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No. 21-5577

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

JOHN LOWERY, Petitioner-Appellant, v. MIKE PARRIS, Warden, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

OPINION

(Filed Aug. 15, 2023)

Before: KETHLEDGE, STRANCH, and MATHIS, Circuit Judges.

KETHLEDGE, Circuit Judge. The State of Tennessee convicted John Lowery of murder and attempted murder on the basis of testimony from three eyewitnesses. A decade later, two of those witnesses recanted their trial testimony. Lowery sought a writ of coram nobis in state court, and both witnesses testified on his behalf. The court found the recantations unreliable and denied relief, and the Tennessee Court of Criminal Appeals affirmed. Lowery then filed this federal habeas petition. His petition came years after the close of the one-year statute of limitations, so the district court could consider it only if Lowery established that no reasonable juror would convict him today in

light of the evidence as a whole. The district court held that Lowery did not meet this demanding standard, and we affirm.

I.

A.

In the early morning hours of October 8, 1996, John B. Lowery called the Knoxville police to report that three masked men had robbed him and stolen his car. Officer Gerald George responded to the call and met Lowery at Lowery's uncle's house. There, Lowery told George that he could not identify the men, but that they had been armed with "various types of weapons" and had taken everything he had on him. George promptly created a police report detailing the incident.

Several hours later, at around 6:10 a.m., William Boatwright and his cousin Vincent Hartsell drove to Kirk's Market—a convenience store a few blocks away from where Lowery filed his police report—to buy drinks and snacks. When they got to Kirk's, they met up with their friend, Malik Hardin.

At around 6:30 a.m., an armed man arrived and shot Hartsell in the neck. Hardin had been in his car listening to music, and rushed to help Hartsell and tried to stop the bleeding. Meanwhile, Boatwright fled back into the store—but the gunman ran after him and shot him in the back. Boatwright survived the attack, but Hartsell died shortly afterwards.

In the hospital, Boatwright told Detective David Ridenour that "J.B." had shot him. Ridenour checked the police records for recent incidents involving those initials, and found Lowery's robbery report. That same evening, he showed Boatwright and Hardin a six-photo lineup which included Lowery—both identified Lowery as the shooter. Tennessee thereafter charged Lowery with Hartsell's murder and Boatwright's attempted murder. Lowery pled not guilty, and his case proceeded to trial in May 1998.

B.

At trial, Officer George testified to the robbery report made by Lowery. The prosecution then called William Boatwright, who explained that, on the morning of the shootings, he had been at Kirk's Market with Hartsell. He said that, while in the store:

> There was a guy that came in that kind of looked familiar. It was Mr. Lowery right there. And I looked at him, and I asked him what was he staring at. He didn't ever say nothing. He walked back out.

As Boatwright paid for their purchases, Hartsell went outside to wait by their car. Boatwright heard a shot, looked around, and saw "John Lowery runnin' towards" him, "holdin' a gun, a black gun." Boatwright continued:

> A: I tried to run back in the store after I heard a shot. Then [Lowery] shot me as I was goin' in the store.

Q: Where did he shoot you?

A: Right here in the chest.

Q: Then what happened?

A: Then I ran and crawled in the store and crawled around a counter, and he was about to come in the store. But the lady at the cash register, she was screamin'. So he took off. . . .

Boatwright said that after he had exited the store, he found Hartsell bleeding from his neck and tried to stop the bleeding. Eventually, though, he panicked and drove to his aunt's house, where he collapsed on the doorstep. Boatwright confirmed that he had picked Lowery from a photo-lineup that evening at the hospital.

On cross-examination, the defense asked Boatwright about the car he had used to drive to Kirk's:

Q: Now, as I understood your testimony on direct examination, you said you were—had went there with the victim Hartsell? . . . In a—in a gray car that you got that was a rental car; is that correct?

A: Yes.

Q: Okay. Did you rent that car?

A: No, sir.

Q: Who rented it?

A: I got it from a friend.

Q: Pardon me?

A: I got it from a friend.

[. . .]

Q: Okay. How much did you rent it for?

A: Twenty dollars.

Q: That wasn't a stolen car?

A: I don't know.

Malik Hardin testified next. He said he had returned to his car after seeing Boatwright arguing with someone inside Kirk's Market. Then, he saw somebody fire a gun, turn around, and flee the scene. Hardin identified Lowery in the courtroom as the man he had seen.

The prosecution then called James Bowman. Bowman said he and his daughter had gone to Kirk's so that she could buy herself a drink for school. While his daughter was inside Kirk's, Lowery walked up to Bowman's car and told him that he had just been robbed. Then, Boatwright and Hartsell pulled up, and Lowery told Bowman "Don't look over there because that is one of the guys"—implying it had been Boatwright or Hartsell who robbed Lowery. But Bowman was a reluctant witness, and he kept interjecting "it's been so long" and "I don't know" before answering the prosecutor's questions. When asked to confirm that John Lowery had been at Kirk's, Bowman responded: "It could have been; it could have not been. There's another one out here that look just like him, his brother [Fred]."

A former girlfriend of Lowery's uncle Walter—Mary Santos—testified next. She said Walter had employed both John Lowery and Vincent Hartsell as drug dealers. According to Santos, Hartsell had stolen a shipment of drugs from Walter. When John Lowery

found out, Santos said, Lowery promised that "I won't let him get away with this" and that "he would put a bullet right there." On cross-examination, Santos admitted she was locked in a bitter custody battle with Walter Lowery over their two young children.

In the defense's case, Walter Lowery testified that Santos was a liar and denied ever dealing drugs. The defense then called Fred Lowery, Jay Harris, and Greg Moore, who each testified that they had been at Kirk's Market at the time of the shooting and that they had not seen John Lowery. On cross-examination, however, all three denied having seen the actual shooter.

Lowery's neighbor, Tamara McMillan, was the defense's final witness. She testified that she had seen Lowery at 6:30 a.m. on the morning of the shootings. According to McMillan, Lowery had been scared and upset when he arrived at her house, because he had just been robbed:

> And I asked—I said, "Well, what's wrong, you know?" And he said, "I just got robbed." . . . And I said, "Well"—I said, "Are you all right"? He said, "Yeah." He said "I'm fine." He said, "But I'm scared to death." He said, "They took everything. They made me strip." He said, "I don't know if these people know where I live at or what."
>
> [. . .]
>
> So he kind of sit (sic) there like he was about to cry. He was in tears. He was lookin' like—in a way that I had never seen him before.

In closing, the prosecution argued that Lowery shot Boatwright because of the robbery and Hartsell because he stole Walter Lowery's drugs. After 51 minutes' deliberation, the jury returned a guilty verdict. Lowery received a life sentence.

C.

In September 2010, more than a decade after Lowery's conviction, Malik Hardin signed an affidavit in which he recanted his trial testimony and swore that he had not seen Lowery at Kirk's Market on the day of the shootings. A year later, the store clerk—Loretta Turner—came forward to say that she, too, had not seen Lowery that day, and that she had informed the police of that fact during her interviews after the shooting. Lowery thereafter filed a writ of error coram nobis in Tennessee state court, arguing that this newly discovered evidence entitled him to a new trial. The state court summarily dismissed Lowery's petition, but the Tennessee Court of Criminal Appeals reversed and remanded the case for an evidentiary hearing. *Lowery v. State*, 2013 WL 44767188 (Tenn. Crim. App., Sept. 4, 2014). Shortly before that hearing, William Boatwright submitted an affidavit also recanting his trial testimony.

The trial court held its evidentiary hearing in October 2014. William Boatwright testified first, contradicting the version of events to which he testified at trial:

> Q: Did you—were you inside or actually outside the store when you were shot?

A: Outside.

Q: Okay. Did you see who shot Mr. Hartsell? Hartsell, yes.

A: No sir.

Q: Did you see who shot you that morning?

A: No, sir.

Boatwright then explained that police had pressured him to identify Lowery and threatened to charge him with robbery and murder if he refused:

> Q: During that time, did you implicate John Lowery, also known as J.B., as the person who shot you that day?
>
> A: Yeah. But it was only because they told—this was said to me, well, we know you committed an aggravated robbery, you know, so . . . I'm like, I didn't commit no robbery. They're like, well, you committed the robbery, murder. You did the murder. I'm like, I didn't do no murder. So they like, well, is this the person that did it? So I—yeah, he the one that did it. Just to keep them, you know what I'm saying, from, I guess, charging me for the murder charge.

Boatwright added that he came forward with his recantation because his false testimony had been weighing on his conscience.

On cross-examination, the state asked Boatwright—who had been sentenced to 49 years' imprisonment on an unrelated charge—about "the feeling towards snitches in prison." Boatwright responded:

A: I don't know. I ain't never had no problem. I don't bother nobody. I don't know. I don't know about that.

Q: You don't know what the attitude is in prison towards snitches?

A: No.

Q: Never heard anything about that?

A: See, I done heard, but I heard people get stuff done to them or, you know, they don't talk to them or—I don't know, just different things.

Q: What kind of stuff gets done to them?

A: I don't know. They just say stuff get done to them. I don't know.

The state also elicited testimony that revealed Boatwright was serving his sentence in the same facility as Lowery.

Hardin testified next. He too said that police had threatened to charge him with robbery or murder if he did not identify Lowery as the perpetrator. But Hardin added that he had gotten "a good look at the shooter" and that the shooter "resembled Mr. Lowery," although he was now "100 percent certain that it wasn't Mr. Lowery." On cross-examination, Hardin admitted that Lowery had asked a jailhouse lawyer to draft Hardin's affidavit. Hardin said he had corrected several factual errors in the affidavit before submitting it to the court.

Turner testified last. She explained that, at the time of the shooting, she had been familiar with Lowery because he had dated her niece and attended a

family cookout. Turner said that she had not seen Lowery at all on the morning of the shooting. But on cross-examination, she acknowledged that she had crouched behind a wooden counter for part of the incident, which would have blocked her view of the store.

The court again denied Lowery's motion, primarily because it found Boatwright and Hardin not credible. The Court of Criminal Appeals affirmed. *State v. Lowery*, 2017 WL 3078313 (Tenn. Crim. App., June 19, 2017). Lowery thereafter filed this *pro se* habeas petition in federal court, arguing (among other things) that his trial counsel had been ineffective, that the state suppressed Turner's testimony in violation of *Brady v. Maryland*, and that he was actually innocent.

The district court dismissed Lowery's petition as untimely, reasoning that because Lowery presented his affidavits in state court first, they did not constitute "new evidence" for purposes of the miscarriage-of-justice exception to the statute of limitations. This court reversed. *Lowery v. Parris*, 819 F. App'x 420 (6th Cir. 2020). On remand, the district court held that Lowery could not show that "no reasonable juror would have convicted him in the light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Thus, the district court held, the statute of limitations barred Lowery's petition. This appeal followed.

II.

We review de novo the district court's denial of Lowery's habeas petition. *Cleveland v. Bradshaw*, 693 F.3d 626, 631 (6th Cir. 2012).

A.

A one-year statute of limitations governs federal habeas petitions. 28 U.S.C. § 2244(d)(1). Under the miscarriage-of-justice exception, however, federal courts may nonetheless consider the merits of an untimely petition if the petitioner can establish, by a preponderance of the evidence, that no reasonable juror would convict him in light of "all the evidence" now available. *House v. Bell*, 547 U.S. 518, 537 (2006) (cleaned up); *see also McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013). The issue in this appeal is whether Lowery can satisfy that standard.

As an initial matter, the parties dispute the degree of deference we owe to the state court's factual determinations. The Supreme Court has explained that in "reviewing a federal habeas petition" we must "presume the state court findings correct unless we determine that the findings result in a decision which is unreasonable in light of the evidence presented." *Miller-El v. Cockrell*, 537 U.S. 322 (2013); *see* 28 U.S.C. § 2254(e)(1) ("a determination of a factual issue made by a State court shall be presumed to be correct"). But the miscarriage-of-justice exception is a "gateway" antecedent to consideration of a habeas claim; it is not itself a habeas claim. *See McQuiggin*, 569 U.S. at 392.

We have not yet decided the degree of deference appropriate in those circumstances and need not do so now. Appellate courts always owe significant deference to a trial judge's credibility determinations. *Miller-El*, 537 U.S. at 339-340. And credibility determinations are the only factual findings that matter here.

The state trial court determined that Boatwright and Hardin's initial testimony was more credible than their belated recantations. At the time that Boatwright gave his coram nobis testimony, he was anticipating another 44 years' confinement in the facility that also housed Lowery—an uncomfortable predicament for the star witness in Lowery's murder trial. A reasonable factfinder could take Boatwright's evasive answers to questions about the risks "snitches" face in prison as evidence that Boatwright had an ulterior motive to recant truthful testimony. *See McCroy v. Vasbinder*, 499 F.3d 568, 574 (6th Cir. 2007) ("Reasonable jurors no doubt could question the credibility of this about face from another inmate and rationally could discount his testimony as nothing more than an attempt to keep from being 'pegged as a rat' for having originally identified [petitioner] as the gunman"). Moreover, Boatwright's assertion that the police threatened to charge him with Hartsell's murder was implausible. Forensic evidence at trial showed that Hartsell and Boatwright had been shot in rapid succession by the same firearm. Boatwright—indisputably a victim of the shooting—would have been an unlikely suspect.

Hardin's testimony contained similar problems. Although the record does not clearly show whether

Hardin and Lowery ever stayed in the same prison, Hardin agreed to testify only after another prisoner drafted an affidavit for him—at Lowery's request. And at the postconviction hearing, Hardin confirmed that the shooter had looked a lot like Lowery. Boatwright and Hardin both denied that Fred Lowery had committed the shooting, and there were no other suspects. A reasonable factfinder could therefore choose to believe Hardin's trial testimony over his recantation. Thus, the trial court's credibility determinations as to Hardin and Boatwright were reasonable.

That leaves the store clerk, Loretta Turner. The Warden suggests that her testimony would have been cumulative because several of Lowery's friends testified that they had not seen him at the store on the day of the shooting. But the testimony of an unbiased bystander plainly would have helped Lowery more than that of his friends, so that argument is meritless. *See Stewart v. Wolfenbarger*, 468 F.3d 338, 357-58 (6th Cir. 2006); *Washington v. Smith*, 219 F.3d 620 (7th Cir 2000). Still, Boatwright testified at trial that Lowery had reached into the store to shoot him without fully entering it; and Turner admitted at the postconviction hearing that she had crouched behind the wooden checkout counter during part of the shooting. Thus, even combined with Hardin and Boatwright's testimony, Turner's testimony was not so damaging to the prosecution's case as to prevent any reasonable juror from voting to convict Lowery. Lowery therefore cannot meet the demanding miscarriage-of-justice standard.

McQuiggin, 569 U.S. at 401. His habeas petition is untimely.

B.

Lowery argues in the alternative that the district court should have held an evidentiary hearing before dismissing his petition. We review the district court's decision not to hold an evidentiary hearing for an abuse of discretion. *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007).

According to Lowery, the district court should have held an evidentiary hearing because, when the state court held one, it was "resolving a question of state law"—not a federal constitutional claim. *See Arnold v. Dittmann*, 901 F.3d 830, 840-41 (7th Cir. 2018). But to prevail under the state-law standard, Lowery had to show that "the admissibility of the newly discovered evidence may have resulted in a different judgment had the evidence been admitted at the previous trial." *Freshwater v. State*, 160 S.W.3d 548, 553 (Tenn. Crim. App. 2004). That is a far more lenient standard than the federal one we apply here, but it goes to the same issue: the effect of the new evidence on a reasonable jury. The state trial court had already held an evidentiary hearing on that topic. And as explained above, its credibility determinations were reasonable. Thus, the district court did not abuse its discretion when it denied Lowery a new evidentiary hearing.

* * *

The district court's judgment is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-5577

JOHN BRADLEY LOWERY,

Petitioner - Appellant,

v.

MIKE PARRIS, Warden,

Respondent - Appellee.

Before: KETHLEDGE, STRANCH, and MATHIS, Circuit Judges.

JUDGMENT

(Filed Aug. 15, 2023)

On Appeal from the United States District Court for the Eastern District of Tennessee at Knoxville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOHN B. LOWERY, Petitioner, v. MIKE PARRIS, Respondent.	)))))))	No.: 3:18-CV-330-CLC-HBG

MEMORANDUM OPINION

(Filed Apr. 29, 2021)

This pro se prisoner's federal habeas action arising under 28 U.S.C. § 2254 is before the Court on remand from the Sixth Circuit for a determination of whether Petitioner has established a claim of actual innocence to allow review of his untimely petition [*See* Doc. 23]. The parties have briefed the issue [*See* Docs. 30, 31, and 33]. Having considered the submissions of the parties, the record of proceedings, and the law applicable to Petitioner's claims, the Court finds that Petitioner is not entitled to avail himself of the actual-innocence exception to § 2254's one-year statute of limitations, and that the petition is time barred. *See* 28 U.S.C. § 2244(d).

I. PROCEDURAL HISTORY

Petitioner was convicted of one count of premeditated first-degree murder and one count of attempted

first-degree murder by a Knox County jury and was sentenced to consecutive terms of life imprisonment for murder and twenty-five years for attempted murder. *State v. Lowery*, No. E1998-0034-CCA-R3-CD, 2000 WL 748103, at *1 (Tenn. Crim. App. June 12, 2000), *perm. app. denied* (Tenn. Feb. 20, 2001). The Tennessee Court of Criminal Appeals ("TCCA") affirmed Petitioner's conviction and sentence on June 12, 2000. *Id.* On February 20, 2001, the Tennessee Supreme Court denied discretionary review. *Id.* Petitioner never filed a post-conviction petition.

On September 14, 2011, more than a decade later, Petitioner filed a petition for writ of error coram nobis, ultimately producing affidavits from three witnesses: two eyewitnesses who recanted their trial identification of Petitioner as the gunman, and a store cashier who swore Petitioner was not in the store the day of the shooting [Doc. 6-11 at 5–25; 35–42]. The petition was summarily denied by the trial court [*Id.* at 63–64]. Petitioner appealed, and the TCCA remanded for an evidentiary hearing. *Lowery v. State*, No. E2012-01613-CCA-R3-PC, 2013 WL 4767188, at *1 (Tenn. Crim. App. Sept. 4, 2013). Following an evidentiary hearing, the coram nobis court denied relief, and on appeal, the TCCA affirmed that denial. *State v. Lowery*, E2016-00587-CCA-R3-CD, 2017 WL 3078313, at *1 (Tenn. Crim. App. July 19, 2017), *perm. app. denied* (Tenn. Nov. 16, 2017). On November 16, 2017, the Tennessee Supreme Court denied discretionary review. *Id.*

Thereafter, on or about August 10, 2018, Petitioner submitted a pro se petition for writ of habeas corpus

[Doc. 1]. In response to the Court's subsequent order for Respondent to answer or otherwise respond to the motion, Respondent filed a motion to dismiss the action as time barred [Docs. 5 and 7]. This Court granted Respondent's motion and held that the affidavits presented by Petitioner did not constitute "new" evidence because the same affidavits were already presented and addressed by the state court [Doc. 11 at 5–6].

Petitioner appealed, and the Court of Appeals for the Sixth Circuit held that this Court "erred by concluding that evidence presented to state courts categorically does not qualify" as new evidence [Doc. 23 at 3]. The Sixth Circuit went on to say:

> That's not to say that the three affidavits *do* qualify as new evidence. Maybe they do, maybe they don't. We leave that to the district court to decide in the first instance. All we decide today is that the district court erred by finding that the evidence wasn't new simply because it was originally presented in state court during the coram nobis proceedings.

[*Id.* at 4]. Consequently, the Sixth Circuit vacated this Court's decision and remanded the case for further proceedings [*Id.*]

On remand, this Court ordered briefing on "whether the three affidavits constitute 'new evidence' that would vitiate the limitations bar" [Doc. 26]. Petitioner's initial brief was filed January 13, 2021 [Doc. 31], Respondent filed his brief on February 9,

2021[Doc. 32], and Petitioner submitted a reply brief on March 22, 2021 [Doc. 33].

II. RELEVANT FACTUAL BACKGROUND

Petitioner was robbed at gunpoint in the early morning hours of October 8, 1996 by three young black males wearing masks [Doc. 6-1 at 33–34]. The robbers took his belongings, forced him into his car, and ultimately drove him to a remote location and dropped him off [*Id.* at 34]. Petitioner made his way to his uncle's home and called the police [*Id.* at 37]. Around 3:30 a.m., Petitioner made a report of the robbery to Officer Gerald Thomas George II, telling the officer that he was unable to identify the robbers [*Id.* 34-36].

A few hours later, eighteen-year-old William Boatwright, accompanied by his sixteen-year-old cousin Darrell Hartsell, drove to Kirk's Market to buy food items [*Id.* at 40–41]. Hartsell remained in the vehicle while Boatwright went inside and made his purchases [*Id.* at 41–42]. While he was in the store, Boatwright saw "a guy . . . that kind of looked familiar" walk in and then walk back out [*Id.* at 42]. At trial, Boatwright identified that "guy" as Petitioner [*Id.*]. After Boatwright purchased his items, he went outside and was called to the side of the building by Jay Harris [*Id.* at 42]. After speaking with Harris for a few seconds, Boatwright heard a gunshot [*Id.* at 42–43]. He then saw Petitioner running toward him with a handgun [*Id.* at 43]. Boatwright attempted to re-enter the store and was shot in the chest just as he was going inside [*Id.*].

Boatwright made it into the store and crawled behind the counter [*Id.* at 43]. Petitioner started to enter the store but instead fled when the cashier began screaming [*Id.*]. Boatwright remained in the store for several minutes before going outside to check on Hartsell, who had been shot in the neck while waiting in the passenger's seat of the car [*Id.* at 45].

Malik Hardin, a friend of Boatwright's, had been in Kirk's Market just prior to the shooting and saw Boatwright arguing with someone he later identified as Petitioner [*Id.* at 67, 71]. Hardin left the store and was backing his car out of the store's parking lot when he saw Hartsell get shot [*Id.* at 67]. Hardin pulled back into the parking lot, and Boatwright ran outside of the store, jumped into Hardin's car, and drove away [*Id.* at 46, 61–63]. Boatwright was apparently found unconscious by his aunt at her front door and was subsequently transported by ambulance to the hospital [*Id.* at 46]. Meanwhile, at Kirk's Market, Hardin stayed with Hartsell until an ambulance arrived [*Id.* at 69].

James Bowman, an acquaintance of Petitioner's brother, Fred Lowery, was present at Kirk's Market just prior to the shooting and gave a statement to police at 9:50 a.m. that morning [*Id.* at 105]. Bowman informed officers that he drove his stepdaughter to the market a little after 6:30 a.m. so she could purchase a drink before school [*Id.* at 91]. While his stepdaughter was inside the store, Petitioner got into Bowman's car and told Bowman he had been robbed earlier that morning [*Id.* at 91–92]. A car then pulled up, and Petitioner indicated that the men who robbed him were in

that car [*Id.* at 96–106]. Petitioner then got out of Bowman's car and told his brother, Fred Lowery, and his cousin, Jay Harris, "[t]hat's it boys, right here" [*Id.* at 105]. Bowman stated that the men then "surrounded the building" [*Id.*]. Bowman asked if he could get his little girl out of the way before "stuff starts" [*Id.* at 106]. Bowman left with his stepdaughter and dropped her at the bus stop [*Id.* at 105–06]. At trial, Bowman was reluctant to definitively identify Petitioner as the person who got into his car, stating that Petitioner's brother Fred looks "just like him" [*Id.* at 107].

The shooting was reported to the Knox County Police Department around 6:40 a.m. [*Id.* at 23]. Hartsell underwent surgery but died the following day [*Id.* at 130–31]. Forensics performed on the shell casings at the scene revealed that the shots were fired from the same .45 caliber weapon [*Id.* at 115].

Detective David Ridenour, at the time a Major Crimes Investigator for the Knoxville Police Department, was notified of the shooting [Doc. 6-2 at 57–58]. He went to the hospital to interview the victims [*Id.* at 60]. At trial, Ridenour testified that Boatwright initially identified the shooter as "J.B." [*Id.* at 60, 62–63]. Ridenour testified that once Boatwright told him that the shooter was "J.B.," he reviewed the reports from that day and found the robbery report from Petitioner [*Id.* at 62–63]. Based on that, he thought the robbery victim might also be the shooter given the area's penchant for drug-related robberies and retaliatory acts [*Id.*]. He put together a photo lineup with Petitioner's

photograph and took the lineup to remaining interviews [*Id.* at 63].

Hardin, an eyewitness to the shooting, identified Petitioner as the person he saw pointing the gun at Hartsell [*Id.* at 59–60]. Bowman identified Petitioner as the individual who got into his car earlier that day to tell him about a robbery [*Id.* at 59]. Boatwright also identified Petitioner as the shooter from the photo lineup but testified at trial that he did not identify Petitioner as the shooter until the police showed him the photo lineup [Doc. 6-2 at 60–61; Doc. 6-1 at 59].

Mary Santos, a previous romantic partner to Petitioner's uncle, Walter Lowery, testified that Walter hired Petitioner and Hartsell to sell drugs for him [Doc. 6-1 at 117–18]. She stated that in the summer of 1996, Petitioner and Walter were angry with Hartsell over a botched drug sale [*Id.* at 121–23]. Santos further testified that she had heard Petitioner state on several occasions that he would kill Hartsell in retaliation [*Id.* at 124]. On cross-examination, Santos admitted that she had been in an ongoing custody battle with Walter over their two children since September 1996 [*Id.* at 125–26].

Petitioner presented five witnesses at trial, three of whom were at the market at the time of the shooting. Fred Lowery, Greg Moore, and Jay Harris each testified that they did not see the person who shot Boatwright and Hartsell, but that Petitioner was not present at the time of the shooting [Doc. 6-2 at 25–26; 33; 43–44]. A fourth witness, Tamera McMillan,

testified that she was Petitioner's neighbor, and that he was at her apartment at the time of the shooting [*Id.* at 48–49]. After deliberating for fifty-one minutes, the jury returned a verdict of guilty on both the murder and attempted murder counts [Doc. 6-3 at 43, 45].

More than a decade later, in an affidavit sworn September 16, 2010, Hardin recanted his identification of Petitioner as the gunman [*See*, *e.g.*, Doc. 2-1 at 3–4]. At the subsequent coram nobis hearing, Hardin testified that when he arrived at the store on the morning of the shooting, he saw Boatwright and Hartsell inside arguing with "a couple other guys" [Doc. 6-16 at 41]. Hardin claimed he made sure everything was okay between the men and returned to his car [*Id.* at 41–42]. Hardin stated that, as he was backing out, he saw a man in motion with his back to Hardin [*Id.* at 42]. The man turned, and Hardin saw a gun in the man's hand [*Id.* at 42]. Hardin, who stated he had his music up too loud to hear anything, saw the man open the door to the store and reach inside before he ran away in front of Hardin's car [*Id.* at 42–43]. Hardin pulled back into the parking lot and found Hartsell hanging out of a car bleeding from the neck [*Id.* at 43–44]. Hardin maintained that Boatwright then exited the store, took Hardin's keys, and drove away [*Id.* at 44]. Hardin stated he remained with Hartsell until the ambulance arrived [*Id.*]. Hardin alleged that when police arrived, he told them he did not know the identity of the shooter, but police repeatedly told him that he either committed the crime or knew who did [*Id.*]. Hardin, who was sixteen years old at the time and out on bond,

claimed that he feared the police would charge him with the crime [Doc. 6-16 at 44–46; Doc. 2-1 at 4]. For that reason, he testified, when police showed him a six-photo lineup and pointed to a specific photo before asking him if that individual was the shooter, he stated that the person in the photo "kind of resembled" the shooter [Doc. 6-16 at 44–47]. He stated however, that once he saw Petitioner "close up" at the Morgan County Correctional Complex ("MCCX"), he was one hundred percent certain Petitioner was not the gunman [*Id.* at 47].

On cross-examination, Hardin acknowledged that an inmate who worked in the law library had drafted the affidavit on Petitioner's behalf and brought it to Hardin to sign, which Hardin did after making a few factual changes that he could not recall [*Id.* at 50–51]. Hardin indicated that he was incarcerated with most of a fifteen-year sentence left to serve [*Id.* at 51–52]. He conceded that "snitches" tend to get assaulted by other prisoners, especially in state prison [*Id.* at 52–53]. Hardin admitted that police never threatened to charge him with anything if he did not identify Petitioner as the shooter [*Id.* at 55–56]. He also conceded that, at the time of Petitioner's trial, he knew he would not be charged with anything relating to the shooting at Kirk's Market but still identified Petitioner as the shooter [*Id.* at 59]. Hardin agreed that, at the time of the shooting, he was upset by the murder of his friend and wanted to help the police apprehend the gunman by providing accurate information [*Id.* at 63–64].

In April 2012, Boatwright, the surviving victim, also recanted his identification of Petitioner as the gunman [*See*, *e.g.*, Doc. 2-1 at 6]. At the coram nobis hearing, Boatwright testified that he saw Hartsell with a gunshot wound right before he was also shot [Doc. 6-16 at 9]. He stated he ran back into the store and the cashier began screaming [*Id.*]. Boatwright then reemerged from the store, sighting Hardin [*Id.*]. Boatwright checked on Hartsell and then drove to "the projects" where he "fell out" [*Id.*]. He later "woke up in the hospital" [*Id.*]. Boatwright testified that he did not see the person who shot him and Hartsell and was unable to identify anyone in the photo lineup presented to him by police [*Id.* at 10]. Boatwright contended that he identified Petitioner when the police showed him the lineup for a second time only because the police threatened to charge him with robbery and murder, and the officers "kept pointing at [Petitioner's] picture" [*Id.* at 11–12]. Boatwright stated that he did not know Petitioner at the time of the murder, and that he felt forced to testify that Petitioner was the man who shot him in order to avoid being charged with murder or robbery [*Id.* at 11].

On cross-examination, Boatwright acknowledged that he had served approximately five years of a forty-nine-year sentence for especially aggravated robbery, aggravated robbery, and burglary, and that he and Petitioner were both incarcerated at MCCX [*Id.* at 16–18]. Boatwright contested a police report purportedly indicating that a detective spoke with him in the hospital approximately thirty minutes after the shooting

where Boatwright identified the gunman as a man named "J.B." [*Id.* at 20–21]. When Boatwright was asked to explain how he believed he could be charged with the murder of Hartsell when witnesses saw him exiting the store, and when he himself was a victim, Boatwright stated that he did not know [*Id.* at 23]. Boatwright denied concerns of being labeled a "snitch" and maintained that everything he said at trial was fabricated to avoid being charged with murder and/or the robbery of Petitioner [*Id.* at 16, 23, 39].

On September 7, 2011, Loretta Turner, the cashier at Kirk's Market on the day of the shooting, signed an affidavit stating that Petitioner was not in the store the morning of the shooting, and that she had told a police officer that fact when she was interviewed the day of the shooting [Doc. 2-1 at 5]. She testified at the coram nobis hearing that she knew Petitioner because he had dated her niece, and she met him once prior to the shooting [Doc. 6-16 at 67–68]. Turner stated that on October 8, 1996, seven or eight "young people" entered the store at approximately 5:45 a.m., and that she was nervous because she thought they might rob her [*Id.* at 66]. Turner stated that when they approached the counter to pay, "they started fussing among themselves" [*Id.*]. Turner maintained that she asked the individuals "not to," and one of the males "chewed [her] out" before leaving the store [*Id.* at 66]. Turner then heard gunshots, ducked behind the solid wooden counter, and did not see the shooter [*Id.* at 66, 72–73]. She stated that when Boatwright came back into the store and fell down, she ran to lock the door

and pulled him around the counter with her [*Id.* at 67]. She did not see the shooter when she locked the door and noted that it was dark outside at the time [*Id.* at 73].

At the conclusion of proof, the coram nobis court denied Petitioner relief [Doc. 6-15 at 61–63]. The court failed to find Hardin and Boatwright's testimony credible, maintaining that they were "vague and inconsistent in their testimony" [*Id.* at 62–63]. It found Turner's testimony seemingly truthful but noted "she was ducking and hiding" at the time of the shootings [*Id.* at 62]. It also noted that her testimony was cumulative of the other witnesses who testified at trial that Petitioner was not present at Kirk's Market the day of the shooting [*Id.* at 62–63]. The coram nobis court concluded that it did "not find that the cumulative evidence of Loretta Turner may have caused the jury to reach a different result." [*Id.*].

III. GOVERNING LAW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which subjects habeas petitions challenging state-court judgments to the one-year statute of limitations set forth in 28 U.S.C. § 2244. *See* 28 U.S.C. § 2244(d)(1) (subjecting habeas petitioners in custody under state-court judgment to file petitions within one year of various triggering dates). There is no dispute that Petitioner filed his habeas petition some sixteen years after his conviction became final in 2001. *See* 28 U.S.C.

§ 2244(d)(1)(A) (providing that one-year limitation period begins to run upon conclusion of direct review). Consequently, the petition is barred as untimely absent an applicable exception. Petitioner argues he is entitled to review of the merits of his petition because he is actually innocent of the crimes of conviction.[1]

Actual innocence, if proved, serves as a gateway through which a petitioner may obtain review of his otherwise barred or untimely claims of constitutional violation. *See McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *see also Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006). In this context, "actual innocence means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citation and internal quotation marks

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[1] The AEDPA statute of limitations is not jurisdictional and is subject to tolling. *Holland v. Florida*, 560 U.S. 631, 645 (2010). However, the issue of whether either statutory or equitable tolling based on newly discovered evidence is applicable is not a question before the Court. *See*, *e.g.*, 28 U.S.C. § 2241(d)(1)(D) (providing one-year limitations period runs from "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence"); *Holland*, 560 U.S. at 649 (finding equitable tolling of statute of limitations is available only if petitioner establishes a diligent pursuit of rights and "that some extraordinary circumstance stood in his way and prevented timely filing") (internal quotation marks omitted); *see also McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (noting actual innocence is an "exception" to § 2241(d)(1), not an extension of the one-year deadline); *see also Reeves v. Fayette SCI*, 897 F.3d 154, 160 n.5 (3rd Cir. 2018). Regardless, to the extent the issue could be considered properly before the Court, Petitioner has failed to argue—much less demonstrate—the requisite diligence in discovering the factual basis of the 2010, 2011, and 2012 affidavits to warrant equitable or statutory tolling.

omitted). Invocation of this exception requires the claim of innocence to be credible. *Cleveland v. Bradshaw*, 693 F.3d 626, 631 (6th Cir. 2012) (citing *Souter v. Jones*, 395 F.3d 577, 601 (6th Cir. 2005)). To be credible, a claim of actual innocence must be supported "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.

To establish a claim of actual innocence, Petitioner bears the burden of demonstrating that it is more likely than not that no reasonable juror would have convicted him in light of new evidence. *McQuiggin*, 569 U.S. at 386; *Schlup*, 513 U.S. at 327. When evaluating whether a petitioner has met this burden, the court assesses all reliable evidence of guilt or innocence, even evidence previously excluded or inadmissible under the rules of evidence at trial. *Schlup*, 513 U.S. at 327–28. The court's inquiry is not to make an independent determination as to the likelihood of a petitioner's guilt, but rather, to "to make a probabilistic determination about what reasonable, properly instructed jurors would do." *Id.* at 329.

Any delay or lack of diligence in Petitioner's pursuit of his claim of actual innocence is not an absolute bar to an actual-innocence claim, but timing is a relevant factor in evaluating the reliability of the proof of innocence. *McQuiggin*, 569 U.S. at 399; *Schlup*, 513 U.S. at 332 (holding court "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of . . . evidence

[of actual innocence]"). Moreover, the Supreme Court has counseled "that the actual innocence exception should remain rare and only be applied in the extraordinary case." *Souter*, 395 F.3d at 590 (citation and internal quotation marks omitted). This standard is only met in cases where "a petition 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." *McQuiggin*, 569 U.S. at 401 (citation and internal quotation marks omitted).

IV. DISCUSSION

A. Credibility of New Evidence

1. "Newness" of Evidence

In determining whether Petitioner's claim of actual innocence is credible, the Court first considers whether the claim is founded on new evidence. Petitioner's trial occurred in May 1998 [*See*, *e.g.*, Doc. 6-1 at 2]. The affidavits presented to the coram nobis court were executed between September 2010 and April 2012 [Doc. 2-1 at 3–6].

Respondent questions whether the affidavits are "new," because "the testimony of all three affiants arguably existed at the time of trial" [Doc. 31 at 5]. Moreover, Respondent notes the assertion in Turner's affidavit, *i.e.* that Petitioner was not present in Kirk's Market when the shooting occurred, was available and presented at trial through multiple witnesses. However, the Court declines to adopt this argument and

finds that the evidence is "new" under governing standards, as it was not presented to the factfinder at trial. *Schlup*, 513 U.S. at 836-37; *Cleveland*, 693 F.3d at 633 (noting Sixth Circuit has not decided whether "new" evidence under *Schlup* is only newly discovered evidence not available at the time of trial or includes evidence not presented to trier of fact, but that its opinions "suggest[ ] that this Circuit considers 'newly presented' evidence sufficient").

2. Reliability of Evidence

This leads the Court to an assessment of the reliability of the new evidence. The coram nobis court found the testimony of Boatwright and Hardin, which was an elaboration of the facts set forth in their respective affidavits, was not credible [Doc. 6-15 at 62]. The court found Turner's testimony to be credible but insufficient to meet the test that it "might have" changed the outcome of the trial [*Id.* at 62–63]. On appeal, the TCCA affirmed. *Lowery*, 2017 WL 3078313, at *6.

Habeas courts generally defer to trial court credibility findings, as the trial court is in the best position to determine witness credibility. *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003); *see also Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) (holding that § 2254 does not give habeas courts "license to redetermine credibility of witnesses whose demeanor has been observed by the state trial court, but not by them"); *Miller-El v. Dretke*, 545 U.S. 231, 265 (2005) (holding trial court's credibility finding may be overturned

where evidence on the issue "is too powerful to conclude anything" other than the unreasonableness of the trial court's finding); *Schlup*, 513 U.S. at 330 (noting that while court may have to assess credibility of witnesses under gateway standard, "the assessment of the credibility of witnesses is generally beyond the scope of review"). Because the coram nobis court made credibility determinations in this case based on the new evidence, this Court defers to those findings where they are supported by the record.

a. Recantation Affidavits – Boatwright and Hardin

Courts typically view recantation testimony with great suspicion. *See*, *e.g.*, *United States v. Willis*, 257 F.3d 636, 645 (6th Cir. 2001) (noting that "affidavits by witnesses recanting their trial testimony are to be looked upon with extreme suspicion") (internal quotation marks omitted). Here, the deceased victim was a cousin to Boatwright and a friend to Hardin, and a reasonable juror could conclude that Boatwright and Hardin provided accurate information to police after the incident to help find the gunman. Moreover, Boatwright himself was a victim of the shooting and had a stake in wanting the gunman caught. A reasonable juror could, therefore, find that these witnesses gave accurate testimony at trial. Conversely, without consideration of other factors, these same circumstances could also lead a reasonable juror to conclude that these witnesses had no improper motive to come forward and recant their testimonies years later. Upon

consideration of additional aspects of the recantations, however, the Court finds indications that they are unreliable.

First, Boatwright and Hardin executed their affidavits recanting their identification of Petitioner as the shooter in 2012 and 2010, respectively [*See* Doc. 2-1 at 53, 55]. Hardin's affidavit is dated September 16, 2010, approximately a year before Petitioner filed for coram nobis relief on September 14, 2011 [Doc. 6-11 at 713–15]. Boatwright's affidavit was not produced until April 5, 2012, after there was a remand in the coram nobis proceedings [Doc. 2-1 at 55]. Petitioner has not adequately accounted for the decade-plus delay in procuring the affidavits nor in presenting them to a court, which undermines their reliability. *Freeman v. Trombley*, 483 F. App'x 51, 61–64 (6th Cir. 2012) (finding that recantation evidence presented ten years after the witness first testified under oath was insufficient to support gateway actual-innocence claim where there was no explanation for the significant delay). A reasonable juror could easily find Hardin and Boatwright's identification of Petitioner as the shooter at trial more credible than their recantations, as the identifications were made within hours after the incident and thus might have been seen as more reliable than the affidavits prepared many years after the incident.

Further, the timing of the affidavits is suspect. *See McQuiggin*, 569 U.S. at 399 (noting that the timing of newly discovered evidence of innocence is relevant to its reliability). These affidavits were procured by Boatwright and Hardin after each were incarcerated on

lengthy state-court sentences and after they were (at least temporarily) housed with Petitioner in MCCX. A reasonable juror could conclude that Boatwright and Hardin, concerned about being labeled as snitches after being housed with or near Petitioner, gave true testimony at trial and false testimony in their recantations.

Moreover, while Hardin claims he did not know Petitioner was not the shooter until he saw him up "close" at MCCX, he still did not initiate the recantation of his trial testimony. Hardin did not prepare his own recantation affidavit; it was prepared by an inmate at Petitioner's request. A reasonable juror could conclude that Hardin's lack of initiative in taking steps to exonerate Petitioner renders his recantation false and his trial testimony true. The record is devoid of the circumstances of Boatwright's recantation other than his statement that he decided to "come forward" and "do the right thing" in 2012 because it was weighing on his conscience [Doc. 6-16 at 13]. A reasonable juror could question, however, why Boatwright and Hardin did not come forward earlier. These facts would make it more difficult for a reasonable juror to find the affidavits reliable. *See Turner v. Romanowski*, 409 F. App'x 922, 930 (6th Cir. 2011) ("[A] reasonable juror would find it difficult to find [the witness's recantation] affidavit credible because he is lying now or he was lying then.").

The decision rejecting the recantation evidence is, therefore, supported by the record. Further, the Court finds that the timing and circumstances surrounding

the recantation affidavits undermine their reliability and that a reasonable juror could find their trial testimony more credible than their recantations. Accordingly, the Court finds Hardin's and Boatwright's affidavits do not constitute credible evidence under *Schlup*.

b. Loretta Turner

Conversely, the coram nobis court found Loretta Turner to be credible. Because no other evidence undermines her credibility, the Court finds that Turner's affidavit and coram nobis testimony constitutes credible new evidence.

B. Totality of Evidence

Now the Court views the new evidence in the full context of the testimony offered at trial to determine whether Petitioner has met his burden of demonstrating "that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 327).

The Court has concluded that Boatwright and Hardin's recantations do not constitute credible new evidence, and each testified at Petitioner's trial that Petitioner was the gunman at Kirk's Market on the day of the shooting. Officer George testified that Petitioner had made a robbery report at around 3:10 a.m. on the day of the shooting [Doc. 6-1 at 33–34]. Bowman

testified that at around 6:30 that same morning, Petitioner got into Bowman's car at Kirk's Market and stated his belief that Boatwright and Hartsell were involved in robbing him [Doc. 6-1 at 91–106]. Petitioner was then identified by Bowman, Boatwright, and Hardin from a photo lineup prepared by Detective Ridenour, who stated that Boatwright identified the shooter as "J.B." [Doc. 6-2 at 59–61]. Therefore, Bowman, George, and Ridenour offered testimony providing context to Respondent's theory of the case that could allow a reasonable juror to conclude that Petitioner was the gunman at Kirk's Market on October 8, 1996, even considering the recantation evidence.

This brings the Court to the new evidence provided by Loretta Turner. Although the jury rejected Petitioner's proof that he was not present at Kirk's Market at the time of the shooting, that testimony came through witnesses with whom Petitioner had some sort of relationship. In fact, three of the witnesses—Fred Lowery, Walter Lowery, and Jay Harris—were related to Petitioner [Doc. 6-2 at 4, 25, 40]. Defense witness Greg Moore was friends with Fred Lowery and was also present, along with Harris and Fred Lowery, when the crime occurred [*Id.* at 30–35]. Therefore, a reasonable juror could find these witnesses less credible than Loretta Turner, a seemingly unbiased witness who was herself partially subjected to the violence at Kirk's Market that day. *House*, 547 U.S. at 552 (finding evidence from witnesses "with no evident motive to lie" more probative than evidence from "friends or relations of the accused"). Additionally, Turner's

testimony would have supported the trial testimony of defense witness Tamera McMillan, the neighbor who stated Petitioner was at her home at the time of the shooting.

However, Turner also testified that she ducked behind a solid wooden counter as soon as the shooting started, and that she did not see the shooting or the gunman [Doc. 6-16 at 66, 72]. The trial testimony and coram nobis testimony established that Hartsell was shot in the parking lot and Boatwright was shot either outside the door of the store or just as he was entering the door [*See id.* at 72–73]. None of the proof of Petitioner's guilt relied on a finding that Petitioner was actually in the store prior to the shooting.

Upon review of all of the available evidence, the Court finds it possible that a reasonable juror might view the recantation evidence and the seemingly unbiased evidence provided by Loretta Turner and harbor a reasonable doubt that Petitioner committed the shootings. However, that is not the standard. Rather, when considering Petitioner's new evidence alongside the evidence of guilt, the Court finds Petitioner has failed to demonstrate it is more likely than not that *no* reasonable juror would convict him in light of the new evidence. *McQuiggin*, 569 U.S. at 399; *Schlup*, 513 U.S. at 327. Accordingly, Petitioner has not established actual innocence as a gateway to bypass the statute of limitations, and his petition is untimely.

C. Actual Innocence

Petitioner has also raised several freestanding claims of actual innocence [*See* Doc. 2]. However, the Court has addressed Petitioner's gateway claim of innocence and found it lacking. Therefore, Petitioner cannot satisfy the extremely high threshold showing of actual innocence that would be required to establish a freestanding claim. *Herrera v. Collins*, 506 U.S. 390, 417 (1993) (finding threshold showing for freestanding claim of innocence "would necessarily be extraordinarily high"); *see also House*, 547 U.S. at 555 (noting that the Supreme Court's decisions imply "at the least that *Herrera* requires more convincing proof of innocence than *Schlup*"). Moreover, such a claim has never been recognized by the Supreme Court. *McQuiggin*, 569 U.S. at 392 ("We have not resolved whether a prisoner may be entitled to habeas relief on a freestanding claim of actual innocence."). Accordingly, Petitioner's freestanding claims of actual innocence also fail to offer Petitioner a basis for relief.

V. CERTIFICATE OF APPEALABILITY

According to Rule 11 of the Rules Governing § 2254 Cases in the United States District Courts, this Court must issue or deny a certificate of appealability ("COA") upon entry of "a final order adverse to the applicant." A COA will not issue unless a petitioner makes "a substantial showing of the denial of a constitutional right" of any claim rejected on its merits, which a petitioner may do by demonstrating that

"reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 28 U.S.C. § 2253(c)(2); *see also Slack v. McDaniel*, 529 U.S. 473, 484 (2000). To obtain a COA on a claim that has been rejected on procedural grounds, a petitioner must demonstrate "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484. Applying this standard, the Court finds that Petitioner is entitled to a COA on his rejected gateway claim of actual innocence.

VI. CONCLUSION

For the reasons set forth above, the Court finds that the instant petition is untimely, and that Petitioner has not established actual innocence to bypass the statute of limitation. Therefore, his petition for a writ of habeas corpus will be **DENIED**, and this action will be **DISMISSED WITH PREJUDICE**. A COA from this decision will be **GRANTED** on the sole issue of whether the actual-innocence exception is applicable to Petitioner's untimely habeas petition. A COA will be **DENIED** as to all other claims.

AN APPROPRIATE JUDGMENT ORDER WILL ENTER.

/s/
CURTIS L. COLLIER
UNITED STATES
DISTRICT JUDGE

NOT RECOMMENDED FOR PUBLICATION
File Name: 20a0511n.06

Case No. 19-5809

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN BRADLEY LOWERY, Petitioner-Appellant, v. MIKE PARRIS, Respondent-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE (Filed Sep. 1, 2020)

BEFORE: BOGGS, DONALD, and THAPAR, Circuit Judges.

PER CURIAM. A jury convicted John Lowery of murder and attempted murder after finding that he shot two people in Knoxville, Tennessee. Many years later, the two eyewitnesses who provided crucial evidence for the prosecution recanted their trial testimony. Another witness also came forward and swore that she didn't see Lowery during the shooting. Based on these revelations, Lowery sought relief in state court (unsuccessfully) and then in federal district court (also unsuccessfully). As relevant here, the district court denied relief after concluding that Lowery's claims were barred by the statute of limitations.[1]

[1] The district court also noted that it could grant the government's motion to dismiss because the petitioner failed to file a

Because the district court erred in reaching that conclusion, we vacate and remand for further proceedings.

Habeas petitioners like Lowery generally must raise their claims before the one-year statute of limitations expires. *See* 28 U.S.C. § 2244(d)(1). Lowery admits that he did not comply with the statute of limitations because he filed his habeas petition more than sixteen years after the one-year period elapsed.

But that's not the end of the matter. That's because prisoners who allege that they are actually innocent may sometimes bypass the statute of limitations and receive a merits adjudication of their habeas petition. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Under the actual-innocence exception, the petitioner must present "new reliable evidence"—such as "trustworthy eyewitness accounts"—"that was not presented at trial." *Schlup*, 513 U.S. at 324.

Lowery tried to get around the statute of limitations by raising an actual-innocence claim and pointing to the three new affidavits. But as the district court saw it, the actual-innocence exception was unavailable because those affidavits didn't qualify as "new evidence." Those affidavits weren't new, the district court

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timely response to the government's motion. But the petitioner did ultimately respond, and the district court considered that response when considering Lowery's motion for relief from judgment. In any event, on appeal, the government doesn't argue that we should affirm on this alternative ground, so we need not consider it. Fed. R. App. P. 28(a)(8), (b); *United States v. Ford*, 184 F.3d 566, 578 n.3 (6th Cir. 1999).

reasoned, because Lowery presented them in state court during his recent coram nobis proceedings. So the district court held that the petition was barred by the statute of limitations and thus denied relief.

That was an error. Admittedly, courts have struggled to define what qualifies as new evidence. Some courts treat all evidence as new so long as it was not presented at trial. *See*, *e.g.*, *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003). Other courts maintain that evidence is new only if it was unavailable at the time of the trial. *See*, *e.g.*, *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008). But whatever new evidence means, the district court erred by concluding that evidence presented to state courts categorically does not qualify. After all, federal law *requires* habeas petitioners to exhaust their claims in state court before seeking relief in federal court. 28 U.S.C. § 2254(b)(1)(A). So it makes little sense to define "new evidence" in a way that precludes habeas petitioners who follow exhaustion requirements from obtaining relief.

That's not to say that the three affidavits *do* qualify as new evidence. Maybe they do, maybe they don't. We leave that to the district court to decide in the first instance. All we decide today is that the district court erred by finding that the evidence wasn't new simply because it was originally presented in state court during the coram nobis proceedings.

For these reasons, we vacate and remand.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JOHN B. LOWERY, Petitioner, v. MIKE PARRIS, Respondent.	)))))))	No. 3:18-CV-330-HSM-HBG

MEMORANDUM OPINION

(Filed Nov. 19, 2018)

This is a pro se prisoner's petition for habeas corpus relief pursuant to 28 U.S.C. § 2254. Now before the Court is Respondent's motion to dismiss the petition as time-barred [Docs. 7]. Even after this Court granted a motion for extension of time to allow Petitioner additional time to respond to Respondent's motion to dismiss, Petitioner did not file a response with this Court and the time for doing so has passed.

For the following reasons, Respondent's motion to dismiss [Doc. 7] will be **GRANTED** and this action will be **DISMISSED**.

I. PROCEDURAL HISTORY

A Knox County jury convicted Petitioner of one (1) count of premeditated first-degree murder and one (1) count of attempted first-degree murder. *State v. Lowery*, No. E199800034CCAR3CD, 2000 WL 748103,

at *1 (Tenn. Crim. App. June 12, 2000). Petitioner was sentenced as a Range I offender to consecutive terms of life imprisonment for first degree murder and twenty-five (25) years for attempted murder. *Id*. The Tennessee Court of Criminal Appeals ("TCCA") affirmed Petitioner's conviction and sentence on June 12, 2000. *Id*. On February 20, 2001, the Tennessee Supreme Court ("TSC") denied discretionary review. *Id*.

On September 4, 2011, Petitioner filed a petition for writ of error coram nobis. *See John Lowery v. State*, No. E2012–01613–CCA–R3–PC, 2013 WL 4767188, at *3 (Tenn. Crim. App., Sept. 4, 2013), *no perm. app. filed*. He filed an amended petition on May 22, 2012. *Id*. On June 27, 2012, the trial court dismissed the petition. *Id*. However, on appeal, the court remanded for an evidentiary hearing. *Id*. Following an evidentiary hearing on October 2, 2014, the trial court denied the petition by an order dated February 23, 2016. *Id*. On appeal, the TCCA affirmed the trial court's denial. *State v. Lowery*, No. E201600587CCAR3CD, 2017 WL 3078313, at *1 (Tenn. Crim. App. July 19, 2017), *appeal denied* (Nov. 16, 2017). On November 16, 2017, the TSC denied discretionary review. *Id*.

On August 10, 2018, Petitioner filed this pro se petition for writ of habeas corpus [Doc. 1]. In response, Respondent filed a motion to dismiss the petition as time-barred under 28 U.S.C. § 2244(d)(1) [Doc. 7].

I. ANALYSIS

The Antiterrorism and Effective Death Penalty Act ("AEDPA") contains a one-year statute of limitations governing the filing of an application for a federal writ of habeas corpus. *See* 28 U.S.C. § 2244(d)(1). The statute begins to run when one of the four circumstances occurs: the conclusion of direct review; upon the removal of an impediment which prevented a petitioner from filing a habeas corpus petition; when a petition alleges a constitutional right, newly recognized by the Supreme Court and made retroactive on collateral review; or when a claim depends upon factual predicates which could not have been discovered earlier through the exercise of due diligence. *Id*. The one-year period is tolled, however, during the pendency of a properly filed application for state post-conviction relief. 28 U.S.C. § 2244(d)(2). Respondent contends that the petition, as submitted to the prison mailroom[1] on August 10, 2018, is time-barred by over sixteen years [Doc. 8 p. 4].

To determine the timeliness of this petition, the Court first must determine the date Petitioner's conviction became final. The TCCA affirmed Petitioner's convictions on direct appeal, and the TSC denied permission to appeal on February 20, 2001. Ninety days later, on Monday, May 21, 2001, when the time expired for filing a petition for certiorari in the United States

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[1] Under the mailbox rule, a habeas petition is deemed filed when the prisoner gives the petition to prison officials for filing in federal courts. *Cook v. Steall*, 295 F.3d 517, 521 (6th Cir. 2001).

Supreme Court, *see* U.S. Sup. Ct. R. 13.1, Petitioner's conviction became final and, the next day, May 22, 2002, AEDPA's one-year clock began to run. *See Bronaugh v. Ohio*, 235 F.3d 280, 284-85 (6th Cir. 2000) (finding that, for purpose of computing periods of time tied to § 2254's limitation statute, "the day of the act, event, or default from which the designated period of time begins to run shall not be included") (citing to Fed. R. Civ. P. 6(a)). Accordingly, for purposes of § 2244(d)(1)(A), the time for filing this § 2254 petition would have ended on May 22, 2002.

Petitioner filed the instant petition on August 10, 2018, over sixteen years after his one-year limitations period expired. As such, the instant federal habeas corpus petition [Doc. 1] is untimely under 28 U.S.C. § 2244(d)(1) and must be dismissed unless Petitioner is entitled to equitably tolling.

II. EQUITABLE TOLLING

Petitioner requests this Court grant him equitable tolling in order to deem his petition timely filed [Doc. 2 p. 5]. Petitioner claims he should be entitled to equitable tolling because he has provided sufficient evidence of his actual innocence. *Id*.

The Supreme Court has held that equitable tolling of a statute of limitation is available "in appropriate cases." *Holland v. Florida*, 130 S. Ct. 2549, 2560 (2010). Petitioners have the burden of demonstrating that they are entitled to equitable tolling. *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004) (citations omitted). "A

habeas petitioner is entitled to equitable tolling only if two requirements are met. First, the petitioner must establish 'that he has been pursuing his rights diligently.' And second, the petitioner must show 'that some extraordinary circumstance stood in his way and prevented timely filing.' " *Hall v. Warden*, 662 F. 3d 745, 749 (6th Cir. 2011) (quoting *Holland v. Florida*, 130 S. Ct. at 2562). "The doctrine of equitable tolling is applied sparingly by federal courts," and is typically used "only when a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control." *Vroman v. Brigano*, 346 F.3d 598, 604 (6th Cir. 2003) (citations and internal quotations marks omitted).

The Supreme Court has held that a credible showing of actual innocence may allow a prisoner to pursue his constitutional claims on the merits notwithstanding the untimeliness of the habeas corpus petition. *McQuiggin v. Perkins*, 133 S.Ct. 1924, 1932 (2013). To invoke actual innocence as an exception to the limitation period, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of any new evidence that may now be available to the petitioner. *Id.* at pg.1935. He does this by supporting "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 v. Delo*, 513 U.S. 298, 324 (1995).

Petitioner claims he has submitted new evidence of his actual innocence in the form of affidavits of two outcome determinative witnesses, victim Williams Boatwright and Malik Hardin, having recanted their testimonies and stating that Petitioner was not the person who committed the offenses [Doc. 2 p. 6]. Additionally, Petitioner attached an affidavit of Loretta Turner, the store clerk on the day of the shooting, who claims to have told police during the investigation that Petitioner never came into the store on the day in question [*Id*.].

Boatwright's and Hardin's affidavits were attached to Petitioner's first petition for writ of error coram nobis [Doc. 6 Exhibit 11 p. 23-25]. The writ was summarily dismissed and on appeal it was remanded for the court to hold an evidentiary hearing. On remand, Petitioner attached the affidavit of Loretta Turner. The TCCA addressed all three affidavits as follows:

> In this case, the trial court found the testimony of Boatwright and Hardin was not truthful. The court stated that it "listened to the witnesses' testimony and observed their demeanor on the stand." It determined that their testimony at the coram nobis hearing was not credible. Inherent in the determination of whether a petitioner is entitled to relief based upon recanted testimony is the trial court's determination of whether the witness recanting his or her testimony is credible. A petitioner is not entitled to coram nobis relief based on recanted testimony unless the coram

> nobis court is reasonably satisfied that the prior testimony was false and the present testimony is true. *State v. Ratliff*, 71 S.W.3d 291, 298 (Tenn. Crim. App. 2001).
>
> . . .
>
> Loretta Turner appeared to be telling the truth as best she could but did admit to being nervous that morning because seven or eight people came in the store all at once and she thought they were going to rob her. Also she was ducking and hiding when the shooting began.
>
> The trial court concluded that although Ms. Turner's testimony was credible, her testimony was cumulative of other witnesses who testified at trial that Petitioner was not present at Kirk's Market on the day of the shooting. The court concluded that in light of the evidence presented at trial, "this court does not find that the cumulative evidence of Loretta Turner may have caused the jury to reach a different result."

Lowery, 2017 WL 3078313, at *5-6. The TCCA affirmed, asserting that "appellate courts do not reassess credibility determinations." *Id*. *6.

This Court finds that the affidavits of Boatwright, Hardin, and Turner do not constitute new evidence because the same affidavits were already presented and addressed by the state court. Petitioner has failed to provide any new evidence to demonstrate his actual innocence. As such, Petitioner does not meet the high

burden for equitable tolling by means of actual innocence. Accordingly, the Court finds that Petitioner has failed to establish grounds that would entitle him to equitable tolling.

III. FAILURE TO RESPOND

As an alternative basis for dismissal, the Court notes that it may properly dismiss this case for want of prosecution. *See*, *e.g.*, *Custom v. Detroit Edison Co.*, 789 F.2d 377, 379 (6th Cir. 1986); Fed. R. Civ. P. 41(b). Failure to respond or otherwise oppose a motion operates as both a waiver of opposition to and an independent basis for granting the unopposed motion. *See*, *e.g.*, *Notredan, LLC v. Old Republic Exch. Facilitator Co.*, 531 F. App'x 567, 569 (6th Cir. 2013); *see also* E.D. Tenn. L.R. 7.2 ("Failure to respond to a motion may be deemed a waiver of any opposition to the relief sought.").

This Court granted Petitioner additional time to file a response to Respondent's motion to dismiss [Doc. 10]. However, Petitioner has not responded and, by way of the same, is found to have waived opposition to Respondent's request. *Millworks Construction, LLC v. Environmental, Safety & Health, Inc.*, No. 3:12-CV-177, 2015 WL 11019129, at *1-2 (E.D. Tenn. Mar. 23, 2015).

IV. CERTIFICATE OF APPEALABILITY

Finally, the Court must consider whether to issue a certificate of appealability (COA), should petitioner

file a notice of appeal. A petitioner may appeal a final order in a § 2254 case only if he is issued a COA, and a COA will be issued only where the applicant has made a substantial showing of the denial of a constitutional right. *See* 28 U.S.C. § 2253(c). A petitioner whose claims have been rejected on a procedural basis must demonstrate that reasonable jurists would debate the correctness of the Court's procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *Porterfield v. Bell*, 258 F.3d 484, 485–86 (6th Cir. 2001). As reasonable jurors would not debate the correctness of the Court's ruling that the § 2254 is time-barred, a COA will not issue.

V. CONCLUSION

For these reasons, Respondent's motion to dismiss [Doc. 7] is **GRANTED** and this action will be **DISMISSED.**

AN APPROPRIATE JUDGMENT ORDER WILL ENTER.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE

No. 21-5577

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOHN LOWERY, Petitioner-Appellant, v. MIKE PARRIS, WARDEN, Respondent-Appellee.	ORDER (Filed Sep. 14, 2023)

BEFORE: KETHLEDGE, STRANCH, and MATHIS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk