a detailed review of the totality of the evidence. While the magistrate judge acknowledged holes and inconsistencies in the State's case, he found ultimately that a reasonable juror could still vote to convict McKoy based on McKoy's statements to Officer Ballard in which, it can be argued, McKoy admitted to shooting Hailey. Accordingly, the magistrate judge recommended that the district court dismiss McKoy's petition. The district court adopted the magistrate judge's memorandum and, by order dated March 30, 2020, dismissed McKoy's § 2254 habeas petition. This appeal followed.

After McKoy filed his § 2254 petition, the State released McKoy on parole — having served a sentence of some 26 years — and his parole is now set to expire in December 2022.

II

When a § 2254 petition is procedurally barred, as was McKoy's, the petitioner can still seek a writ of habeas corpus by passing through an "actual-innocence gateway." *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *see also Schlup*, 513 U.S. 298. But to do so, the petitioner must present "new reliable evidence" and "demonstrate that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a

reasonable doubt." *Teleguz v. Pearson*, 689 F.3d 322, 328–29 (4th Cir. 2012) (cleaned up). Thus, in considering such a petition, a court must consider "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial," *House*, 547 U.S. at 538 (cleaned up), and then make "a probabilistic determination about what reasonable, properly instructed jurors would do," *Schlup*, 513 U.S. at 329. If the court determines "that it is more likely than not that no reasonable juror would have convicted" the defendant, based on the totality of the evidence, then the defendant can pass through the actual-innocence gateway and have his procedurally defaulted claims heard on the merits. *Id*. at 327. The actual-innocence showing is "a procedural mechanism" to open the gate to having the petitioner's substantive claims considered, and any entitlement to habeas relief would ultimately depend on the merits of his procedurally defaulted claims. *Teleguz*, 689 F.3d at 327–28.

To argue that he made this gateway showing, McKoy points essentially to three factual matters. *First*, he argues that his March 1990 conversation with Officer Ballard was not a confession and that in that conversation he in no way implicated himself in Hailey's murder. *Second*, he argues that the accumulation of evidence — two police tips from January 1990 and evidence developed during the course of the joint federal-state task force's investigation of gang activity in Fayetteville and Talley, in particular, in 1995 — pointed to Talley as the actual murderer of Hailey. And *third*, he argues, relying on a wide range of evidence and arguments, that Williams, who testified as an eyewitness against McKoy at trial, was not credible, rendering his testimony unworthy.

As to the first contention about McKoy's confession, we note that this argument was already considered by both the jurors who convicted McKoy and the North Carolina Supreme Court on direct appeal, *see McKoy*, 417 S.E.2d at 246, and therefore such a determination of fact must "be presumed to be correct," with the burden on McKoy of rebutting the presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). His simple protestation, however, was not sufficient to rebut the presumption. Moreover, Officer Ballard testified again to the conversation at the hearing on McKoy's § 2254 petition, giving rise to the magistrate judge's finding that Officer Ballard was credible.

As to the evidence implicating Talley as the murderer, we again note that the North Carolina Superior Court determined in 2001 that the evidence was insufficient to support McKoy's claim. This evidence, however, was later buttressed by McKoy's receipt of additional evidence from the unrelated joint federal-state investigation into gang-related activity in Fayetteville, making this McKoy's most persuasive argument. But, taking the evidence as a whole, it was nonetheless not conclusive and surely did not directly exclude McKoy as Hailey's shooter. To be sure, McKoy presented evidence pointing to Talley's participation in a similar shooting, but the circumstances of Talley's shooting might also have been distinct from the circumstances of McKoy's shooting, suggesting two different incidents. This was fully examined by the district court, and we cannot conclude that the court erred in holding that, in view of all the evidence taken as a whole, it is not "more likely than not that no reasonable juror would have convicted [McKoy]." *Schlup*, 513 U.S. at 327.

Finally, as to McKoy's challenge to Williams's credibility, that issue was appropriately resolved by the jury, apparently against McKoy. Moreover, Williams's testimony still stands that he witnessed McKoy shooting into the rear of Hailey's car.

At bottom, we cannot conclude that the district court erred in concluding that McKoy failed to carry his very demanding burden of showing that it is more likely than not that no reasonable juror would have convicted him in light of all of the evidence.

The district court's order dismissing McKoy's § 2254 petition is accordingly

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:16-HC-2262-FL

LAMONT McKOY,	)	
	)	
Petitioner,	)	
	)	
v.	)	(SEALED)[1]
	)	ORDER
ERIK A. HOOKS,	)	
	)	
Respondent.	)	

This matter is before the court on the parties' cross motions for summary judgment. On January 31, 2020, United States Magistrate Judge Robert T. Numbers, II, issued Memorandum and Recommendation ("M&R"), (DE 127), and recommended that the court grant respondent's motion for summary judgment, (DE 85), deny petitioner's motion for summary judgment, (DE 88), and dismiss the instant petition for a writ of habeas corpus, (DE 1). Petitioner objected to the M&R. (DE 128). As explained below, with the exception of one factual objection, the court overrules petitioner's objections, adopts the conclusions in the M&R, and dismisses the petition.

BACKGROUND

The court incorporates herein by reference the detailed summary of the facts and procedural history set forth in the M&R. (See DE 127 at 2-41).

[1] Certain filings on which the parties rely in furtherance of their objections to the magistrate judge's report were filed under seal. Within 14 days, the parties jointly shall return to the court by U.S. Mail or email, addressed to the case manager, a copy of this order marked to reflect any perceived necessary redactions. Upon the court's inspection and approval, a redacted copy of this sealed order will be made a part of the public record.

Petitioner seeks relief from his 1991 North Carolina conviction for the murder of Myron Hailey ("Hailey"), pursuant to 28 U.S.C. § 2254.[2] Petitioner alleges the following three claims: the State violated Brady v. Maryland when it failed to disclose exculpatory materials and information; the State violated Napue v. Illinois and Giglio v. United States when it failed to correct alleged false testimony provided by its witness Bobby Lee "Strawberry" Williams, Jr. ("Williams"); and the State and Federal Public Defender violated Brady when it withheld evidence of two "Crimestoppers" tips implicating William "Rat-Rat" Talley ("Talley") in Hailey's murder. In the M&R, the magistrate judge determined that petitioner's claims are procedurally barred by the statute of limitations pursuant to 28 U.S.C. § 2244(d)(1) and North Carolina General Statute § 15A-1419(a)(1), and that petitioner failed to establish the actual innocence gateway necessary for obtaining review of procedurally-barred claims. Petitioner objects to the magistrate judge's finding that he has not established actual innocence. Specifically, petitioner objects to certain of the magistrate judge's factual findings, as well as the determination that petitioner admitted to murdering Hailey. Petitioner, additionally, asserts that the magistrate judge misapplied the actual innocence gateway standard. Respondent filed opposition, arguing that the M&R contains no errors.

DISCUSSION

A. Standard of Review

"The Federal Magistrates Act requires a district court to make a de novo determination of those portions of the magistrate judge's report or specified proposed findings or recommendations to which objection is made." Diamond v. Colonial Life & Accident Ins. Co., 416 F.3d 310, 315

[2] Petitioner is on parole and no longer incarcerated.

(4th Cir. 2005) (quotation omitted); see 28 U.S.C. § 636(b). Absent a timely objection, "a district court need not conduct a de novo review, but instead must only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Diamond, 416 F.3d at 315 (quotation omitted). The court does not perform a de novo review where a party makes only "general and conclusory objections that do not direct the court to a specific error in the magistrate's proposed findings and recommendations." Orpiano v. Johnson, 687 F.2d 44, 47 (4th Cir. 1982). Section 636(b)(1) does not permit a generalized objection concerning "all issues addressed by the magistrate judge; it contemplates that a party's objection to a magistrate judge's report be specific and particularized, as the statute directs the district court to review only those portions of the report or specified proposed findings or recommendations to which objection is made." United States v. Midgette, 478 F.3d 616, 621 (4th Cir. 2007) (quotation omitted).

B. Analysis

1. Factual Objections

Petitioner objects to the magistrate judge's characterization of September 5, 1995, correspondence from Assistant United States Attorney John Bennett to Assistant District Attorney John Dickson as a "memorandum from [North Carolina State Bureau of Investigation] Agent Fox." (DE 128 at 21). While Agent Fox was copied on the correspondence, the correspondence was addressed to John Dickson.[3] (FEH Day 1 Tr. (DE 118) at 24:2-26:20; MAR Hr'g Tr. (DE 93-1) at 60:22-61:21).[4] Thus, this factual objection is sustained, and the court notes that the September 5, 1995, correspondence was sent from Bennett to Dickson.

[3] The court notes that the record also contains a memorandum from Agent Fox to North Carolina State Bureau of Investigation Special Agent F.L. McKinney. (DE 92-23).

[4] "FEH Day [] Tr." refers to the transcript of the federal evidentiary hearing held before the magistrate judge

As for petitioner's remaining factual objections, the differences in semantics have no meaningful bearing on the magistrate judge's ultimate legal conclusions in his M&R. Upon de novo review of the relevant portions of the M&R, the court overrules petitioner's remaining factual objections.

2. Legal Objections

Petitioner's legal objections relate to the magistrate judge's determination that petitioner failed to establish his actual innocence. "[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." McQuiggin v. Perkins, 569 U.S. 383, 386 (2013). However, "tenable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" Id. (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995)). The Fourth Circuit Court of Appeals recently held:

> A valid actual innocence claim "requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324, 115 S.Ct. 851. A petitioner must also "demonstrate that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice. If a petitioner passes through the Schlup gateway by satisfying this standard, the district court then considers and reaches the merits of all of the petitioner's procedurally defaulted claims." [Teleguz v. Pearson, 689 F.3d 322, 329 (4th Cir. 2012)] (internal citations omitted). In evaluating the petitioner's claim, "the district court is not bound by the rules of admissibility that would govern at trial" and must consider "all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become

on November 5, 6, and 12, 2019. "MAR Hr'g Tr." refers to the transcript of the state court hearing on petitioner's motion for appropriate relief.

> available only after the trial." Schlup, 513 U.S. at 327-28, 115 S.Ct. 851 (internal quotation marks omitted).

See Finch v. McKoy, 914 F.3d 292, 298-99 (4th Cir. 2019). "An actual innocence finding 'requires a holistic judgment about all the evidence and its likely effect on reasonable jurors applying the reasonable-doubt standard.'" Hayes v. Carver, 922 F.3d 212, 216 (4th Cir. 2019) (quoting House v. Bell, 547 U.S. 518 (2006)).

As an initial matter, petitioner objects to the magistrate judge's application of the actual innocence standard. Specifically, petitioner asserts that the magistrate judge misapplied the standard because he failed to holistically consider the entirety of the record, including both new and old evidence. Petitioner states that the magistrate judge improperly assessed each piece of evidence, individually, against statements petitioner made to investigating officer Michael Ballard in March 1990, which the magistrate judge found to be an expression of guilt. The court disagrees. The court, instead, finds the M&R set forth an in-depth procedural and factual history for this case spanning over forty pages. The M&R additionally provided a detailed analysis of the new evidence now before the court on habeas review, considered along with the entire record. After considering all of the evidence in the record, both new and old, the magistrate judge determined that petitioner had not met the exacting standard for a finding of actual innocence. See Hayes, 922 F.3d at 216-17. Thus, the court overrules this objection.

Petitioner next objects to the magistrate judge's characterization of statements McKoy made to Ballard in March 1990 as an expression of guilt. Petitioner's statements to Ballard in pertinent part are as follows:

> Ballard began by telling [petitioner] "his name had come up in an investigation and it came up that he was the shooter." McKoy Trial Tr. 138:21–22; FEH Day 3 Tr. 66:15. [Petitioner] responded, "[M]an, I don't even shoot at cars." McKoy Trial Tr.

138:23. Ballard then told [petitioner] he was lying because [petitioner] had shot at a car a few days earlier. Id. 138:24–139:1; FEH Day 3 Tr. 66:18–20. [Petitioner] smiled and said he didn't know what Ballard was talking about. McKoy Trial Tr. 139:1–5.

Ballard then explained that he knew that a few days earlier, a man drove up in front of the Thompson house to purchase drugs from [petitioner] and snatched the drugs without paying. Id. 139:5–8, 21–140:17; FEH Day 3 Tr. 66:18–23. After Ballard said this to [petitioner], he "smiled and said, ['']I know it.['']" McKoy Trial Tr. 140:19–20; FEH Day 3 Tr. 66:24.

Ballard then said that [petitioner] "told everyone to move out of the way and he shot at the car as it was driving off with an automatic weapon" and others present "told him he better quit shooting at cars because he shot at one already and a man was killed." McKoy Trial Tr. 142:21–25. [Petitioner] responded, "I know it" "with a smile on his face[.]" Id. 142:25–26.

Ballard then accused [petitioner] of doing the same to Hailey, shooting Hailey because "he ripped [petitioner] off." Id. 141:1–2. [Petitioner] smiled and replied, "I know it." Id. 141:2–3; see also FEH Day 3 Tr. 67:5–9.

Then Ballard told [petitioner] that "Hailey got into his car and started driving away and [petitioner] shot him[.]" McKoy Trial Tr. 141:3–4. [Petitioner] replied, "I know it." Id. 141:4–5; FEH Day 3 Tr. 67:10–11.

Ballard then said that [petitioner], Ant Lee, Cat, and Charmaine ran through the path that night, came out at the corner of Davis and Arsenal, and began shooting again as Hailey turned down Davis. McKoy Trial Tr. 141:5–8; FEH Day 3 Tr. 67:12–14. Ballard then said [petitioner] "shot again, and Hailey started swerving from side to side." McKoy Trial Tr. 141:7–8. McKoy again replied, "I know it." Id. 141:8; FEH Day 3 Tr. 67:15.

Ballard then told [petitioner] that he, Ant Lee, Charmain, and Cat "were going to go down for it." McKoy Trial Tr. 141:10–11. [Petitioner] continued to smile but did not reply. Id. 141:11.

When Ballard told him that the other boys were going to "roll over on him," [petitioner] became "very angry" and said, "[T]hey might roll over on me, but I ain't saying anything." Id. 141:11–16.

Ballard asked if he was innocent, but [petitioner] did not reply. Id. 141:16–17. [Petitioner] refused to let Ballard take a photo of him to show to eyewitnesses and when Ballard told [petitioner] he thought an innocent man would want his picture

> taken to prove he was telling the truth, [petitioner] just smiled and asked if he could leave. Id. 141:18–25.
>
> Then [petitioner] said to Ballard, "[Y]ou don't even know what kind of bullet it was." Id. 142:1. And when Ballard told [petitioner] that the bullet that killed Hailey was a .357, [petitioner] "immediately quit smiling [and] exited [the] vehicle." Id. 142:2–3.
>
> Ballard did not believe [petitioner] was "smarting off" with him during this conversation. Id. 153:9–12. Instead, Ballard considered [petitioner's] statements to be an admission that he had committed the crime. FEH Day 3 Tr. 67:16–19.

(DE 127 at 8-10).

Petitioner contends that the above statements do not constitute an admission of guilt, but are nothing more than youthful defiance and bravado. The magistrate judge considered this argument and determined that such characterization of petitioner's statements could be "one interpretation," but "by no means the only reasonable one." (DE 127 at 53); see also State v. McKoy, 331 N.C. 731, 733 (1992) (noting that the jury instructions at petitioner's trial stated "[t]here is evidence which tends to show that the defendant has admitted the facts relating to the crime charged in this case"). In making his determination that petitioner's statements were not mere "youthful braggadocio," the magistrate judge relied upon Ballard's testimony that, in his opinion, petitioner was not smarting off, as well as petitioner's change in demeanor once Ballard confronted him with details regarding the bullet's caliber and the threat that his friends would implicate him in the crime. (DE 127 at 53). The court agrees with the magistrate judge.

The fact that Ballard did not immediately arrest petitioner after these statements does not establish that Ballard did not consider petitioner's statements to be incriminating. Rather, Ballard testified at petitioner's trial that he did not arrest petitioner when the statements were made because Ballard was still attempting to obtain cooperation from a witness who was a passenger in Hailey's

car when he was shot. (Trial Tr. (DE 90-9) at 167:17-168:20). To the extent petitioner asserts Ballard's testimony as to petitioner's March 1990 statements is not credible due to Ballard's alleged tacit acceptance of Williams's false trial testimony, the court finds no grounds for this objection. In finding Ballard's testimony credible, the magistrate judge stated, "[n]othing presented to this court has undermined Detective Ballard's testimony about the conversation he had with [petitioner] in his car . . . . Ballard's testimony on this point has remained consistent over the years[.]" (DE 127 at 53). Based upon the foregoing, the court overrules petitioner's objections relating to the magistrate judge's characterization of petitioner's March 1990 statements as an expression of guilt. See McKoy, 331 N.C. at 734 ("If the jury believed such evidence that the defendant gave the repeated answers of 'I know it,' it reasonably could have found that the defendant had admitted shooting the victim as the victim drove away in his car.").

Petitioner next objects to the magistrate judge's reliance upon Figgs v. North Carolina, No. 5:16-HC-2018-FL, 2017 WL 481426, at *4 (E.D.N.C. Feb. 6, 2017), and Whitley v. Bair, 802 F.2d 1487, 1504 (4th Cir. 1986), as support for his determination that petitioner's March 1990 statements preclude a finding of actual innocence under Schlup. In particular, petitioner argues that Figgs and Bair are distinguishable from the instant action because unlike the petitioners in Figgs and Bair, petitioner made no credible admission. The court disagrees with petitioner's contention that he made no credible expression of guilt for the reasons set forth above. See McKoy, 331 N.C. at 734. Moreover, the record contains reliable corroborating evidence of petitioner's guilt. Thus, the court overrules this objection.

To the extent petitioner contends that a conviction cannot be supported by an uncorroborated confession alone, the court agrees. See United States v. Abu, 528 F.3d 210, 234

(4th Cir. 2008) (discussing established principle "that a conviction must rest upon firmer ground than the uncorroborated admission or confession of the accused made after commission of a crime") (internal quotation omitted). That said, the magistrate judge did not rely exclusively on petitioner's March 1990 statements. Rather, the magistrate judge found petitioner's statements to be consistent with Williams's eye-witness trial testimony. The magistrate judge further acknowledged the inconsistencies in Williams's statements, but found that "a reasonable juror could disregard the portions of Williams's testimony that are contradicted or unsupported by the evidence while still accepting the portions of Williams's statement that [petitioner] appears to have confirmed." (DE 127 at 54-55). The magistrate judge additionally concluded that petitioner offered no compelling reason for a jury to disregard his March 1990 statements, such as a claim of coercion, a credible recantation, or another person taking responsibility for the murder. (Id. at 53-54). After considering the record in its entirety, the magistrate judge determined that petitioner had not met the actual innocence standard. The court agrees. Thus, this objection is overruled.

Finally, petitioner objects to the magistrate judge's finding that the new evidence presented in support of his actual innocence claim did not establish no reasonable juror could have found him guilty. Regarding the Fayetteville Police Department's ("FPD") incident card for the transformer repair, petitioner's characterization of this evidence as "new" is questionable. In particular, defense testimony at petitioner's trial reveals that petitioner knew about the transformer shooting and subsequent repair at the intersection of Bryan and Branson streets on the evening of Hailey's murder prior to the trial. (Trial Tr. (DE 90-9) at 269:1-270:14). Consequently, petitioner could have investigated which officers were dispatched to the scene and how long they

remained there. See Allen v. Lee, 366 F.3d 319, 324-25 (4th Cir. 2004); United States v. Wilson, 901 F.2d 378, 381 (4th Cir. 1990).

In any event, petitioner's contention that police presence at the location in Haymount Hill[5] undermines the State's timeline is of little consequence. As acknowledged by the magistrate judge, the FPD investigative notes reflect that the investigating officers believed the shooting occurred between 11:00 p.m. and midnight, which is the time period during which FPD officers were at the transformer site and reported hearing no gunshots. (DE 127 at 55). However, as found by the magistrate judge, the State never put that specific timeline before the jury, and there is evidence in the record that the shooting occurred after the FPD officers left the scene. (DE 127 at 55; FPD Incident Report (DE 19-24); Pet. Ex. 2 (DE 2-2) at 7, 32 (indicating shots heard at approximately 3:30 a.m. on January 26, 1990)).

As for petitioner's contention that the inaccuracies in Williams's testimony makes it impossible for a reasonable juror to find him credible, the magistrate judge correctly found otherwise. Here, the record contains evidence both supporting Williams's version of events, and discrediting the Talley evidence (which the court will discuss further below). In particular, investigators received statements from two witnesses, who were not called to testify at trial, which largely support Williams's version of events. (See Pet. Ex. 2 (DE 2-2) at 33; Pet. Ex. 7 (DE 2-7) at 4). Additionally, several people who were interviewed during the investigation, and two witnesses who did testify at petitioner's trial, placed Hailey in Haymount Hill, and not Grove View Terrace, on the evening of his death. (Pet. Ex. 2 (DE 2-2) at 9, 11, 12, 20, 44; Trial Tr. (DE 90-

[5] As noted by the magistrate judge, this area of Fayetteville, North Carolina is referred to in the record as both Haymount Hill and Haymont Hill. (DE 127 at 5 n.2). For consistency, the court will refer to this area as Haymount Hill.

9) at 192:2-193:25, 218:1-220:05). Further, there is evidence that petitioner was a known drug dealer in the Haymount Hill area with a violent reputation and history of "shoot[ing] at cars after ripping people off, and . . . sell[ing] bad dope when he is broke." (Pet. Ex. 2 (DE 2-2) at 41 (referring to petitioner by the nickname "Saboo"); FEH Day 2 Tr. (DE 119) at 32:6-33:18). Finally, Willie Mae McCrowie's April 3, 2004, affidavit, in which she states that Williams later recanted his testimony, lacks reliability viewed in light of the other evidence in the record as summarized above and set forth in the M&R. (Pet. Ex. 12 (DE 2-14); see also Sharpe v. Bell, 593 F.3d 372, 384 (4th Cir. 2010); Williams v. Brown, 208 F. Supp. 3d 713, 733-34 (E.D. Va. 2016). As determined by the magistrate judge, a reasonable juror could find Williams's statements consistent with petitioner's own expression of guilt.

As for the Talley evidence, including the two new "Crimestoppers" tips, the record reflects that petitioner had heard rumors that Talley shot and killed Hailey prior to trial, and informed his counsel of such rumors. (See Aug. 22, 1995, correspondence (DE 55-6) at 4-5). Despite having this knowledge, petitioner and his counsel then presented eye-witness testimony at trial that Dennis Fort, and not petitioner, shot Hailey in the Haymount Hill area on January 25, 1990. (Trial Tr. (DE 90-9) at 191:14-217:23). At any rate, evidence of Talley shooting at a car in Grove View Terrace on the same evening does not preclude a juror from finding that petitioner shot Hailey, particularly in light of evidence that shootings were common in both the Haymount Hill and Grove View Terrace areas of Fayetteville at that time. (FEH Day 1 Tr. (DE 118) at 62:7-21; McKoy Trial Tr. (DE 90-9) at 200:9-201:23). Finally, as discussed by the magistrate judge, a reasonable juror would find issues with the accuracy and reliability of the Talley evidence. See also United States v. Wilson, 135 F.3d 291, 298, 302 (4th Cir. 1998) (discussing prosecutor's failure to

establish evidentiary basis for allegation that Talley committed a murder similar to the Hailey shooting); MAR Hr'g Tr. (DE 93-1) at 57:4-17, 60:22-61:21).

As for the involvement of investigator Robert Parker, the magistrate judge correctly found that petitioner never developed any specific evidence that Parker took steps to direct the investigation away from Grove View Terrace. Petitioner additionally presents no evidence that Parker acted in an improper manner during the investigation of petitioner. Petitioner's evidence regarding the direction in which Hailey was traveling after he was shot likewise does not alter the court's conclusion that petitioner failed to demonstrate that it is more likely than not that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt.

In sum, with the exception of the one factual correction noted above, the court adopts the M&R. Petitioner has failed to establish his actual innocence, and thus his claims are barred by § 2254's statute of limitations or procedurally defaulted. Accordingly, the court will dismiss petitioner's habeas petition.

C. Certificate of Appealability

Having determined the instant petition must be dismissed, the court next considers whether petitioner is entitled to a certificate of appealability. 28 U.S.C. § 2253(c)(2). After reviewing the claims presented in light of the applicable standard, the court finds reasonable jurists would not find the court's treatment of petitioner's actual innocence claim debatable or wrong, and none of the issues deserve encouragement to proceed further. See Buck v. Davis, 137 S. Ct. 759, 777 (2017); Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Accordingly, the court determines a certificate of appealability is not warranted.

CONCLUSION

Based on the foregoing, and upon de novo review of the record, the court adopts the conclusions of the M&R, (DE 127). The court SUSTAINS petitioner's factual objection regarding the September 5, 1995, correspondence, and OVERRULES petitioner's remaining objections. The court GRANTS respondent's motion for summary judgment, (DE 85), DENIES petitioner's motion for summary judgment, (DE 88), and DISMISSES the petition, (DE 1). Within **14 days**, the parties are DIRECTED to provide their proposed redactions to this order, if any, as set forth in footnote one. A certificate of appealability is DENIED. The clerk is DIRECTED to close this case.

SO ORDERED, this the 30th day of March, 2020.

LOUISE W. FLANAGAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
No. 5:16-HC-02262-BO

Lamont McKoy,

Petitioner,

v.

Erik A. Hooks, Secretary, North Carolina Department of Public Safety,

Respondent.

Memorandum & Recommendation

Petitioner Lamont McKoy claims a state-court jury wrongfully convicted him in 1991 for the murder of Myron Hailey. McKoy, who is currently on parole after serving a lengthy sentence, has filed a habeas corpus petition asking the court to vacate his conviction because of constitutional violations committed by the State during his prosecution.

But McKoy must overcome procedural barriers before the court can address his claims on the merits. He filed two of his claims decades after the statute of limitations expired. And a third claim is unexhausted because he did not present it to North Carolina's state courts.

The only way McKoy can avoid these procedural bars is by establishing that he is actually innocent of Haley's murder. To do so, he must convince the court that, after considering both the old and new evidence, it is more likely than not that no reasonable juror could find him guilty of that crime beyond a reasonable doubt.

Among the evidence presented at McKoy's trial are statements he made to a law enforcement officer that can be reasonably construed as an admission to Hailey's murder. A reasonable juror who accepted these statements as an admission of guilt could find McKoy guilty beyond a reasonable doubt–something the Supreme Court of North Carolina noted almost three

decades ago. As a result, even after considering McKoy's additional evidence, McKoy cannot establish that he is actually innocent of Hailey's murder and his claims are procedurally barred. Thus, the undersigned recommends that the district court deny McKoy's Motion for Summary Judgment, grant Hooks's Motion for Summary Judgment, and deny McKoy's petition.

I. Background

A. The Murder of Myron Hailey.

Shortly after 7:00 a.m. on January 26, 1990, Fayetteville Police Department (FPD) found Myron Hailey dead, slumped over in the driver's seat of his blue Honda Accord. *See* McKoy Trial Tr. 9:17–10:3, 17:4–8 (testimony of Durwood Cannon), Pet'r Ex. 9, D.E. 90–9; Federal Evidentiary Hearing (FEH) Day 3 Tr. 58:4–7, D.E. 125 (testimony of Michael Ballard). The car was located among some trees down an embankment near Rowan Street and Bragg Boulevard in Fayetteville, North Carolina. *See* McKoy Trial Tr. 10:7–21; FEH Day 3 Tr. 54:16–19. When the crime scene technician arrived, he determined Hailey had suffered a gunshot wound. McKoy Trial Tr. 14:3–6, 17:14–23.

Investigators found two bullet holes in the car: one in the left rear turn signal and one in the trunk. McKoy Trial Tr. 13:25–14:8. One bullet went through Hailey's body—officers found a spent Winchester .357 caliber bullet on the floorboard—and the other grazed but did not pierce his back. *Id.* 16:19–21, 17:1, 17:21–18:3, 285:2–10. The driver's side window was rolled down and the car's front fender, hood, and passenger side door appeared to have been damaged by hitting a nearby tree. FEH Resp't Ex. 5 at 11; McKoy Trial Tr. 10:24–26, 28:3–12 (noting the impact of the crash had made the passenger door difficult to open). Hailey, dressed in a white sweatshirt, blue jeans, and tennis shoes, was still wearing his seatbelt. FEH Resp't Ex. 5 at 11; McKoy Trial Tr. 10:3, 28:17–25.

Hailey died of blood loss from a gunshot wound, McKoy Trial Tr. 38:19–22, but the shooting occurred somewhere else, Fayetteville Police Dep't (FPD) Running Incident Report at Narrative 2, Pet'r Ex. 8, D.E. 90–8. Investigators believed that someone shot Hailey the night before, on January 25. FEH Day 1 Tr. 4:9–11; 6:4–7, D.E. 118.

The location of the shooting and the identity of the shooter are at the heart of McKoy's petition.

B. McKoy's Trial

The FPD's investigation led them to arrest Lamont McKoy. FEH Day 3 Tr. 58:13–22 (testimony of Michael Ballard); McKoy Trial Tr. 131:7–26. In May 1990, a grand jury indicted McKoy for first-degree murder. He entered a not guilty plea and his trial began in April 1991.

1. Prosecution's Case.

The State opened its case by calling Durwood Cannon, the crime scene technician who responded to the scene where Hailey was found and identified Hailey. McKoy Trial Tr. 17:4–8.

Cannon found "a blue Honda four-door vehicle . . . . parked . . . in the tree line along the roadway" in an area on Rowan Street near Bragg Boulevard. *Id.* 9:17–10:1. Inside "a black male [was] slumped over" wearing a long-sleeved white sweatshirt, blue jeans, tennis shoes. *Id.* 10:1–3, 188:17–22. He was wearing his seatbelt, the window was partly rolled down, and the car was still in drive. *Id.* 28:18–29:15.

The car was "on the right-hand side of the road going toward Fort Bragg, facing in the opposite direction in the trees" and "[t]he only way you could really see [the car] is if you were going off Rowan Street to go on Murchison Road[.]" *Id.* 10:10–20. The front of the car had suffered damage, which Cannon believed happened when the car crashed into the trees. *Id.* 10:22–26, 27:24–28:12. Cannon testified that it had rained during the night, so the ground was wet and

Hailey's car became "bogged up in some of the soft sand" when authorities removed it. *Id.* 189:12–15. Cannon also recalled "it was unseasonably warm" that night. *Id.* 189:22.

There were two bullet holes in the car's body and Cannon found two spent bullets inside the car, one on the floor and one on the driver seat. *Id.* 13:25–14:8. The bullet on the floorboard was "either a .38 or .357 caliber." *Id.* 16:19–17:1. Cannon traced each bullet's path by running white string from each bullet hole to the front of the car. *Id.* 20:13–23:18. He determined that both bullets went through the driver's side rear and front seat; one bullet went through Hailey's body, into the dashboard of the car, and then fell to the floor, and the other bullet got lodged between Hailey's body and the driver seat. He determined the bullet that went through the dashboard and landed on the floor came from the hole he marked No. 2, but he could not say this bullet killed Hailey. *Id.* 31:14–26. Inside the car Cannon found some items in the glove compartment, religious materials, and cake mixes and eggs in the backseat. *Id.* 29:18–30:4.

Jerald Wolford, a pathologist, testified next. Wolford performed Hailey's autopsy, which confirmed that he died because of blood loss from a gunshot wound. *Id.* 34:19–22, 38:21–22. Hailey's body had two gunshot wounds: one that entered at his back and exited at his front and another that created an excoriation, meaning the skin was missing but the bullet did not enter his body. *Id.* 35:17–37:24. Hailey suffered internal injuries and had "a liter and a half of blood within the abdominal cavity." *Id.* 38:12–18. A blood test showed that Hailey had an undetermined amount of cocaine in his system. *Id.* 38:23–39:8, 19–21.

Bobby Lee "Strawberry" Williams, Jr., testified at McKoy's trial that he saw McKoy fire the shots that killed Hailey. According to Williams, he and Hailey were good friends.[1] Williams, a felon on parole for armed robbery, common law robbery, and manslaughter, claimed he and

[1] Williams testified that he had been friends with Hailey since 1979 and "loved him . . . like a brother," but hadn't seen him since going to prison in the early 1980s. McKoy Trial Tr. 44:20-26, 65:25–66:5, 73:7-9.

Hailey were together in the Haymount Hill area of Fayetteville before the shooting.[2] *Id.* 43:10, 45:4–7.

The night of January 25, Williams came home from doing community service at Fayetteville Community College, took a shower, and then went for a walk. *Id.* 45:8–14. He ran into his friend Lonnie McNeil and while he was talking to McNeil, Hailey walked up Branson Street toward him. *Id.* 45:14–24. Hailey had 12–13 small bags of crack cocaine, which Williams admitted to being familiar with because he had experience using and selling cocaine. *Id.* 46:10–47:2. Hailey gave Williams one of the rocks, which Williams tasted and told him "it was beet," or fake. *Id.* 47:8–17. Hailey spent $300 on the fake cocaine, so Williams offered to help his friend find the dealer who sold it to him. *Id.* 69:12, 73:3–7, 113:14–114:1.

They walked down Branson Street to an arcade on the corner of Turnpike Road looking for the dealer. *Id.* 47:20–21. When they got to the arcade, they "walked inside" but Hailey "didn't see nobody inside the arcade. A couple was in there, but they was playing machines and shooting pool." *Id.* 47:22–24. Williams and Hailey left and walked up back Branson Street. *Id.* 47:25–26. Then at the corner of Bryan and Branson Streets, Hailey saw the dealer. *Id.* 47:25–48:1. Williams knew the man by his street name, Saybo,[3] and said he had seen him before standing on the corner in that area. *Id.* 48:1–49:3. Saybo stood close to an oak tree near Bryan Street. *Id.* 71:4–7, 75:14–17.

Williams approached Saybo and told him "you can give my brother his motherfucking money back or the real stuff." *Id.* 49:13–14. The three men then went behind a house on Bryan Street.[4] *Id.* 49:16–22. Saybo pulled out a bag of cocaine from between his legs and gave it to Hailey

[2] Throughout the record, this area of Fayetteville is called both Haymount Hill and Haymont Hill. For consistency, the court will call it Haymount Hill.
[3] Throughout the record, McKoy's appears as Saybo or Sayboo. For the sake of consistency, the court will use Saybo.
[4] This house is referred throughout the trial transcript as the "Thompson house." McKoy Trial Tr. 56:18-20.

and Hailey returned the bag of beet. *Id.* 49:24–50:15. Hailey then used a stem—a "cut up antenna ear"—and Williams's cigarette lighter to light a piece of crack.[5] *Id.* 50:1–6. After doing this, Hailey said the drugs were real. *Id.* 50:5–6. Then Williams left. *Id.* 50:6–7.

Williams walked away to meet his fiancée, Willie Mae McCrowie, on the corner of Branson Street and Highland Avenue, the next block over. *Id.* 84:17–85:2. While walking, Williams heard a gunshot coming from "[r]ight down on Bryan Street" where Hailey had parked his car. *Id.* 50:23–51:6.[6] At the same time, he also heard someone say, "Don't do it, don't do it." *Id.* 124:21–25. His fiancée was coming up the road to meet him, but Williams turned around and went back toward Bryan Street. *Id.* 51:21–23. He "walked fast like" for "[a]bout five minutes" to get back to the intersection of Bryan and Branson Streets because he "wanted to be nosey and see what was going on." *Id.* 86:12–21, 89:4–5.

There, he saw Saybo, James "Cat" Mitchell, and Charles Williams[7] "running through the path" that connected Bryan and Branson Streets to Davis Street. *Id.* 51:8–13, 57:22–23, 133:11. That path began at the corner of Bryan and Branson Streets, "[z]ig-zag[ged] toward Davis Street and zig-zag[ged] back around toward Branson up around . . . houses . . . into a small cluster of woods," ending between some vacant houses on Davis Street. *Id.* 161:18–26 & 162:1–4 (testimony of Michael Ballard). Williams followed them down the path but took a shortcut behind some houses on Davis Street. *Id.* 88:18–23, 90:11–15. When he got over by Haymount Hill Center on Davis Street, he saw "Saybo level his hand out[,] . . . a shot[,] . . . [and] sparks coming from the

[5] Cannon testified that he did not find a radio antenna or any plastic bags containing white powder in Hailey's car or pockets. McKoy Trial Tr. 30:5–31:3. Detective Ballard also testified that he did not find any packages of cocaine or "a stem that could have been used to light a cocaine rock" in Hailey's car. *Id.* 143:20-25.

[6] Williams said Hailey parked his car on Bryan Street in front of the Thompson house. McKoy Trial Tr. 56:9-22. Williams first saw it when he and Hailey walked back from the arcade. *Id.* 79:4-6, 80:4-10, 81:24–82:1.

[7] Williams later said that he saw "Saybo and Lamont McKoy, Charmain, and Cat, and Ant Lee" running down the path. McKoy Trial Tr. 87:1. Charmain is Charmaine Evans and Ant Lee is Anthony Lee Everette. *Id.* 133:9-10 (testimony of Michael Ballard).

rear of the car," which was "weaving down the street." *Id.* 52:11–14. McKoy had a .9 millimeter or a .357 in his hands. *Id.* 52:19–20. Williams saw Hailey's car get hit while it was on Arsenal Avenue "going down by Davis [Street]." *Id.* 59:11–13. Then Hailey made a left turn on Davis and a right turn on Hay Street. *Id.* 53:20–23, 59:18–19. Williams heard a female voice shouting at Hailey to put his foot on the gas pedal.[8] *Id.* 53:7.

Hailey's car was found the next day, January 26, down an embankment at Rowan Street and Bragg Boulevard, near Murchison Road, over two and a half miles away.

Williams did not immediately contact the police.[9] Instead, it was several weeks later when he gave Hailey's sister, Cassandra, his contact information, which Cassandra gave to FPD. *Id.* 60:7–61:6. Detective Ballard contacted Williams soon after and Williams gave a statement to FPD. *Id.* 62:1–4; *see* Statement of Bobby Lee Williams taken by FPD (Feb. 20, 1990) [hereinafter Williams Feb. 1990 Statement], Pet'r Ex. 13, D.E. 90–13. Williams read this statement to the jury. McKoy Trial Tr. 100:11–105:15. The jury also learned that Williams amended this statement a few weeks later. *Id.* 125:2–11; *see* Statement of Bobby Lee Williams taken by FPD (Mar. 19, 1990) [hereinafter Williams Mar. 1990 Statement], Pet'r Ex. 17, D.E. 91–3.

Williams told private investigator Lawrence Morrisey, hired by McKoy's attorney to assist in trial preparation, the same story, which Morrisey testified to at trial. McKoy Trial Tr. 254:10–255:8, 257:10–258:8. But Morrisey recalled Williams also told him "that he was getting a little mad because the police had promised him a thousand dollars, but he had not received any of it" and that "he was thinking about not even coming to court to testify." *Id.* 255:14–16, 256:6–7. Morrisey and his partner showed Williams their weapons to ask if he recognized the type of gun

[8] When Williams first saw Hailey's car parked on Bryan, he saw a passenger inside, but didn't know who she was. McKoy Trial Tr. 53:8-12, 82:4-7.

[9] Detective Ballard testified that Williams said he was "scared if he came forward to the police that they might revoke his probation" for being in a "drug infested area." McKoy Trial Tr. 147:15-22.

McKoy used to shoot Hailey, and Williams said that Morrisey's partner's Smith and Weston .9 mm automatic was the type. *Id.* 255:22–256:3.

Through its investigation, FPD identified Saybo as Lamont McKoy. FEH Day 3 Tr. 64:13–65:8 (testimony of Michael Ballard).

FPD Detective Ballard testified at trial to his involvement in the investigation. McKoy Trial Tr. 130:23–26. Ballard reached out to Williams after receiving his contact information from Hailey's sister. *Id.* 131:7–26. Ballard confirmed the story Williams had told him, which Ballard wrote down in a statement that Williams signed. *Id.* 132:1–134:11; Williams Feb. 1990 Statement. Ballard also confirmed that in March Williams amended his initial statement to say that his fiancée was not on the path with him that night. McKoy Trial Tr. 152:1–9. Williams told Ballard he had been using McCrowie "as a reference point" to convey the direction he took but that she did not follow him on the path. *Id.* 152:7–9. As part of his investigation, Ballard and Williams returned to Haymount Hill to walk through the events at the place where they occurred. *Id.* 134:15–137:14.

Ballard tried to talk to McKoy several times about Hailey's murder, but McKoy was uncooperative at first. *Id.* 166:22–25; FEH Day 3 Tr. 65:2–13. Then, in March 1990, FPD stopped McKoy's car and called Detective Ballard to the scene. FEH Day 3 Tr. 65:21–24; McKoy Trial Tr. 138:1–4. When Ballard arrived, he and McKoy had a conversation in Ballard's police car. McKoy Trial Tr. 138:8–9; FEH Day 3 Tr. 66:6–10.

Ballard began by telling McKoy "his name had come up in an investigation and it came up that he was the shooter." McKoy Trial Tr. 138:21–22; FEH Day 3 Tr. 66:15. McKoy responded, "[M]an, I don't even shoot at cars." McKoy Trial Tr. 138:23. Ballard then told McKoy he was lying because McKoy had shot at a car a few days earlier. *Id.* 138:24–139:1; FEH Day 3 Tr. 66:18–

20. McKoy smiled and said he didn't know what Ballard was talking about. McKoy Trial Tr. 139:1–5.

Ballard then explained that he knew that a few days earlier, a man drove up in front of the Thompson house to purchase drugs from McKoy and snatched the drugs without paying. *Id.* 139:5–8, 21–140:17; FEH Day 3 Tr. 66:18–23. After Ballard said this to McKoy, he "smiled and said, [']I know it.[']" McKoy Trial Tr. 140:19–20; FEH Day 3 Tr. 66:24.

Ballard then said that McKoy "told everyone to move out of the way and he shot at the car as it was driving off with an automatic weapon" and others present "told him he better quit shooting at cars because he shot at one already and a man was killed." McKoy Trial Tr. 142:21–25. McKoy responded, "I know it" "with a smile on his face[.]" *Id.* 142:25–26.

Ballard then accused McKoy of doing the same to Hailey, shooting Hailey because "he ripped [McKoy] off." *Id.* 141:1–2. McKoy smiled and replied, "I know it." *Id.* 141:2–3; *see also* FEH Day 3 Tr. 67:5–9.

Then Ballard told McKoy that "Hailey got into his car and started driving away and [McKoy] shot him[.]" McKoy Trial Tr. 141:3–4. McKoy replied, "I know it." *Id.* 141:4–5; FEH Day 3 Tr. 67:10–11.

Ballard then said that McKoy, Ant Lee, Cat, and Charmaine ran through the path that night, came out at the corner of Davis and Arsenal, and began shooting again as Hailey turned down Davis. McKoy Trial Tr. 141:5–8; FEH Day 3 Tr. 67:12–14. Ballard then said McKoy "shot again, and Hailey started swerving from side to side." McKoy Trial Tr. 141:7–8. McKoy again replied, "I know it." *Id.* 141:8; FEH Day 3 Tr. 67:15.

Ballard then told McKoy that he, Ant Lee, Charmain, and Cat "were going to go down for it." McKoy Trial Tr. 141:10–11. McKoy continued to smile but did not reply. *Id.* 141:11.

When Ballard told him that the other boys were going to "roll over on him," McKoy became "very angry" and said, "[T]hey might roll over on me, but I ain't saying anything." *Id.* 141:11–16.

Ballard asked if he was innocent, but McKoy did not reply. *Id.* 141:16–17. McKoy refused to let Ballard take a photo of him to show to eyewitnesses and when Ballard told McKoy he thought an innocent man would want his picture taken to prove he was telling the truth, McKoy just smiled and asked if he could leave. *Id.* 141:18–25.

Then McKoy said to Ballard, "[Y]ou don't even know what kind of bullet it was." *Id.* 142:1. And when Ballard told McKoy that the bullet that killed Hailey was a .357, McKoy "immediately quit smiling [and] exited [the] vehicle." *Id.* 142:2–3.

Ballard did not believe McKoy was "smarting off" with him during this conversation. *Id.* 153:9–12. Instead, Ballard considered McKoy's statements to be an admission that he had committed the crime. FEH Day 3 Tr. 67:16–19.

Ballard tried to identify the woman in Hailey's car at the time of the shooting. McKoy Trial Tr. 142:5–7. He showed Williams two photographs but Williams "could not identify [either] positively." *Id.* 142:8–13, 150:25. One of the photographs was a black and white picture of a woman named Linda Kemp. *Id.* 150:11–13. Williams first identified her as the woman in the car, but later stated that he "was not sure" because the woman had red hair and Kemp did not. *Id.* 150:15–151:7. Later, while at the law enforcement center Williams identified Diane Monk in person as the woman in the car. *Id.* 142:14–21. But Ballard could not get her to cooperate. *Id.* 168:17–19, 169:5–6.

After speaking with Williams and McKoy, Ballard found other "corroborating evidence" "through interviews of the co-defendants" before arresting McKoy. *Id.* 167:17–168:5.

There was only one piece of physical evidence that could even remotely link the shooting to the corner of Bryan and Branson Streets. Ballard testified about an unspent Winchester .357 bullet he found on the ground under an oak tree on the corner of Bryan and Branson Streets a few days after the shooting occurred. *Id.* 171:10–172:3, 173:10–11. The oak tree was in "[t]he same location Mr. Williams said he saw [McKoy] standing the night Myron Hailey was shot." *Id.* 173:7–9. Ballard gave that bullet to Cannon on January 29. *Id.* 172:1–3. Ballard conceded that the bullet could have been at that location from a different shooting and that he was unable to "tie that shell in with Myron Hailey." *Id.* 173:15–174:9.

Two other witnesses testified at trial. Thomas Trochum, a North Carolina State Bureau of Investigation (SBI) Agent, received the bullet recovered from the floorboard of Hailey's car from L.J. Brisbee of the City-County Bureau of Identification. *Id.* 276:6–7, 284:5–8. The court certified Trochum as an expert in forensic firearms and toolmark examination. *Id.* 276:10–11, 279:8–10. Trochum concluded that the bullet was a silvertip design only made by Winchester, was .357 caliber, and based on the number of lands-and-grooves in the bullet itself, only from a .357 revolver could have fired it. *Id.* 285:2–17, 286:7–11.

And Sandra Adams testified that she was working as an assistant manager at the women's clothing store D.A. Kelly's in Clinton, North Carolina, on January 25. *Id.* 271:12–18. She remembered that night Hailey came into the store to return some items at 8:55 p.m. *Id.* 271:25–272:7. She recognized Hailey because he would often come into the store with his wife. *Id.* 273:5–8. Adams remembered that time specifically because she had asked another employee to lock the door when Hailey came in, and she had to unlock the door so that Hailey could leave. *Id.* 272:5–20. Detective Ballard spoke with Adams and verified that Hailey was in that store that night returning some items. *Id.* 289:2–25. Clinton is about a 50-minute drive from Haymount Hill.

Directions from D.A. Kelly's, Clinton, N.C., to Branson Street and Bryan Street, Fayetteville, N.C., Google Maps (printed Feb. 19, 2013), Pet'r Ex. 14, D.E. 90–14.

2. McKoy's Evidence.

McKoy argued that he did not shoot Hailey and identified who he thought to be the real shooter.

Other witnesses testified at his trial that there had been gunfire in the Haymount Hill area earlier in the day on January 25. The street lights and a transformer at the corner of Bryan and Branson Street were shot out, causing a power outage. Multiple witnesses testified that between 8 and 9 p.m., the power went out in Haymount Hill. *See* McKoy Trial Tr. 231:12–15 (Leslie Finley told FPD that "the street light at the corner of Branson and Bryan was shot out around 8:45 p.m."); 243:7–11 (testimony of Melissa Carette McKoy) ("It was about 9:00 when the lights went out."); 220:6–9 (testimony of Erwin Lee Jones) ("[A]bout twenty after 8:00, something to 9:00, I heard a whole bunch of shooting. We were sitting there watching T.V. and all of a sudden, all of the lights had went off."). The Fayetteville Public Works Commission received a call about the outage at 10:01 p.m., and the power came back on between 11:15 and 11:30 p.m. *Id.* at 269:12–13 (testimony of Judy Meshaw of the Fayetteville Public Works Commission).

And multiple witnesses testified that they knew there would be a shooting that night. *See id.* 192:2–4 (Finley) ("They were having a conflict with, I say, one side of the street and the other side of the street. And they were shooting that night."); 242:26–243:4 (Carette McKoy) ("We heard, you know, it was going to be some shooting earlier that day. They said they were going to start shooting at dusk/dark. And we were all in the house, you know, because they said they were going to start shooting.").

McKoy presented evidence that Dennis Fort was the likely shooter, because a witness reported seeing Fort shoot out the transformer and shoot at a car that night.

Leslie Finley testified that she was on Haymount Hill that night and saw Dennis Fort and others shooting at a blue car that Hailey was driving. *Id.* 191:14–193–18. Finley saw the blue car driving around Haymount Hill several times that night. *Id.* 208:4–213:18. She also saw Fort shoot out the transformer box and relayed this to FPD in a statement. *Id.* 193:19–194:4, 196:9–14, 203:6–9. Fort was in the intersection of Bryan and Branson Streets and had a "long gun," a "big gun" like a rifle or shotgun, and Finley saw him "pump the gun." *Id.* 202:4–25, 205:15–206:7. She thought Fort unintentionally shot the car because "they were shooting at each other, and he was just there." *Id.* 217:21–23. Finley testified that she saw Saybo that night but that "he wasn't there" and she did not see him shoot at anyone. *Id.* 192:16–17, 196:15–16. When Finley came to FPD to give her statement, she had a newspaper article which described the scene of Hailey's accident. *Id.* 230:1–231:11.

Finley also told investigator Morrisey that "she was in the area where [Hailey] was killed and that she saw the two gangs shooting at each other." *Id.* 253:24–26. She said Fort had "a long gun, like the one . . . that was used to kill [Hailey]." *Id.* 253:26–254:2. Morrisey testified at trial that it is possible to fire a .357 bullet in a pump action rifle or shotgun. *Id.* 258:18–20. Finley also told Morrisey that "she did not see Lamont McKoy shoot" Hailey. *Id.* 254:5–6.

Erwin Lee Jones also testified that he saw a blue car in the Haymount Hill area on the night of January 25. *Id.* 218:20–22. The car was driving around; it passed him several times and stopped twice on Bryan Street. *Id.* 219:11–220:5. Jones went inside his house and at "about twenty after 8:00, something to 9:00, [he] heard a whole bunch of shooting . . . . and all of a sudden, all of the

lights had went off." *Id.* 220:6–9. He testified that he couldn't tell who the people standing outside were but that he did not see Saybo. *Id.* 223:23–224:2, 17–20.

Despite Jones testifying that he couldn't see who was shooting, he had given a statement to FPD that he "heard the shooting," "seen the car," and identified multiple people who were present. *Id.* 220:10–13, 227:15–17. The State recalled Detective Ballard to read Jones's statement to the jury. *Id.* 227:1–22.[10]

In his statement, Jones told FPD that he was standing by the telephone pole on Bryan Street and saw the blue car driving around the Haymount Hill area on Bryan Street and Turnpike Road. *Id.* As the car was driving up Bryan Street toward Branson Street, "Ricky Thompson, Tweety Bird, Timothy Johnson, Pumpkin, Saybo, and Anthony Lee Thompson, Moselle McNatt came out of the house sitting at Sampson, and Brian had started shooting at the car." *Id.* 227:15–17. Then "[t]he car started going from side to side, so [Jones] figured [the driver] was shot." *Id.* 227:18–19. Ballard also testified that Jones told him that Saybo was one of the people shooting at the car that night. *Id.* 228:15–17. Jones admitted on cross examination that he was drinking that night and typically drank "about five days" out of the week. *Id.* 222:22–223:7.

Melissa Carette McKoy, McKoy's wife, testified about a potential alibi for McKoy. She said she and Lamont were at the McNeil house on Branson Street on the night of January 25. *Id.* 241:21–242:14. There were several people there hanging out and playing Nintendo, and around 9:00 p.m., "the lights went out, and everybody . . . hit the floor." *Id.* 242:25–243:11. Ms. McNeil called the police, who responded. *Id.* 243:5–6. Carette McKoy then said she and Lamont "ran home." *Id.* 243:16. She said it was raining and cold that night, "cold enough for a jacket." *Id.*

[10] When counsel asked Jones if he could read his statement, he responded that he could not because he "was in the hospital last month for three weeks" and "had got hit in the head with a baseball bat," so the words were blurry. McKoy Trial Tr. 220:23–221:4.

243:19–21, 249:2–3. They got back to their house on Bryan Street around 9:30 p.m. *Id.* 237:14–15, 243:22–244:3. She and Lamont went to bed because "the police were still up there . . . because they were shooting and stuff, so . . . they stayed up there for awhile." *Id.* 244:3–14. Carette McKoy did not see a blue car driving around the Haymount Hill neighborhood that night. *Id.* 244:18–20. Carette McKoy also testified that Lamont owned a .22 and had never known him to own any other type of weapon. *Id.* 245:2–8, 248:21–25.[11] She had "never known him to shoot at cars." *Id.* 245:19.

3. Verdict and Sentencing.

McKoy made unsuccessful attempts to have the case dismissed at the close of the State's evidence and again at the close of all evidence, so the judge submitted the case to the jury. *Id.* 174:14–175:21 & 294:9–10. After three hours of deliberation, the jury told the court it was deadlocked 11–1. McKoy Trial Tr. 315:6–17. But after several more hours of deliberation the jury convicted McKoy of first-degree murder. *Id.* 316:20–317:17. The presiding judge then sentenced him to life in prison. *Id.* 319:11–14.

C. McKoy's Direct Appeal.

McKoy appealed to the Supreme Court of North Carolina. He argued that the trial court committed reversible error by giving the jury an admission instruction. *See* Pet. for Writ of Habeas Corpus at 3, D.E. 1. The trial court instructed the jury: "There is evidence which tends to show that the defendant has admitted the facts relating to the crime[] charged in this case. If you find that the defendant made that admission, then you should consider all the circumstances under which it was made in determining whether it was a truthful admission and the weight you will give to it." McKoy Trial Tr. 302:23–303:2. McKoy maintained that his repeated answers of "I know it"

[11] Evans also told investigators that McKoy did not have a .357 revolver but that he did have a black .22. John Britt Interview of Charmaine Evans (Mar. 23, 1990) at 9–10, Pet'r Ex. 12, D.E. 90-12.

to Ballard's questions "were ambiguous at best, and that the trial court's instructions failed to leave it for the jury to determine whether any admission actually was made by the defendant." *State* v. *McKoy*, 331 N.C. 731, 734, 417 S.E.2d 244, 246 (1992). In June 1992, the court found no prejudicial error and affirmed his conviction. *See id.* at 734, 247. It reasoned that the instruction that followed "made it clear that even though there was evidence tending to show that the defendant had made an admission, it was solely for the jury to determine whether the defendant in fact had made any admission." *Id.* at 734, 246–47. McKoy did not file a petition for certiorari with the Supreme Court of the United States. Pet. for Writ of Habeas Corpus at 3–4.

D. McKoy's Motions for Appropriate Relief.

In April 1998, McKoy filed a pro se Motion for Appropriate Relief (MAR) in North Carolina Superior Court. *See* First MAR, Pet'r Ex. 54, D.E. 93–10. He raised five grounds: (1) ineffective assistance of trial counsel; (2) that the trial court erred when it denied McKoy's motion to dismiss based on insufficient evidence to support the conviction; (3) the prosecution relied on perjured testimony; (4) McKoy was not allowed to subpoena witnesses to testify on his behalf; and (5) ineffective assistance of appellate counsel. *See* Order Regarding First MAR at Findings of Fact ¶8, Pet'r Ex. 56, D.E. 93–12.

In September 2001, the court dismissed four of McKoy's claims, without a hearing, as "not supported by the record" but ordered an evidentiary hearing into the ineffective assistance of appellate counsel claim. *See id.* at Conclusions of Law ¶4. The court appointed an attorney to represent McKoy at this hearing. *Id.* at 3.

The hearing focused on whether Carlton Fellers, McKoy's trial and appellate counsel, learned of new exculpatory evidence identifying Hailey's shooter. *State* v. *McKoy*, No. 90 CRS 11412, MAR Hr'g Tr. 3:9–14, Pet'r Ex. 45, D.E. 93–1. This new evidence came from a 1995

federal trial involving several members of the "Court Boys," a gang centered at the Grove View Terrace apartment complex in Fayetteville. William "Rat-Rat" Talley and others faced trial for drug charges. *Id.* 5:1–6:8.

During the federal trial, several witnesses testified that they saw Talley shoot at a car one night following a drug deal and that the car slowed down as if the bullet had hit the driver. Talley Trial Tr. 133:24–135:12, 224:5–225:13, Pet'r Ex. 29, D.E. 92–4, 92–5. The witnesses claimed that someone from Haymount Hill had been convicted of this crime and was in prison. *Id.* Talley's attorney reached out to Fellers after the trial to share this information. MAR Hr'g Tr. 6:21–23, 9:20–10:13 (testimony of Alexis Pearce).

At his MAR hearing, McKoy presented testimony from witnesses of an:

> incident of someone coming up to buy some drugs and then Talley was . . . serving them and the person drove off real suddenly, and then Mr. Talley fired several shots. And then they said the car . . . sort of lurched a little bit and then it wobbled on around the corner . . . . And then the next revelation was that . . . either late at night or in the morning . . . they saw the car down the embankment.

Id. 30:19–31:8. McKoy offered trial testimony from Talley trial witnesses Ronald Perkins and Kelly Debnam, *id.* 18:10–20:10, 58:24–59:2 (Perkins); 20:11–21:21 (Debnam), and excerpts from interviews with Court Boys Craig Everette Roberts and James Rodney Smith, *id.* 55:7–11 (Smith); 58:17–20 (Roberts).

It was also revealed that McKoy had heard rumors that one of the Court Boys committed Hailey's murder before learning the information revealed at Talley's trial. *Id.* 47:17–48:1, 48:11–14. Fellers testified at the MAR hearing that McKoy "had heard that the Court Boys had done this" and gave Fellers "several names of people who may have been involved in this particular murder." *Id.* 48:12–14.

The court also received a memorandum from North Carolina State Bureau of Investigation Agent Scott Fox to SBI Agent McKinney. *Id.* 51:6–54:5; *see* Fox Memo to SBI Special Agent McKinney, Pet'r Ex. 43, D.E. 92–23. The memorandum stated that interviews of several of Talley's codefendants uncovered that "on the night of [Hailey's] murder, Talley fired six rounds from a revolver at the back of the victim's car. Subsequently, the car slowed and continued out of Grove View Terrace in a manner that caused several witnesses to believe the driver had been wounded." Fox Memo to SBI Special Agent McKinney. A memorandum from Agent Fox to Assistant District Attorney John Dickson was also read to the court. MAR Hr'g Tr. 60:22–61:21. In that memorandum, Agent Fox wrote, "I do not believe that [the information I have on the 1990 shooting involving Tally] provides enough evidence to charge Tally with the murder, nor does it provide enough evidence to exonerate Lamont McKoy." *Id.* 61:9–12.

The court dismissed this claim. Order Den. First MAR, Pet'r Ex. 57, D.E. 93–13. Judge Thompson held that:

> the alleged new evidence of a shooting similar to the one for which the defendant was convicted would not be beneficial to the defendant in that the only similarity to the defendant's case is that a shooting at an automobile took place at some unknown date and time in the City of Fayetteville.

Id. ¶8.

McKoy, acting pro se, appealed to the North Carolina Court of Appeals, which denied his petition. *See* NCCOA Order Den. Cert. Pet. for First MAR, Pet'r Ex. 59, D.E. 93–15. McKoy, again pro se, appealed this decision to the Supreme Court of North Carolina, which denied his petition in February 2003. *See* NC Supreme Court Order Den. Cert. Pet. for First MAR, Pet'r Ex. 60, D.E. 93–16.

In July 2013, McKoy filed a second Motion for Appropriate Relief in Superior Court. *See* Second MAR, Pet'r Ex. 61, D.E. 93–17. This time the Duke University School of Law Wrongful

Convictions Clinic represented him. He raised two primary grounds: (1) there was new evidence, arising from an investigation into the Court Boys gang and presented in a federal trial, which had direct bearing on McKoy's claim of complete factual innocence but he had never presented it in North Carolina Superior Court; and (2) his conviction resulted from constitutional violations under the doctrines established by *Brady* v. *Maryland*, *Giglio* v. *United States*, and *Napue* v. *Illinois*. *Id.* The Superior Court denied his motion "based on procedural bar," ruling that McKoy failed to raise the issues during a previous appeal, had received a ruling on the merits from Judge Thompson, and failed to timely file his motion. *See* Order Den. Second MAR at 3, Pet'r Ex. 62, D.E. 93–18.

McKoy appealed this decision to the North Carolina Court of Appeals, which also denied review of his petition. *See* NCCOA Order Den. Cert. Pet. for Second MAR, Pet'r Ex. 63, D.E. 93–19.

E. McKoy's Federal Habeas Petition and Additional Evidence

In October 2015, McKoy petitioned for writ of habeas corpus in this court. *See* Pet. for Writ of Habeas Corpus. His petition raised two grounds. First, he argued that the State violated *Brady* v. *Maryland* by failing to disclose exculpatory materials and information. McKoy alleges that the State withheld information that the FPD Special Response Unit (SRU) was at Haymount Hill where the State alleged McKoy killed Hailey at the same time the State alleged the shooting occurred. Second, McKoy argued that the State violated *Napue* v. *Illinois* and *Giglio* v. *United States* by failing to correct Williams's allegedly false testimony. McKoy points to many inconsistencies within Williams's trial testimony and between his testimony and prior statements made to police.

In October 2018, the court allowed McKoy to amend his federal habeas petition to include a new claim. Oct. 22, 2018 Order, D.E. 62. McKoy alleges the State and the FPD violated *Brady*

v. *Maryland* by withholding evidence of two tips received by the Fayetteville/Cumberland County Crimestoppers stating that Talley shot Hailey. Mot. to Amend Habeas Petition, D.E. 48; Mem. in Supp. of Mot. to Amend Habeas Pet., D.E. 49. McKoy first learned of these tips during discovery here.

The parties filed the cross-motions for summary judgment currently before the court in August 2019. D.E. 85 & 88. The court held a three-day evidentiary hearing in November 2019 at which parties presented evidence to the court.

The following evidence is before the court:

- Two Crimestoppers tips recorded by FPD on January 27 and 28 which identify Hailey's shooter as Talley;
- Evidence of FPD presence in Haymount Hill during the time the State alleged the shooting occurred;
- Testimony from Talley's trial bolstering the theory that Talley shot Hailey in Grove View Terrace;
- Eyewitness testimony to a Grove View Terrace shooting allegedly committed by Talley and testimony from individuals who either place McKoy in Haymount Hill on January 25 or maintain he was not involved;
- Expert testimony reconstructing the accident to determine Hailey's direction of travel;
- Evidence that FPD Officer Robert Parker, who was involved in the Hailey investigation, was later convicted on corruption charges;
- Inconsistencies in Williams's trial testimony and prior statements, including a discrepancy about the arcade, and an alleged recantation which cast doubt on his credibility;
- Analysis of FPD records showing the only murder victim in a car in the Rowan Street/Bragg Boulevard area of Fayetteville between 1986 and 1995 was Hailey.

1. Crimestoppers Tips.

Fayetteville Police Department received two Crimestoppers tips on January 27 and 28, 1990—one and two days, respectively, after Hailey's murder—identifying a suspect. Both callers identified Hailey's shooter as William Talley, or Rat-Rat. *See* Crimestoppers Report (Jan. 27, 1990) & FPD Tip (Jan. 28, 1990), Pet'r Exs. 2 & 3, D.E. 90–2 & 90–3. The first tip stated a caller said that "Rat-Rat did the shooting" and a then-17-year-old "Irvin Cook saw the shooting." Crimestoppers Report (Jan. 27, 1990) at 1. A note in the file directed an FPD sergeant to check into the allegations and respond. *Id.* at 2. The second tip stated a caller said that "he knew who killed the subject in the vehicle on Rowan Street in the city this past week" and named Rat-Rat as the person responsible for the crime. FPD Tip (Jan. 28, 1990).

McKoy had open file discovery during trial, *see* McKoy Trial Tr. 149:26, but only learned of these tips after the State produced additional evidence under a March 2019 order by Chief Judge Boyle, Mem. in Supp. of Mot. to Amend Habeas Pet. at 3. Theresa Newman, one of McKoy's habeas attorneys, testified at the evidentiary hearing that she made "multiple requests for discovery" in the case and received records from the State but that she was "absolutely certain" the State did not include the tips in those records. FEH Day 1 Tr. 116:17–118:21. Newman testified that she reviewed FPD files on all homicides from 1988 to 1991, including Hailey's file, and Hailey's file did not include the tips. *Id.* 118:6–12, 19–24. She emphasized that "the real import of the tips is that back in 1990 that if the tips had been disclosed, that Grove View Terrace would have been the focus of pretrial investigation," *id.* 134:17–20, and described the tips as "[i]ncredibly, remarkably important . . . to the case," *id.* 116:3–4.

The State does not dispute the existence of the tips. Detective Ballard testified at the hearing that he investigated the Crimestoppers tips and his investigation did not point toward Talley. FEH Day 3 Tr. 75:21–22, 76:11–13.

The State argues that the tips are unimportant because McKoy was already aware that people were saying Talley was involved in the shooting. In 1995 McKoy wrote in a letter to FPD Officer Clinkscales that "before prison [someone] told some guys on the hill that Rat, Rat was the one that done the murder. I heard about it when I was out on bond, but didn't know for sure cause people was saying Dennis Ford done it. I told my lawyer about it too! . . . . It was the talk of the town." McKoy Letter to FPD (Aug. 22, 1995) at 3, Pet'r Ex. 46, D.E. 93–2. But Newman maintains that reports from these two tips differed from the "rumors that Mr. McKoy was hearing" referenced in his 1995 letter. FEH Day 1 Tr. 129:22–23.

2. Police Presence on Haymount Hill.

The night of January 25, the FPD SRU responded to a call of "shots fired into occupied dwelling" near Branson and Bryan Streets in Haymount Hill around 9:45 p.m. FPD Incident Card No. 8340, Pet'r Ex. 24, D.E. 91–10. The SRU stayed at that location "for several hours that night and into the early morning hours of the next day." Mem. in Supp. of Pet'r Mot. for Summ. J. at 16, D.E. 90; *see* Aff. of Glenn Mobley (July 23, 2013) at ¶8, Pet'r Ex. 23, D.E. 91–9.

Retired FPD Sergeant Tracy Campbell testified at the evidentiary hearing that he was working as a member of the SRU that night and was called to Bryan and Branson Streets. FEH Day 2 Tr. 8:8–17, D.E. 119. His unit generally worked from 5 p.m. to 1 a.m. and it was the unit's practice to remain at the scene of an incident until the area was secure and reports were complete. *Id.* 7:11–13, 8:21 (if assigned to a specific area, the team "would take care of every call that we had up there" that night); Mobley Aff. ¶8(b). Sergeant Campbell could not recall what time his

shift ended that night, but the FPD incident card says his team did not call back in service until 12:41 a.m. on January 26, so "[he] wouldn't have left Haymount Hill until [that] time at the earliest," FEH Day 2 Tr. 10:8–10, 15:17–18; FPD Incident Card. It was the unit's practice to call back into dispatch when they had finished at a scene and that it was dispatch's practice to note the time of the call on the incident card. FEH Day 2 Tr. 11:9–23. This means the SRU was around Bryan and Branson Streets until at least 12:41 a.m. on January 26.

Sergeant Campbell did not remember hearing any additional shots that night near Bryan and Branson Streets. FEH Day 2 Tr. 21:22–22:3.[12] If someone had fired more shots, he would have heard them. *Id.* 22:24–23:1. He said that when he found out about the discovery of Hailey's body, he was concerned because his colleagues were talking about it and saying that "the shooting happened up in Haymount," but that he did not recall a shooting. *Id.* 27:6–7

Sergeant Campbell said McKoy had a reputation of being a drug dealer who was violent and armed, but he was unaware of McKoy shooting anyone the night of January 25. *Id.* 33:2–18, 34:16–18. McKoy argues that he could not have shot Hailey under the State's investigatory timeline[13] without SRU observing it and that SRU has no record of a second shooting that night is evidence of McKoy's innocence.

Sergeant Campbell also testified that he was familiar with the path connecting Branson Street and Davis Street; he had run it personally several times. *Id.* 24:11–23. He does not think it possible for someone to run the path that connects Bryan and Branson Street to Davis Street and

[12] Anthony Richardson also testified that he stayed in his house all night after the transformer was shot out, that his house was one house away from the corner of Bryan and Branson Street, and heard no other shots fired that night. FEH Day 1 Tr. 111:3-7, 113:13-18, 113:24–114:1. Neither Charmaine Evans nor Richardson remember hearing shots later that night after the shots that caused the power to go out. *Id.* 83:24–84:5, 106:5-8.

[13] The State's investigatory theory was that Hailey was shot between 11 p.m. and midnight on January 25. *See* Ballard Felony Investigative Report at 2, Pet'r Ex. 11, D.E. 90-11 (listing a time frame for the shooting of between 2300 and 2400 hours).

intercept a car coming from Branson and Bryan at Arsenal and Davis "if they had no idea where he was going." *Id.* 26:3–13.

3. The Talley Theory.

McKoy asks the court to reexamine the theory that the shooting occurred at Grove View Terrace. In 1995, Talley and others faced charges relating to a multi-year drug distribution ring carried out by the "Court Boys," a gang centered in the Grove View Terrace apartment complex in Fayetteville.

At Talley's trial, multiple Court Boys members testified to witnessing or hearing about Talley shooting and killing someone in a drug deal gone bad. Ronald Perkins said he saw Talley shoot at a car in Grove View Terrace. Talley Trial Tr. 133:24–134:21. The car drove away slowly and the next day, Perkins saw the car "over the bridge embankment down there in the grassy part" near Murchison Road. *Id.* 134:22–135:12. Another witness, Kelly Debnam, testified about an incident where a car came into the project to make a sale and Talley fired at the car as it drove away. *Id.* 224:5–25. Debnam recalled he, Talley, and others were standing on the corner when the car came in. *Id.* But "something went bad, and the car pulled away, and Mr. Talley fired at it." *Id.* Debnam said that the car then slowed down "like it had been hit," the brake lights came on and "they wobbled on out . . . like they was drunk." *Id.* 225:1–6. Debnam recalled seeing the car the next day down an embankment near Murchison Road. *Id.* 225:7–13.

Investigators interviewed other Court Boys who recalled the incident raised at Talley's trial. Craig Everett Roberts told investigators that he remembered "the murder for which a black male subject from Haymount Hills had been convicted and sentenced to life in prison" and that he "had been wrongfully convicted." SBI Interview of Craig Everett Roberts at 1, Pet'r Ex. 40, D.E. 92–16. Roberts was with Talley in Grove View Terrace the night of the murder and saw Talley

"shooting at a car that was traveling away from him on Lamon Street towards B Street." *Id.* Roberts could not recall the color of the car. *Id.* He saw Talley fire six shots and heard a scream from the driver "that made Roberts think the driver had been shot." *Id.* The car stopped and lurched forward before traveling slowly out of sight. *Id.* Another person present said to Talley, "Boy you hit him, I don't care what you say, you hit him." *Id.* at 2. Talley replied, "Shut up . . . I know . . . shouldn't have took my shit." *Id.* The next day, two other Court Boys told Roberts that they "had seen the car that William Corrie Talley had shot at driven off of the side of the road near Vick's Drive-In[.]" *Id.* Roberts "believed that Talley's gunfire had killed the driver." *Id.* at 1.

In a July 2007 affidavit, Bernard McIntyre swore to an incident in January 1990 where Hailey came to Grove View Terrace to buy drugs from Talley. Aff. of Bernard McIntyre, Pet'r Ex. 36, D.E. 92–16. McIntyre said Hailey regularly came to buy drugs from Talley and drove a light blue Honda Accord. *Id.* On that day, when Talley offered to make him a sale, "Hailey snatched the drugs and drove off without paying." *Id.* Talley then "pulled out a gun and sh[ot] Mr. Hailey's car," firing several times. *Id.* McIntyre later learned "that a man had been shot and killed in a light blue Honda Accord the night [he] saw William Talley shoot at the blue Honda Accord" and "believe[d] that to be the same shooting." *Id.*

These witnesses said Talley regularly used a .357 magnum revolver—the type of gun used to shoot Hailey. *See, e.g.*, FPD Interview of James Rodney Smith at 6, 8, Pet'r Ex. 31, D.E. 92–8 (Smith told investigators that Talley "always carried a gun, usually a 9mm handgun or a .357 caliber revolver," and that he had been in a car with Talley and saw Talley's .357 revolver.). No evidence was presented at McKoy's trial that McKoy used or owned that type of gun.

None of the witnesses at Talley's trial mentioned McKoy by name or identified the date of the Talley shooting. MAR Hr'g Tr. 14:19–21, 31:9–18 (testimony of Alexis Pearce). The witnesses

were only able to place the shooting at Grove View Terrace and said the car of the shooting victim was found down an embankment. *Id.* 31:19–32:4. Private investigator Jimmy Henley testified at the MAR hearing that the two things that tied the Talley shooting to the Hailey murder were "that in the Lamont McKoy trial and in the statements made by the government witnesses, in each case, it was indicated that a revolver was used, and also in both cases, the final resting place of the car was identical." *Id.* 64:13–17.

SBI Agent Fox worked as part of the joint task force investigation into the Court Boys. FEH Day 1 Tr. 18:18–19:10. He interviewed Ronald Perkins, Anthony Perkins, and Craig Roberts. SBI Interview of Ronald Perkins & Anthony Perkins, Pet'r Ex. 38, D.E. 92–18; SBI Interview of Craig Everett Roberts.

Ronald Perkins told Agent Fox that he was present during a shooting incident involving Talley but "did not recall the exact night or even year." SBI Interview of Ronald Perkins & Anthony Perkins at 1. He heard a car accelerate and when he looked up, he saw Talley fire five to seven shots from a large handgun at the car. *Id.* He saw the car's brake lights come on and the car slowed down before turning onto B Street. *Id.* He did not remember the driver making any noise and only remembered one person in the car. *Id.* at 2. The next day, Perkins remembered seeing "the victim's car off of Rowan Street, opposite Vick's Drive-In, facing toward Murchison Road." *Id.* He found out later that the driver of the car had been killed and someone from Haymount Hill had been arrested for the murder. *Id.* He said that "it was common knowledge among the people who lived on Haymount Hill that William Corrie Talley had shot at the vehicle the same night that the victim was killed." *Id.*

Anthony Perkins confirmed that he was also in Grove View Terrace the night of the shooting and "recalled the events as reported" by Ronald, but did not add any additional information. *Id.*

Agent Fox testified at Talley's sentencing hearing that at that time their evidence "only indicated that [Talley] had fired into Grove View Terrace" and he "didn't have information" on "the murder on Haymount Hill." FEH Day 1 Tr. 44:5–10; Talley Sentencing Hr'g Tr. 3:7–5:10, Pet'r Ex. 44, D.E. 92–24. None of the statements Fox gathered said that "Rat-Rat specifically shot Myron Hailey." FEH Day 1 Tr. 46:17–19. He did not know about the tips in the FPD's Hailey investigative file suggesting that Rat-Rat may have been involved but said he would have found that information important. *Id.* 25:16–22. But Fox did inform his superiors that the investigation revealed Talley was "involved in the murder of Myron Craig Hailey." Fox Memo to SBI Special Agent McKinney.

Detective Ballard, the lead investigator in the Hailey murder case, never spoke to Kelly Debnam, Craig Roberts, or Scott Fox. FEH Day 3 Tr. 81:25–82:8. Ballard said that nothing during the investigation led him to Grove View Terrace, *id.* 117:10–13, and nothing besides the two tips received by FPD mentioned Rat-Rat as a potential shooter, *id.* 115:22, 24–25; 118:18–20.

4. Witness Testimony.

Two individuals originally charged as McKoy's accomplices submitted affidavits and testified at the evidentiary hearing.

After the FPD arrested McKoy, they also arrested Charmaine Evans and charged him as an accessory after the fact to Hailey's murder. He was 16 years old. FEH Day 1 Tr. 73:8–17. Officer Parker and Detective Ballard handcuffed Evans to a chair and questioned him. When he told them

that he didn't know anything, they told him "[Y]es, you do" and that McKoy "already admitted that [they] was all together." *Id.* 74:15–19, 76:3.

Evans signed a statement that said he saw McKoy shoot at a car and heard him say, before shooting, "He beat me. He beat me." Statement of Charmaine Evans taken by FPD at 2 (Mar. 20, 1990), Pet'r Ex. 20, D.E. 91–6. But Evans quickly recanted. He told investigators on March 23 that he made a false statement to FPD. John Britt Interview of Charmaine Evans, Pet'r Ex. 12, D.E. 90–12. Evans also told the district attorney before McKoy's trial that he would not testify because McKoy did not shoot Hailey. FEH Day 1 Tr. 85:3–7, 86:16–18. Detective Ballard said he was unaware that Evans had told the D.A. that he had provided a false statement. FEH Day 3 Tr. 107:21–108:1. Despite receiving subpoena papers from the D.A. personally, Evans was in jail on a probation violation during McKoy's trial and did not testify. FEH Day 1 Tr. 85:7–8, 86:10–13.

Evans wrote two letters to McKoy's attorney stating that he had lied in his statement. Letter from Evans to Graham Gurnee (2002), Pet'r Ex. 21, D.E. 91–7; Letter from Evans to Graham Gurnee (2004), Pet'r Ex. 22, D.E. 91–8. He testified at the evidentiary hearing that he lied because he was afraid of being put in jail for the rest of his life. FEH Day 1 Tr. 74:24, 77:25, 78:7–8. He was not with McKoy on January 25 and does not know what McKoy was doing. *Id.* 81:25–82:3.

The FPD also arrested Anthony Richardson after Hailey's murder.[14] Officer Parker and Detective Ballard similarly handcuffed Richardson to a chair and questioned him, telling him that "[he] did it . . . [so he] might as well go ahead and confess." *Id.* 102:17–20, 23, 103:1–2. Richardson did not give a statement and officers released him; the State eventually dropped the charges against him. *Id.* 103:15–16, 104:3–6.

[14] Williams and FPD erroneously identified Richardson as Anthony Lee Everette. *See* FEH Day 1 Tr. 101:7–102:10.

Detective Ballard identified three other individuals who placed McKoy in the Bryan and Branson Street area the night of January 25: Charles Williams, Kimmie Johnson, and Stephen Womack. FEH Day 3 Tr. 73:22–75:8; Ballard Felony Investigative Report at 2, Pet'r Ex. 11, D.E. 90-11.

Charles Williams was coming home from the store between 11 p.m. and midnight on January 25 when he saw McKoy, Anthony Lee Everette, and another black male standing at the corner of Bryan and Branson Streets. Ballard Investigative Report at 3. About 30 minutes later he heard a gunshot and when he looked out the window, he saw McKoy, Everette, and the other male "running up Bryant St. chasing a car." *Id.* at 2, (2)(C). He then heard two more shots. *Id.*

Kimmie Johnson told Detective Ballard that around midnight on January 25, he saw a man pull up in in a car on Bryan Street. *Id.* at 2, 2(D). Another man sold him drugs, but when the victim walked back to his car he realized that the drugs were fake and told the seller that "he would have to do better than this and leaned up agains[t] his vehicle." *Id.* Then a friend of the victim came up and the two confronted the seller about the drugs. *Id.* After the seller handed over the real drugs, the friend walked away and the victim got back in his car. *Id.* As the victim started to drive off, the seller shot at the car two times. *Id.* Then the seller and three other men "ran thru the path and to the corner of Arsenal and Davis St. and when the victim turned left onto Davis, [the seller] shot once more." *Id.*

None of these witnesses testified at McKoy's trial.

There is conflicting testimony on whether Williams's fiancée saw what Williams's alleged happened on the path.

Willie Mae McCrowie told FPD that the night of January 25 she was walking up a path behind her house on Broadfoot Avenue, saw Williams at the corner of Bryan and Branson Street,

and then heard a gunshot. Statement of Willie Mae McCrowie taken by FPD (Feb. 22, 1990), Pet'r Ex. 16, D.E. 91–2. McCrowie then saw "a group of boys running between two houses on Bryan Street and [Williams] started running behind them." *Id.* at 1. McCrowie went back to her house and 15–20 minutes later, met Williams at the corner of Branson Street and Broadfoot Avenue. *Id.* Williams told her that "somebody got shot" and when she asked if he knew who it was, he said yes. *Id.* Neither Williams nor McCrowie went anywhere else the rest of the night. *Id.*

But in a 2004 affidavit, McCrowie said she was in her house when she heard gunshots "somewhere in the Haymont Hills neighborhood." Aff. of Willie Mae McCrowie at ¶4, Pet'r Ex. 6, D.E. 90–6. Williams came to the backdoor about 15 minutes later and told her that someone had been shot. *Id.* ¶5. When he came inside, McCrowie saw "a silver gun lying on the ground next to the doorstep." *Id.* ¶6. Ten minutes later, Williams left and McCrowie noticed the gun had disappeared. *Id.* ¶7. When Detective Ballard interviewed her, McCrowie told him that she "didn't see anything because [she] was at home at the time." *Id.* ¶8. She also told him about seeing Williams with the gun, but that detail did not appear in the statement Ballard had McCrowie sign, which McCrowie did not know. *Id.* ¶¶9–11.

McKoy's wife, Melissa Carette McKoy, testified at trial that she and Lamont were at the McNeils' house on Branson Street when they heard shooting and the power went out around 9 p.m. McKoy Trial Tr. 241:21–243:13. She and Lamont then "ran home," arriving around 9:30 p.m. *Id.* 243:18, 22–244:3. They both stayed home the rest of the night because the police were still up on the Hill. *Id.* 244:3–14. Evans was at the McNeils' house when the power went out but could not remember whether McKoy or his wife were there. FEH Day 1 Tr. 91:9–11, 18–21. He later testified that he did not see McKoy at all. *Id.* 92:8, 22.

The discovery of the Crimestoppers tips led to additional potential eyewitnesses. [redacted] [16] She could not testify to the date or day of the week that this shooting occurred. *See* FEH Day 1 Tr. 59:11–13, 64:23–24. She said she would sit on her porch every night and one night she saw a car drive into the neighborhood, there was shooting, and then the car left. *Id.* 57:20–25. She said she did not know who shot the gun, *id.* 61:10–11, but that McKoy was not in the group of shooters because she knew "every one of them" that hung out in Grove View Terrace, *id.* 61:5–9, 21–62:2. Butler testified repeatedly at the evidentiary hearing that the car she saw getting shot at that night was "white" or "yellowish-white" and she was certain of the color. *Id.* 58:10–17.

[redacted]

[15] The January 27 tip stated that the caller's name was Little Irvin. Crimestoppers Report (Jan. 27, 1990) at 1.

[16] At the evidentiary hearing, McKoy's counsel asked to seal the courtroom for Butler's protection. Because Butler had no stated fear of witness retaliation, the court declined to do so and thus now identifies Butler by name despite her sealed declaration.

[redacted]

5. Expert Testimony.

The State presented Sergeant Anthony Barnes of the North Carolina Highway Patrol's Collision and Reconstruction Unit to the court as an expert in collision reconstruction. FEH Day 3 Tr. 5:21–22, 7:24–8:6. Sergeant Brian Palmiter had contacted Barnes to review Hailey's accident and help the State in its reconstruction efforts. *Id.* 8:12–19.[17]

Barnes believes Hailey's car was traveling eastbound at the time of the accident. He concluded Hailey's car "was traveling in an eastbound fashion on Rowan Street as it traveled off the roadway, striking a tree located on the . . . northbound road side of Rowan Street" and that the car "was either making a right-hand turn [on Rowan Street] or drifting across from Bragg Boulevard onto Rowan Street in an eastbound motion." *Id.* 19:6–9, 12–14. He cited several factors, including photos that showed the vehicle at final rest on the eastbound side of the road, *id.* 14:2–4; a lack of photographs of the eastbound side of the tree, which would lead Barnes to conclude that there was no evidence in that area, *id.* 36:11–21; a curb strike at the accident scene that he said shows that Hailey's vehicle was traveling "in an eastbound manner on Rowan Street," *id.* 13:11–12; and damage to the westbound sides of the trees at the scene, which would only happen if Hailey was traveling east, *id.* 16:9–11, 18–21 ("If the vehicle strikes the tree on the westbound side of the tree, it would have to be traveling in an eastbound manner at that time of the collision."). He told the court that where a collision occurs and the passenger side of a vehicle is struck, "the vehicle

[17] The State offered several reports, including the initial on-scene accident report dated January 26, 1990, completed by FPD Officer T.P. Riley, Resp't Ex. 4; Palmiter's report, which Barnes adopted as his own, FEH Day 3 Tr. 24:7-8; Resp't Ex. 3; and Barnes's report, Resp't Ex. 2; FEH Day 3 Tr. 9:2-8.

normally rotates in a clockwise position, kinda around the tree, and that's common to see it coming to rest at this point in time after striking the tree on that westbound side." *Id.* 17:13–17.

Barnes "[didn't] see any way [the vehicle] could be traveling west on Rowan [Street]" because it would have had to avoid a utility pole and sign located at the curb, strike the tree, and make a complete 180-degree rotation to its final rest position. *Id.* 21:2–11. He said the lack of dirt and debris in the photographs did not suggest that the car would have made that 180-degree movement if Hailey had been traveling west. *Id.* 23:4–7.

But Barnes also conceded that "[t]here's no definite evidence that shows" that the curb mark "in fact c[a]me from [Hailey's] vehicle." *Id.* 27:19–20. His conclusion was "based mostly on the striking of the tree and the final resting position of the vehicle, and not so much the curb strike." *Id.* 28:13–15. He similarly said that tire tracks found at the scene were not significant to his analysis and admitted that they could have come from a car other than Hailey's. *Id.* 14:5–8, 28:3–6. He believed that "[t]he important information outside of curb strike is the damages to the tree itself and the manner in which the vehicle came to rest and the manner of the damages to the front passenger's side of the vehicle rotating it around with all the damages located on the westbound side." *Id.* 47:12–17.

McKoy presented William Kluge, Jr., a forensic engineer, to the court as an expert in forensic accident reconstruction. *Id.* 133:8; 137:7–9. Kluge believes that there is not enough information in the Hailey murder investigation record for him to do an independent reconstruction of the accident, *id.* 137:17–19, 168:5–10, or conclude which direction Hailey's car was traveling, *id.* 175:4–8.

Kluge testified that all the photographs really show is that Hailey's vehicle "hit the side of the tree that's towards the street." *Id.* 139:8–10; *see also id.* 152:9–11 ("It's very hard to discern

on these three photographs, but these are the only photographs that we have."). He said the fact that Hailey's vehicle had come to rest about six feet back from the tree was "not something I normally see when someone hits a tree straight on." *Id.* 139:24–140:5. He told the court that "[t]here really wasn't enough photographs or measurements taken of just that aspect of the collision to do a good analysis with respect to speed and vehicle orientation." *Id.* 140:21–23.

Kluge also explained that neither of the tire track tread patterns in the roadway near Hailey's crash site matched the tires on Hailey's 1986 Honda Accord. *Id.* 145:19–22. Kluge believes Riley's report drawing conclusions about the accident "[do not] explain the damage from the center to the left headlight" on Hailey's vehicle. *Id.* 153:24–25. While he expressed difficulty pinpointing the exact nature of the crash from the crash scene photos, Kluge testified that if the vehicle had been traveling from the west and hit the tree, "it could reasonably come to rest in the exact position that's shown . . . at approximately six feet from the tree." *Id.* 163:6–14. He also agreed that the fact that there was no damage directly west of the tree would fit with the vehicle having originally been traveling in a westbound direction. *Id.* 163:17–20.

6. Officer Parker's Involvement.

FPD Officer Robert Parker worked on the Hailey murder investigation with Detective Ballard in 1990. At or around the same time, he was living undercover in Grove View Terrace and having an extramarital affair with a woman there. This woman, Cathy Carter Howard, testified at the evidentiary hearing that she lived near Grove View Terrace during January 1990 and had a son with him. FEH Day 1 Tr. 68:5–11, 18–21, 69:3–4, 7–9.

Officer Parker allegedly had a reputation on the street for roughing up people. Both Evans and Richardson recalled Parker regularly harassing and shaking people down. *Id.* 76:9–10, 24–77:19, 106:16–107:7. Carter testified that Parker had once warned her "about a bust that was going

to go through the neighborhood" and told her to "tell the boys in Grove View that the bust was coming." *Id.* 71:15–17, 20–22.

Two years after Hailey's murder, Officer Parker was arrested for accepting money from a defendant in exchange for getting charges dismissed. *State* v. *Parker*, Nos. 92 CRS 49643 et seq., Tr. of Guilty Plea Proceedings at 17–18 (Apr. 3, 1995), Pet'r Ex. 4, D.E. 90–4. It was alleged that he had been shielding gang suspects from investigation and prosecution. In 1995, Parker pleaded guilty to obtaining property by false pretenses. *Id.* at 15. McKoy argues that Officer Parker's personal activities created motive to steer the Hailey investigation away from Talley and Grove View Terrace.

Detective Ballard, who worked with Officer Parker in the Hailey investigation, testified at the evidentiary hearing that he was unaware that Officer Parker lived at Grove View Terrace and had a child with a woman there or fed information about impending searches or investigations in Grove View Terrace. FEH Day 3 Tr. 79:16–80:24. He admitted that he would consider this behavior "corrupt." *Id.* 80:25–81:1. But he also said that while Officer Parker was involved in the Hailey investigation, Ballard was the lead investigator in the case. *Id.* 54:9–10.

7. Williams's Credibility and Inconsistent Statements.

McKoy alleges that Williams provided false and inconsistent testimony to the FPD and at McKoy's trial. Some of these inconsistencies include:

a) Where Hailey was standing.

In his initial statement to police, Williams said he first saw Hailey standing by his car at the corner of Bryan and Branson Streets. Williams Feb. 1990 Statement at 1. At trial, Williams testified that he first saw Hailey walking on Branson Street between Highland Avenue and Branson

Street. McKoy Trial Tr. 45:21–46:6. On cross, Williams testified that Hailey "wasn't standing on no corner" or "standing on no street" but that "[h]e was walking." *Id.* 66:6–15.

b) Where Hailey's car was.

Williams first told police that he saw Hailey's car when he saw Hailey standing at the corner of Bryan and Branson Streets. Williams Feb. 1990 Statement at 1. At trial, Williams testified on cross that he did not see Hailey's car when he first saw Hailey but that he first saw the car after encountering McKoy and going behind the house to oversee the drug deal. McKoy Trial Tr. 70:25–26, 77:17–23. Then on redirect, Williams claimed to have first seen Hailey's car on Bryan Street. *Id.* 119:21–24.

c) What Hailey was wearing.

Williams testified at trial that Hailey was wearing a grey, polyester short-sleeved shirt and blue jeans the night of January 25. McKoy Trial Tr. 66:16–26. But when FPD found Hailey, he was wearing a long-sleeved white sweatshirt. *Id.* 188:17–22; FPD Running Incident Report at Narrative 14.

d) That Williams and Hailey went to the arcade.

In his initial statement to FPD and at trial, Williams said that after meeting Hailey they both went down to the arcade on Branson Street looking for the person who sold Hailey the bad drugs. They went inside, where they saw people playing pool and games, but Hailey didn't see anyone he recognized. Williams Feb. 1990 Statement at 2; McKoy Trial Tr. 47:19–24; 69:19–70:13. But Williams also testified at trial that he first saw Hailey after the power went out. McKoy Trial Tr. 266:9–11. Judy Meshaw from the Fayetteville Public Works Commission testified at trial that the power the city did not restore power at Haymount Hill on January 25 until between 11:15 and 11:30 p.m. *Id.* 269:7–16. And on January 26, Mary Ann Quinn, the owner of the arcade, told

FPD that she closed the arcade early—at 9:30 p.m.—on January 25 because of the power outage, which happened around 9:30 p.m. FPD Running Incident Report at Narrative 16. McKoy argues that if Williams met up with Hailey after the power came back on, the arcade would have been closed and they could not have gone inside. He also emphasizes how often Williams mentions the arcade—over 30 times—in his testimony, yet the fact that the arcade closed early was not mentioned at McKoy's trial. *See* FEH Day 3 Tr. 89:14–90:5, 18 (Detective Ballard did not tell the jury at McKoy's trial that Quinn told him the arcade closed at 9:30 p.m. that night).

e) That the first shots were fired at the intersection of Bryan and Branson Streets.

Williams testified at trial that the drug deal happened behind a house on Bryan Street and then when he left and was walking home, he heard the first shot coming from Bryan Street. McKoy Trial Tr. 49:10–22, 50:26–51:7. But the FPD SRU responded to a call of shots fired related to the power outag at the corner of Bryan and Branson Streets on January 25 and arrived on scene at 9:49 p.m. The unit stayed on scene until at least 12:41 a.m., when the call was reported cleared to dispatch, though it is likely the unit would have stayed at least until the end of its shift, which was 1 a.m. The unit did not report hearing any shots fired at the corner of Bryan and Branson Streets that night. *See* Mobley Aff. ¶8; FPD Incident Card No. 8340; FEH Day 2 Tr. 21:22–22:3 (testimony of Sgt. Campbell).

f) How long it took to get from Bryan and Branson Streets to the intersection of Arsenal Avenue and Davis Street.

Williams testified that about five minutes passed after the first shot before he saw McKoy and others running through a path connecting Bryan and Branson Streets to Davis Street. McKoy Trial Tr. 86:9–25. During those five minutes he "walked fast like." *Id.* 86:14. After the first shot was fired, Williams said Hailey drove up Bryan Street and arrived at the corner of Davis Street

and Arsenal Avenue at the same time as McKoy, who ran through the path. *Id.* 51:3–52:15, 86:22–92:12; Williams Feb. 1990 Statement at 3–4. According to McKoy's expert Phil Locke, driving the road distance from the corner of Bryan and Branson to Arsenal and Davis at 35 mph[18] would have taken 17 seconds. Graphical Analysis of Williams's Description of Events, Pet'r Ex. 18, D.E. 91–4. Running the path in 17 seconds would require a foot speed of 31.4 mph, a sprinting speed never humanly achieved. Karen Aspelin, Establishing Pedestrian Walking Speeds, Institute of Transportation Engineers (May 31, 2009), Pet'r Ex. 19, D.E. 91–5.

g) Hailey's direction of travel after the shooting.

Sergeant Campbell believes Williams's testimony is improbable because one couldn't know which direction Hailey's car would turn on Arsenal Avenue. Mobley Aff. ¶8(f); FEH Day 2 Tr. 26:9–13 (testimony of Sgt. Campbell). The State maintains that Hailey was shot in the Haymount Hill area and was traveling east when he crashed into the embankment near Rowan Street and Bragg Boulevard. McKoy argues that Hailey was shot in Grove View Terrace and was traveling west when his car veered off the road. McKoy says that if Hailey was traveling east, he would have gone right by a hospital,[19] which is unlikely given he was bleeding from a gunshot wound. But Detective Ballard said that someone who was not from Fayetteville—such as Hailey—would likely not have noticed the hospital. FEH Day 3 Tr. 124:24–125:4. Williams first stated that he did not know which way Hailey's car went after seeing McKoy fire at Hailey's car, Williams Feb. 1990 Statement at 4, but repeatedly testified at trial that he saw Hailey's car turn to the right from Davis Street onto Hay Street, which would mean it was headed east when it crashed.

[18] There is no evidence in the record to establish that Hailey was, in fact, driving at 35 mph after the shooting.
[19] The Highsmith Rainey Specialty Hospital is near the Haymount Hill area of Fayetteville. FEH Day 3 Tr. 85:8-19.

h) Who else was on the path.

In his initial statement, Williams said McKoy was on the path with "Anthony Lee Thompson, Cat, and Charmain." Williams Feb. 1990 Statement at 4. Williams testified at trial that "Saybo, Cat, and Charles Williams" were running through the path. McKoy Trial Tr. 51:13. On cross, he testified that "Saybo and Lamont McKoy, Charmain, and Cat, and Ant Lee" were on the path. *Id.* 86:22–87:1. The names of the individuals whom Williams placed on the path are Anthony Richardson (arrested as Anthony Lee Everette), James Mitchell (also known as Cat), and Charmaine Evans. Charles Williams is the name of an individual who gave Detective Ballard a witness statement. Saybo was McKoy's street name, so Saybo and McKoy refer to the same person.

i) Whether McCrowie was present.

Williams first told FPD that his fiancée Willie Mae McCrowie met him "in the path and [they] started walking fast down Branson Street[.]" Williams Feb. 1990 Statement at 3. Williams amended this statement in March and told FPD that McCrowie was not on the path with him. Williams Mar. 1990 Statement. Williams told Detective Ballard that he had told him that McCrowie was on the path because "he was using his wife as a reference point because he thought [Ballard] was confused about which direction they were coming [from]," FEH Day 3 Tr. 120:4–6, but that McCrowie had told him that she wasn't with him, *id.* 119:24. *See also* McKoy Trial Tr. 152:1–9. Williams testified at trial that he met McCrowie on Broadfoot Avenue. McKoy Trial Tr. 57:10–12.[20]

[20] Ballard testified at trial that Williams told him that he met his fiancée "walking on a pathway between Bryan and Highland." McKoy Trial Tr. 166:2-3.

j) Whether Williams saw a bullet hole in Hailey's car.

In his initial statement, Williams claimed he could see a bullet hole in the trunk of Hailey's car caused by the second shot fired at the corner of Arsenal Avenue and Davis Street. Williams Feb. 1990 Statement at 4. But on cross-examination at trial, Williams testified that he only saw a spark and did not see a hole. McKoy Trial Tr. 97:24–98:6. McKoy's attorney raised this discrepancy before the jury. *Id.* 106:12–18.

k) The identity of Hailey's female passenger.

Williams first told FPD that the passenger he saw in Hailey's car had reddish-brown hair and he had seen her before in Dunn, North Carolina. Williams Feb. 1990 Statement at 4. Detective Ballard testified at McKoy's trial that Williams had at first identified Linda Kemp as the passenger in Hailey's car, but when he learned that she didn't have red hair, he later identified Diane Monk as the passenger after seeing her in person at the law enforcement center. McKoy Trial Tr. 150:3–22, 151:1–7, 142:8–23.

l) The temperature the night of January 25, 1990.

Williams testified at trial that the weather was clear and "milk warm" on January 25. McKoy Trial Tr. 96:16–26. There was also testimony that it had rained hard that night, causing Hailey's car to become bogged down in the wet sand when it was towed away. *Id.* 189:9–16, 190:6–7, 243:21.

Williams took two polygraph tests before trial about his testimony. FPD Running Incident Report at Narratives 85–86; McKoy Trial Tr. 114:24–26. The first polygraph created two responses indicating no deception and a third inconclusive, and the second polygraph led to "a strong +5 score for truthfulness." Mem. in Supp. of Resp't Mot. for Summ. J. at 8, D.E. 87. Mark Handler, a licensed polygraph examiner, reviewed Williams's second polygraph results and

concluded that under the scoring system used, the threshold for no deception is a +6, so a total score of +5 would be "inconclusive and not a strong score for truthfulness." Decl. of Mark Handler ¶5, Pet'r Ex. 35, D.E. 92–15.

Williams died in 2000. Mem. in Supp. of Pet'r Mot. for Summ. J. at 13.[21] Four years later, Williams's fiancée submitted an affidavit that stated sometime after McKoy's conviction, Williams had told her he did not see McKoy shoot Hailey. McCrowie Aff. ¶15. Williams allegedly told McCrowie that he was "going to get some money from the police department for 'snitching' on Sayboo." *Id.* ¶20. He told McCrowie that "they promised him $1,000, but he only got $500" and he needed the money to go see his family in Georgia. *Id.*

8. FPD Homicide Files.

The FPD confirmed that between May 1988 and February 1991, Hailey was the only individual who was found shot to death in a car in that area of Rowan Street near Bragg Boulevard in Fayetteville. Email from FPD Lt. Christopher Davis to Jarvis John Edgerton (Aug. 2, 2010), Pet'r Ex. 41, D.E. 92–21. McKoy's attorneys confirmed that the FPD had no reports of another male shooting victim in a car in Fayetteville in a nine-year period from 1986 to 1995. *See* FPD Homicide Case Spreadsheet, Pet'r Ex. 42, D.E. 92–22.

II. Analysis

A. Summary Judgment Standard.

Summary judgment is appropriate when review of the pleadings, affidavits, and other proper discovery materials before the court shows that "there is no genuine dispute as to any material fact," thus entitling the moving party to judgment as a matter of law. Fed. R. Civ. P. 56(a). "In ruling on a motion for summary judgment, the court will believe the nonmoving party's

[21] The State asserts that Williams died in 1999. Mem. in Supp. of Resp't Mot. for Summ. J. at 14. This fact is not independently supported in the record. But the exact date Williams died is not material to resolving this matter.

evidence and draw all justifiable inferences in that party's favor." *News & Observer Publ'g Co.* v. *Raleigh-Durham Airport Auth.*, 597 F.3d 570, 576 (4th Cir. 2010) (quoting *Hunt* v. *Cromartie*, 526 U.S. 541, 552 (1999)); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The movant carries the initial burden of showing that no genuine issue of material fact exists. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 324 (1986). A fact is "material" if proof of its existence or non-existence might affect the outcome of the litigation. *Anderson*, 477 U.S. at 248. And a factual dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* Once the moving party has met its burden, the nonmoving party then must affirmatively demonstrate that there is a genuine issue of material fact requiring trial. *Matsushita Elec. Indus. Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party fails to introduce evidence contradicting a fact supported by the movant's evidence, the court may treat the fact as undisputed for summary judgment purposes. Fed. R. Civ. P. 56(e)(2).

This matter involves cross-motions for summary judgment. In that circumstance, the court "examines each motion separately, employing the familiar standard under Rule 56 of the Federal Rules of Civil Procedure." *Desmond* v. *PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011).

The undersigned has determined that there are no genuine issues of material fact present, so the analysis turns to whether either party is entitled to a judgment as a matter of law.

B. Overview of Standard for a § 2254 Petition.

To have standing to bring a federal habeas petition, a petitioner must be "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a). McKoy is no longer incarcerated, but he is on parole.[22] But a parolee may still be considered "in custody"

[22] McKoy's parole is set to expire on December 9, 2022. *See* North Carolina Department of Public Safety Offender Public Information, available at:

under § 2254(a). *See Jones* v. *Cunningham*, 371 U.S. 236, 240 (1963) (declining to take a literal view of "in custody," noting that "besides physical imprisonment, there are other restraints on a man's liberty . . . not shared by the public generally, which have been thought sufficient . . . to support the issuance of habeas corpus" and holding that persons released from incarceration on parole are "in custody" under 28 U.S.C. § 2241); *Brooks* v. *N.C. Dep't of Corrs.*, 984 F. Supp. 940, 946 (E.D.N.C. 1997) ("Like parolees, probationers are also subject to restraints not shared by the public generally, and should therefore be considered "in custody" for habeas corpus purposes.") (internal quotation and citation omitted). Thus McKoy's parolee status does not preclude him from bringing a federal habeas petition.

Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), the court may not issue a writ of habeas corpus for claims adjudicated on the merits in state court unless the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," 28 U.S.C. § 2254(d)(2).

A state court decision is "contrary to" Supreme Court precedent if it arrives "at a conclusion opposite to that reached by [the United States Supreme] Court on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite" to the United States Supreme Court. *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000) (O'Connor, J., concurring).

A state court decision "involves an unreasonable application" of Supreme Court case law "if the state court identifies the correct governing legal rule from [the United States Supreme]

https://webapps.doc.state.nc.us/opi/viewoffender.do?method=view&offenderID=0271987&searchLastName=mckoy&searchFirstName=lamont&listurl=pagelistoffendersearchresults&listpage=1.

Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Id.* at 407. "Unreasonable" does not mean simply incorrect or erroneous; the court must judge reasonableness by an objective standard. *Id.* at 409–11.

A federal court must consider a state court's factual findings to be presumptively correct unless rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Thus, "[t]o secure habeas relief, [a] petitioner must demonstrate that a state court's [factual] finding . . . was incorrect by clear and convincing evidence and that [it] was 'objectively unreasonable' in light of the record before the court." *Miller-El* v. *Cockrell*, 537 U.S. 322, 348 (2003) (internal citation omitted).

C. Procedural Bars to Pursuing Relief.

Before a federal court may review claims raised by a habeas petitioner, it must ensure there are no procedural bars to review. All petitioners are subject to a one-year statute of limitations, which runs from the latest of several dates, including the date the judgment in a case became final. 28 U.S.C. § 2244(d)(1). A petitioner cannot raise a second habeas petition alleging claims he already presented to the court. 28 U.S.C. § 2244(b)(1). Petitioners must also exhaust all available remedies in state court before bringing their claims to federal court. 28 U.S.C. § 2254(b). And federal courts must decline review when a state court has decided a petitioner's constitutional claims on their merits under an adequate and independent state procedural rule. *See Burket* v. *Angelone*, 208 F.3d 172, 183 (4th Cir. 2000).

If a petitioner satisfies none of these requirements, his claims are procedurally barred from federal review. But, in exceptional circumstances, such as a showing of cause and prejudice or the potential for a miscarriage of justice absent review, a court may excuse a petition's procedural shortcomings.

1. Statute of Limitations.

A one-year period of limitations applies to a petition for writ of habeas corpus by a person convicted by a state court. 28 U.S.C. § 2244(d)(1). This limitations period runs from the latest of, among other dates, "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. § 2244(d)(1)(A). This one-year period may be tolled for "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2).

The statute of limitations period is also tolled when a petitioner discovers new evidence. The one-year clock is tolled under § 2244(d)(1)(D) from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

McKoy's case became final on direct review in June 1992, when the Supreme Court of North Carolina denied his direct appeal. Petitioners involved in cases which became final on direct review before the April 24, 1996 enactment of the AEDPA had one year after that date to file a federal habeas petition. *See Brown* v. *Angelone*, 150 F.3d 370, 375–76 (4th Cir. 1998). Thus, McKoy had until April 24, 1997, to file his federal habeas petition.

McKoy filed his federal habeas petition in October 2016, almost twenty years after the deadline. McKoy's state post-conviction relief did not toll the statute of limitations period, since his first post-conviction motion was filed in April 1998, one year after the AEDPA deadline. McKoy does not argue that the period should be tolled based on discovery of new evidence. Thus, McKoy's federal habeas petition is untimely and his claims are procedurally barred by AEDPA's one-year statute of limitations.

2. Failure to Exhaust.

A federal district court may only hear an application for writ of habeas corpus when the petitioner has exhausted all remedies available in state court. 28 U.S.C. § 2254(b)(1)(A); *Rose* v. *Lundy*, 455 U.S. 509, 510 (1982); *Vinson* v. *True*, 436 F.3d 412, 417 (4th Cir. 2006). Exhaustion of remedies occurs when a petitioner presents a state court with the substance of his federal habeas petition. *Anderson* v. *Harless*, 459 U.S. 4, 6 (1982) (per curiam); *Picard* v. *Connor*, 404 U.S. 270, 275–78 (a federal habeas court may consider only those issues "fairly presented" to the state courts); *Lenz* v. *Washington*, 444 F.3d 295, 302 (4th Cir. 2006) (courts should not "allow any semantic confusion to bar all federal review of petitioner's constitutional claims"). "The exhaustion requirement is not satisfied if the petitioner presents new legal theories or factual claims for the first time in his federal habeas petition." *Breard* v. *Pruett*, 134 F.3d 615, 619 (4th Cir. 1998) (citing *Matthews* v. *Evatt*, 105 F.3d 907, 911 (4th Cir. 1997), *abrogated on other grounds by United States* v. *Barnette*, 644 F.3d 192 (4th Cir. 2011)); *see also Skipper* v. *French*, 130 F.3d 603, 610 (4th Cir. 1997) (noting the general rule that theories presented for the first time on appeal will not be considered).

Exhaustion is not a jurisdictional requirement. *Granberry* v. *Greer*, 481 U.S. 129, 131 (1987) ("[T]he failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application."). But "[i]n the regular and ordinary course of procedure," a petitioner should exhaust the power of the highest state court regarding questions of constitutional rights. *U.S. ex rel. Kennedy* v. *Tyler*, 269 U.S. 13, 17 (1925). Thus, even where a petition contains both exhausted and unexhausted claims, the district court must dismiss the entire petition for failure to exhaust. *Rose*, 455 U.S. at 522.

But there are "unusual circumstances" where exhaustion is not required. *Id.* at 515. When a petitioner does not present his claims properly to the state's highest court, the exhaustion requirement is still met when the state waives exhaustion or when an adequate and independent state procedural rule "would bar consideration if the claim was later presented to the state court[.]" *Matthews*, at 105 F.3d at 911 (internal citation omitted). Additionally, a petitioner may present procedurally defaulted claims in federal court if he establishes "cause and prejudice" for failure to meet the exhaustion requirement or that his confinement constitutes a "miscarriage of justice." *Hash* v. *Johnson*, 845 F. Supp. 2d 711, 727 (W.D. Va. 2012) (citing *Wolfe* v. *Johnson*, 565 F.3d 140, 160 (4th Cir. 2009)). A showing of actual innocence qualifies as a miscarriage of justice. *House* v. *Bell*, 547 U.S. 518, 536–37 (2006).

The State claims that McKoy has not exhausted his state court remedies because McKoy's "right of appeal was to the North Carolina Supreme Court (NCSC) and the N.C. Rules of Appellate Procedure still require[d] him to file his post-conviction certiorari petition in the NCSC[,]" which he did not do. Mem. in Supp. of Resp't Mot. for Summ. J. at 16 (citing N.C. Gen. Stat. § 7A-27(a); N.C.R. App. P. 21(b)).

McKoy maintains that he exhausted his remedies when he appealed the Superior Court's denial of his second MAR to the North Carolina Court of Appeals. Pet'r Resp. to Resp't Mot. for Summ. J. at 2, D.E. 97. McKoy also argues he raised all constitutional claims in his petition to the North Carolina Superior Court in his second MAR. That court rejected these claims and the North Carolina Court of Appeals declined to grant cert. Mem. in Supp. of Pet'r Mot. for Summ. J. at 41.

McKoy has exhausted his *Giglio*/*Napue* and police presence *Brady* claims raised in his second MAR. Under North Carolina law, an appeal of right lies to the Court of Appeals "[f]rom any final judgment of a superior court." N.C. Gen. Stat. § 7A-27(b)(1) (2019). McKoy appealed

the state court's denial of his second MAR to the North Carolina Court of Appeals, which declined to grant cert. Decisions of the Court of Appeals on review of motions of appropriate relief are final and the North Carolina Supreme Court lacks jurisdiction to hear an appeal of the Court of Appeal's denial of cert. N.C. Gen. Stat. § 7A-28(a) (2010). Because McKoy sought review of his *Giglio/Napue* and police presence *Brady* claims the highest state court available, he exhausted those claims.

The State claims N.C. Gen. Stat. § 7A-27(a) applies, from which an appeal of right lies to the Supreme Court "in all cases in which the defendant is convicted of murder in the first degree and the judgment of the superior court includes a sentence of death." N.C. Gen. Stat. § 7A-27(a)(1) (2019). But McKoy did not receive a death sentence, so subsection (a)(1) would not apply to him. His appeal of right was to the Court of Appeals from a final judgment of a superior court under subsection (b)(1). N.C. Gen. Stat. § 7A-27(b)(1).

But McKoy did not raise his *Brady* claim relating to the Crimestoppers tips until his federal habeas petition. Because McKoy did not raise this claim in state court, it is unexhausted.

The State argues that "the record shows Petitioner received pre-trial open file discovery and the anonymous tip claim is therefore non-exhausted and now procedurally barred pursuant to section 15A-1419(a)(1) and (b), and therefore procedurally barred from federal habeas review." Mem. in Supp. of Resp't Mot. for Summ. J. at 30.

McKoy asserts that his actual innocence supersedes any procedural bars to review by this federal court. Mem. in Supp. of Pet'r Mot. for Summ. J. at 40–43. A finding of actual innocence can overcome a procedural bar to review. *See Murray* v. *Carrier*, 477 U.S. 478, 496 (1986) (the actual innocence exception excuses procedural default where "a constitutional violation has probably resulted in the conviction of one who is actually innocent"). "[I]f Petitioner is raising

actual innocence as a gateway through which to present the procedurally defaulted claim of trial court error, then the exhaustion requirement is inapplicable to that claim." *Smith* v. *Mirandy*, No. 2:14-cv-18928, 2015 WL 1395781, at *4 (S.D.W. Va. Mar. 25, 2015). Thus the court must find actual innocence to overcome the procedural bar of McKoy's unexhausted *Brady* claim.

3. Adequate and Independent State Procedural Grounds.

Additionally, "absent cause and prejudice or a miscarriage of justice, a federal habeas court may not review constitutional claims when a state court has declined to consider their merits on the basis of an adequate and independent state procedural rule." *Burket*, 208 F.3d at 183 (citing *Harris* v. *Reed*, 489 U.S. 255, 262 (1989)); *see also Wainwright* v. *Sykes*, 433 U.S. 72, 87–91 (1977).

Judge Ammons denied McKoy's second MAR "based on procedural bar," citing N.C. Gen. Stat. §§ 15A-1419(a)(3) and (a)(4). Order Den. Second MAR at 3. Section 15A-1419(a)(3) is "a statute [the Fourth Circuit] ha[s] repeatedly held to both adequate and independent." *Sharpe* v. *Bell*, 593 F.3d 372, 377 (4th Cir. 2010) (citing *Lawrence* v. *Branker*, 517 F.3d 700, 714 (4th Cir. 2008)); *see also Burket*, 208 F.3d at 183 (internal citations and quotations omitted) (noting "a rule is adequate if it is regularly or consistently applied by the state court, and is independent if it does not depend on a federal constitutional ruling"). "A federal habeas court 'does not have license to question a state court's finding of procedural default' or to question 'whether the state court properly applied its own law.'" *Sharpe*, 593 F.3d at 377 (quoting *Barnes* v. *Thompson*, 58 F.3d 971, 974 n.2 (4th Cir. 1995)). Because McKoy has not argued cause and prejudice, only a finding of actual innocence may overcome this procedural bar. *Id.*

4. Excusal of Procedural Bars Due to Actual Innocence.

a) Standard.

Because McKoy's claims are untimely and procedurally barred, he may obtain review from this court "only if he falls within the 'narrow class of cases . . . implicating a fundamental miscarriage of justice.'" *Schlup* v. *Delo*, 513 U.S. 298, 314–15 (1995) (quoting *McCleskey* v. *Zant*, 499 U.S. 467, 494 (1991)). When a petitioner presents evidence that "establish[es] sufficient doubt about his guilt to justify the conclusion that his execution would be the miscarriage of justice *unless* his conviction was the product of a fair trial," he asserts a claim of actual innocence.[23] *Schlup*, 513 U.S. at 316. The purpose of the actual innocence exception is "'to see that federal constitutional errors do not result in the incarceration of innocent persons.'" *McQuiggin* v. *Perkins*, 569 U.S. 383, 392 (2013) (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)).

The fundamental miscarriage of justice exception is "rare" and applied only in the "extraordinary case." *Schlup*, 513 U.S. at 321; *see Bousley* v. *United States*, 523 U.S. 614, 623 (1998) (cognizable claims of actual innocence are extremely rare and must reflect "factual innocence, not mere legal insufficiency"). Proof of actual innocence bypasses any procedural bar and allows the court to review the petitioner's constitutional claims. *Schlup*, 513 U.S. at 327–28; *House*, 547 U.S. at 536–37; *McQuiggin*, 569 U.S. at 386 (applying "actual innocence" gateway to overcome the § 2241(d)(1) statute of limitations). But it operates only as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits"; the Supreme Court has not recognized "freestanding claims of actual innocence." *Herrera*, 506 U.S. at 404–05.

[23] The court assumes without deciding that *Schlup* actual innocence claims apply to non-capital cases.

Thus, if a petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Schlup*, 513 U.S. at 316.

The standard for proving actual innocence is stringent. The § 2254(d) default standard of review does not apply to a *Schlup* claim of actual innocence. *Sharpe*, 593 F.3d at 377. Instead, a petitioner must show that, because of new evidence, "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327; *see also Teleguz* v. *Pearson*, 689 F.3d 322, 329 (4th Cir. 2012) (the petitioner must show "that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice."). The new evidence must "raise[] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that the trial was untainted by constitutional error." *Schlup*, 513 U.S. at 317.

While this case is before the court on cross motions for summary judgment, "the Court is not required to test the new evidence by a standard appropriate for deciding a motion for summary judgment[.]" *Id.* at 332. The court bases its assessment of petitioner's innocence on a review of "all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, 547 U.S. at 538 (internal quotations omitted); *see also Royal* v. *Taylor*, 188 F.3d 239, 244 (4th Cir. 1999) (recognizing that, under *Schlup*, a court should evaluate a gateway innocence claim "in light of all available evidence, including that considered unavailable or excluded at trial and any evidence that became available only after trial"); *Teleguz* v. *Zook*, 806 F.3d 803, 808 (4th Cir. 2015) (quoting

Teleguz v. *Pearson*, 689 F.3d at 329) (court analyzing actual innocence gateway should consider whether the "totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt").

The court must give "due regard to any unreliability of" the evidence and "may have to make some credibility assessments." *Schlup*, 513 U.S. at 328, 330; *see also United States* v. *MacDonald*, 641 F.3d 596, 612–13 (4th Cir. 2011). "[T]he inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *House*, 547 U.S. at 538. "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact on reasonable jurors." *Id.*; *see also Schlup*, 513 U.S. at 330 (noting actual innocence is a "probabilistic inquiry," requiring the habeas court to "consider what reasonable triers of fact are likely to do").

b) Discussion.

McKoy claims that the evidence before the court satisfies the *Schlup* actual innocence standard. He points to four main categories of evidence to support his position. First, he argues that there are so many inconsistencies and inaccuracies in Williams's testimony that no reasonable juror could have believed him. Second, he maintains that because FPD officers were present in Haymount Hill until 12:41 a.m. and heard no gunshots, the murder could not have occurred between 11:00 p.m. and midnight on January 25th. Third, McKoy claims that there is substantial evidence pointing to Talley as Hailey's actual killer. And fourth, McKoy asserts that Officer Parker's conviction on charges related to corrupt activities at Grove View Terrace gave Parker an incentive to steer the investigation away from that location. After considering all of these issues, McKoy claims, no reasonable juror could have found him guilty of Hailey's murder beyond a reasonable doubt.

But despite all the information presented to this court, a key piece of evidence in support of McKoy's guilt remains uncontradicted and unrebutted. Nothing presented to this court has undermined Detective Ballard's testimony about the conversation he had with McKoy in his car where, it can be argued, McKoy admitted to shooting Hailey. Ballard's testimony on this point has remained consistent over the years and the undersigned found his testimony at the evidentiary hearing to be credible. *See* McKoy Trial Tr. 137:17–142:4 & 152:20–153:12; FEH Day 3 Tr. 65:17–67:19.

McKoy argues that the court should chalk this statement up to youthful braggadocio. The statement was not an admission of guilt, his attorneys claim, but a flippant and dismissive response by a teenager. And while that could be one interpretation of McKoy's actions, it is by no means the only reasonable one. Ballard testified that in his opinion, McKoy was not "smarting off" when he made the statement. McKoy Trial Tr. 153:9–10. What's more, Ballard's testimony that McKoy's demeanor changed when confronted with the caliber of the bullet that killed Hailey and the threat that his friends would implicate him in the crime, support the statement being understood as an expression of guilt.

McKoy's statements to Ballard prevent the court from finding that it is more likely than not that no reasonable juror could find him guilty of Hailey's murder. This is because, as the Supreme Court of North Carolina noted at the time of McKoy's direct appeal, "[i]f the jury believed such evidence that the defendant gave the repeated answers of 'I know it,' it reasonably could have found that the defendant had admitted shooting the victim as the victim drove away in his car." *State* v. *McKoy*, 331 N.C. 731, 734, 417 S.E.2d 244, 246 (1992). And without a compelling reason to disregard the statement, such as a claim of coercion, a credible recantation, or another person taking responsibility for the murder, an admission of guilt precludes McKoy

from establishing his actual innocence. *See, e.g.*, *Figgs* v. *North Carolina*, No. 5:16-HC-2018-FL, 2017 WL 481426, at *4 (E.D.N.C. Feb. 6, 2017) (where petitioner was convicted by a jury of statutory rape and filed a § 2254 petition alleging actual innocence, the court discredited petitioner's personal affidavit alleging his confession was coerced and held that "[i]n light of the evidence of petitioner's guilt, including his own admission that he had vaginal intercourse with the victim, petitioner has not made a showing sufficient to establish a *McQuiggin* gateway claim"); *cf. Whitley* v. *Bair*, 802 F.2d 1487, 1504 (4th Cir. 1986) ("Given the extensive record below establishing Whitley's guilt, including, among other things, Whitley's own admissions, we do not believe that refusal to consider Whitley's defaulted claims on their merits carries with it the risk of a manifest miscarriage of justice.").

Further, as discussed below, the evidence McKoy presented in support of his claim of actual innocence would not require a reasonable juror to disregard his statements to Ballard and find him not guilty.

(1) Williams's Credibility and Inconsistent Statements.

McKoy claims that the inaccuracies in Williams's testimony make it impossible for a reasonable juror to find him credible, thus preventing the jury from finding McKoy guilty. But McKoy's statements to Ballard are independent of Williams's testimony. Thus, any supposed recantation by Williams or inconsistencies present in the trial testimony or afterwards do not affect the persuasive weight of McKoy's statements.

If anything, McKoy's statement bolster's the central premise of Williams's testimony: that McKoy shot twice at Hailey's car as Hailey drove away from the Haymount Hills area because McKoy was angry that Hailey had figured out that McKoy was selling fake cocaine. A reasonable juror could disregard the portions of Williams's testimony that are contradicted or unsupported by

the evidence while still accepting the portions of Williams's statement that McKoy appears to have confirmed. *See Hyman* v. *Brown*, 927 F.3d 639, 661–62 (2d Cir. 2019); *United States* v. *Elswick*, 306 F. App'x 8, 15 n.2 (4th Cir. 2008); *United States* v. *Pruneda-Gonzalez*, 953 F.2d 190, 196 n. 9 (5th Cir. 1992); *United States* v. *Prince*, 883 F.2d 953, 959 n. 3 (11th Cir. 1989).

(2) Police Presence on Haymount Hill.

McKoy's actual innocence argument relies heavily on his discovery during this proceeding that the police were present in Haymount Hill until 12:41 a.m. on the night of Hailey's murder. McKoy's theory is that a reasonable juror could not have convicted him if this information was before the jury, because law enforcement officers believed the murder happened between 11:00 p.m. and midnight.

Although the FPD investigative notes state that officers believed the shooting occurred between 11:00 p.m. and midnight, the State never put that specific timeline before the jury. At no point does any witness testify to an exact timeframe for the shooting. The only testimony put before the jury is that Williams saw Hailey after the lights came back on, which was between 11:15 and 11:30 p.m. McKoy Trial Tr. 266:9–11 & 269:6–16.

And while the trial transcript repeatedly refers to events occurring on January 25, given the late hour these events began and the vague measurements of time used, *see e.g. id.* 102:8–9 (explaining that after Williams left his house he talked with friends for "awhile" before seeing Hailey), it is not unreasonable to believe that the events leading to Hailey's death spilled over into the early morning hours of January 26.

It is also worth noting that at the evidentiary hearing, one of the officers who was on Haymount Hill that night said that the following day people were talking about a shooting at Haymount Hill. FEH Day 2 Tr. 27:1–9. Given the fact that the shooting occurred after the power

came back on at 11:15 p.m. to 11:30 p.m., these statements lend credence to the shooting occurring after the officers had left the scene.

Thus, there was nothing in the record that would have required a reasonable juror to reject McKoy's statements if they had heard that the police were present in Haymount Hill until almost 1:00 a.m.

(3) The Talley Theory.

A reasonable juror would also be able to credit McKoy's statement over the theory that Talley shot Hailey in Grove View Terrace. McKoy's statement can be interpreted as a direct admission of his involvement in Hailey's death. The Talley theory, while not implausible, rests on a much shakier foundation of a multiplicity of statements that are often vague, inconsistent, and contradict known facts.

For example, two witnesses, Ronald Perkins and Kelly Debnam, testified at Talley's trial that they saw Talley shoot at a car in Grove View Terrace after a drug deal gone bad and then saw the car (but not a victim) down an embankment near Murchison Road the next day. Talley Trial Tr. 133:24–135:12 & 224:5–225:6. As the Fourth Circuit noted when addressing Talley's direct appeal, "[w]hile this evidence may have been sufficient to support the inference that Talley's gunfire hit the car, or perhaps that a shot struck the driver, it is not enough to suggest that the driver *died* as a result of any gunshot from Talley." *United States* v. *Wilson*, 135 F.3d 291, 298 (4th Cir. 1998) (emphasis in original).

The information obtained through interviews by the SBI also has substantial shortcomings. The SBI interviewed three individuals who claimed that they witnessed Talley shooting at a car in Grove View Terrace after someone in a car stole drugs from him. Interview of Ronald & Anthony Perkins, D.E. 92–18 & Interview of Craig Roberts, D.E. 92–20. But none of the witnesses could

place a time or date on the shooting. None of those individuals identified Myron Hailey as the driver of the car.

Another individual who claimed to be present when Talley fired at a car was Bernard McIntyre. McIntyre Aff., D.E. 92–16. McIntyre claims that he knew Hailey and, on a night in January 1990, he saw Talley shoot at Hailey's car several times after Hailey stole drugs from him. *Id.* But the affidavit carries limited weight because McIntyre has never made these statements at a setting when he was subject to cross examination and he is currently an absconder from probation. Resp't Mem. in Supp. of Mot. for Summ. J. at 11.

The new evidence McKoy developed for the federal habeas proceedings also has issues.

McKoy called Nizzie Butler to testify about a shooting she witnessed in the Grove View Terrace Area. Butler is confident that she saw a shooting involving a "white" or "yellow-whitish" at Grove View Terrace. *See* FEH Day 1 Tr. 58:9–19. But Hailey's car was blue. When asked whether her recollection would have been better in 1990, Butler testified that it would have been "about the same. I ain't changed[.]" *Id.* 66:8. And the court notes that Butler appeared confused at times while testifying, *see, e.g.*, *id.* 56:8–23 (Butler gave the court four different answers for how long she had lived in Fayetteville). Thus, this evidence carries little weight.

[redacted] None of these witnesses could confidently say that Talley shot McKoy.

McKoy's evidence presents an alternative theory of Hailey's murder: Talley shot Hailey in Grove View Terrace after Hailey or someone in his car stole drugs from Talley. Based upon the

totality of the evidence, McKoy can plausibly argue that Talley shot at a car that fled after stealing some drugs from him. And there is a limited amount of evidence suggesting that Hailey could have been the driver. But as noted above, there are issues with the accuracy and reliability of the evidence. McKoy's alternative theory does not have the same compelling force as statements from the defendant himself admitting his involvement in the crime. Thus, it cannot nullify the effect of McKoy's statements to Ballard.

(4) Officer Parker's Involvement.

McKoy claims that Officer Parker's conviction years after Hailey's murder taints the investigation into McKoy. But McKoy never developed any specific evidence that Parker took steps to direct the investigation away from Grove View Terrace. And much like Williams's misstatements, McKoy's statements to Ballard are independent of any actions taken by Officer Parker in connection to the Hailey investigation. A reasonable juror would not need to disregard or discount McKoy's statements on this basis.

III. Conclusion

After considering all the evidence, the court finds that McKoy does not meet the actual innocence standard in *Schlup*. Thus, his claims are procedurally barred and should be dismissed. As a result, the undersigned recommends that the court grant Hooks's Motion for Summary Judgment (D.E. 85), and deny McKoy's Motion for Summary Judgment (D.E. 88), and deny McKoy's petition.

The Clerk of Court must serve a copy of this Memorandum and Recommendation ("M&R") on each party who has appeared here. Any party may file a written objection to the M&R within 14 days from the date the Clerk serves it on them. The objection must specifically note the portion of the M&R that the party objects to and the reasons for their objection. Any other party

may respond to the objection within 14 days from the date the objecting party serves it on them. The district judge will review the objection and make their own determination about the matter that is the subject of the objection. If a party does not file a timely written objection, the party will have forfeited their ability to have the M&R (or a later decision based on the M&R) reviewed by the Court of Appeals.

Dated: January 31, 2020

Robert T. Numbers, II
United States Magistrate Judge

FILED: January 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-6598
(5:16-hc-02262-FL)

LAMONT MCKOY

Petitioner - Appellant

v.

ERIK A. HOOKS

Respondent - Appellee

O R D E R

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk