No. 24-6180

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

FILED
NOV 08 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Carl Hubbard — PETITIONER
(Your Name)

VS.

Jeffery Tanner — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☑ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

United States District Court, Sixth Circuit Court of Appeals
All Michigan States Court

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☑ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and: Alexander Kazam, Lawyer in Washington DC at the Law Firm King & Spalding LLP, Sixth Cir Appoints Pro Bono Counsel

☐ The appointment was made under the following provision of law: 18 U.S.C § 3006A (a)(2)(B). (Pro Bono En Banc) → Gregory Cui, or Roderick & Solange MacArthur Justice Center, 501 H Street NE, Suite 275 Washington, DC 20002

☑ a copy of the order of appointment is appended. A.

Carl Hubbard
(Signature)

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Carl HUBBARD, Petitioner,

V.

Jeff TANNER, Warden-Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed in forma pauperis.

Petitioner has previously been granted leave to proceed in forma pauperis in the following court(s):

The United States District Court

The Sixth Circuit court of Appeals

All Michigan State courts

Petitioner's affidavit in support of this motion is attached hereto.

Carl Hubbard #205988

Carl Hubbard #205988
Macomb Correctional Facility
34625 26 Mile Road
Lenox Township, MI 48048

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Carl Hubbard, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ NONE	$ NONE	$ NONE	$ NONE
Self-employment	$ NONE	$ NONE	$ NONE	$ NONE
Income from real property (such as rental income)	$ NONE	$ NONE	$ NONE	$ NONE
Interest and dividends	$ NONE	$ NONE	$ NONE	$ NONE
Gifts	$ NONE	$ NONE	$ NONE	$ NONE
Alimony	$ NONE	$ NONE	$ NONE	$ NONE
Child Support	$ NONE	$ NONE	$ NONE	$ NONE
Retirement (such as social security, pensions, annuities, insurance)	$ NONE	$ NONE	$ NONE	$ NONE
Disability (such as social security, insurance payments)	$ NONE	$ NONE	$ NONE	$ NONE
Unemployment payments	$ NONE	$ NONE	$ NONE	$ NONE
Public-assistance (such as welfare)	$ NONE	$ NONE	$ NONE	$ NONE
Other (specify): _____	$ NONE	$ NONE	$ NONE	$ NONE
Total monthly income:	$ NONE	$ NONE	$ NONE	$ NONE

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	$ NONE
NONE	NONE	NONE	$ NONE
NONE	NONE	NONE	$ NONE

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE	NONE	NONE	$ NONE
NONE	NONE	NONE	$ NONE
NONE	NONE	NONE	$ NONE

4. How much cash do you and your spouse have? $ NONE
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Type of account (e.g., checking or savings)	Amount you have	Amount your spouse has
NONE	$ NONE	$ NONE
NONE	$ NONE	$ NONE
NONE	$ NONE	$ NONE

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☑ Home
Value NONE

☑ Other real estate
Value NONE

☑ Motor Vehicle #1
Year, make & model NONE
Value NONE

☐ Motor Vehicle #2
Year, make & model NONE
Value NONE

☐ Other assets
Description NONE
Value NONE

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
None	$ None	$ None
None	$ None	$ None
None	$ None	$ None

7. State the persons who rely on you or your spouse for support. For minor children, list initials instead of names (e.g. "J.S." instead of "John Smith").

Name	Relationship	Age
None	None	None
None	None	None
None	None	None

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ None	$ None
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ None	$ None
Home maintenance (repairs and upkeep)	$ None	$ None
Food	$ None	$ None
Clothing	$ None	$ None
Laundry and dry-cleaning	$ None	$ None
Medical and dental expenses	$ None	$ None

	You	Your spouse
Transportation (not including motor vehicle payments)	$ None	$ None
Recreation, entertainment, newspapers, magazines, etc.	$ None	$ None
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ None	$ None
Life	$ None	$ None
Health	$ None	$ None
Motor Vehicle	$ None	$ None
Other: _____	$ None	$ None
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ None	$ None
Installment payments		
Motor Vehicle	$ None	$ None
Credit card(s)	$ None	$ None
Department store(s)	$ None	$ None
Other: _____	$ None	$ None
Alimony, maintenance, and support paid to others	$ None	$ None
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ None	$ None
Other (specify): _____	$ None	$ None
Total monthly expenses:	$ None	$ None

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? None

If yes, state the attorney's name, address, and telephone number:

None

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? None

If yes, state the person's name, address, and telephone number:

None

12. Provide any other information that will help explain why you cannot pay the costs of this case.

have NO Income . No Job Working on this petition

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11-5- , 20 24

Carl Hubbard

(Signature)

FEDERAL COURT

Prisoner-Plaintiff/Petitioner/Appellant name and number		Defendant's/Respondent's/Appellee's name
CARL HUBBARD, #205988	V	TANNER, JEFFREY

CERTIFICATE OF PRISONER INSTITUTIONAL/TRUST FUND ACCOUNT ACTIVITY

I am employed by the Michigan Department of Corrections at the facility identified below, at which the prisoner identified as Plaintiff/Petitioner/Appellant is currently incarcerated.

Attached is a computer printout which accurately reflects the current spendable balance and all activity within this prisoner's account during the preceding six months or, if the prisoner has been incarcerated for less than six months, for the period of incarceration. Code "C" on the printout represents a withdrawal from the account and code "D" represents a deposit to the account. The attached printout reflects, for the reported period, an average monthly account deposit (i.e., total deposits divided by number of months) of $92.84, an average monthly account balance (i.e., total deposits minus total withdrawals divided by number of months) of $-31.40. There is a current spendable account balance of $17.98.

Date: 10.22.2024

PJohnson Acct Tech
Signature of Custodian of Prisoner Institutional/Trust Fund Account

Macomb Correctional Facility
Correctional Facility

Daily Transaction Summary: April 22, 2024 - October 22, 2024

Offender Information

Offender Number:	0205988	Institution:	MRF	Living Unit:	HU#2	Primary Balance:	$94.00
Offender Name:	HUBBARD, CARL LYNDELL	Housing Facility:	MRF	Cell:	117	Available Balance:	$17.98
Account Status:	Open	Tier:	D	Bed:	Bot		

Primary Trust Transactions

Date	Transaction Type	Payer / Paid To	Voucher Number	Deposit	Expense	Balance	Loc Code
04/22/2024						$206.37	
04/26/2024 08:44	Phone Credits	ViaPath Technologies			($25.00)	$181.37	MRF
05/03/2024 05:10	GTL	Alicia Bertrand		$25.00		$206.37	COF
05/05/2024 19:40	Kiosk Request	JPay Inc.			($5.00)	$201.37	COF
05/06/2024 23:30	Commissary Sale	Keefe Commissary	C394472		($73.82)	$127.55	MRF
05/08/2024 08:31	Phone Credits	ViaPath Technologies			($25.00)	$102.55	MRF
05/09/2024 05:10	GTL	Tamara Hubbard		$21.00		$123.55	COF
05/15/2024 08:23	Phone Credits	ViaPath Technologies	MRF PCD 5.15.24		($25.00)	$98.55	MRF
05/23/2024 19:40	Kiosk Request	JPay Inc.			($5.00)	$93.55	COF
06/04/2024 05:10	GTL	Alicia Bertrand		$25.00		$118.55	COF
06/04/2024 23:21	Commissary Sale	Keefe Commissary	C436316		($59.98)	$58.57	MRF
06/06/2024 19:40	Kiosk Request	JPay Inc.			($1.57)	$57.00	COF
06/07/2024 08:33	Phone Credits	ViaPath Technologies			($25.00)	$32.00	MRF
06/13/2024 19:40	Kiosk Request	JPay Inc.			($5.00)	$27.00	COF
06/27/2024 05:10	GTL	Tamara Hubbard		$96.05		$123.05	COF
07/02/2024 23:36	Commissary Sale	Keefe Commissary	C479046		($121.04)	$2.01	MRF
07/11/2024 05:10	GTL	Tamara Hubbard		$45.00		$47.01	COF
07/15/2024 19:40	Kiosk Request	JPay Inc.			($6.00)	$41.01	COF
07/16/2024 09:23	Phone Credits	ViaPath Technologies			($25.00)	$16.01	MRF
08/03/2024 05:10	GTL	Tamara Hubbard		$50.00		$66.01	COF
08/07/2024 08:50	Phone Credits	ViaPath Technologies			($25.00)	$41.01	MRF
08/13/2024 23:39	Commissary Sale	Keefe Commissary	C538251		($34.33)	$6.68	MRF
08/25/2024 05:10	GTL	Tamara Hubbard		$100.00		$106.68	COF
08/28/2024 19:40	Kiosk Request	JPay Inc.			($6.00)	$100.68	COF
08/29/2024 09:50	Phone Credits	ViaPath Technologies			($30.00)	$70.68	MRF
08/31/2024 05:10	GTL	RAYMOND WILLIAMS		$95.00		$165.68	COF
09/10/2024 23:37	Commissary Sale	Keefe Commissary	C578686		($127.75)	$37.93	MRF
09/12/2024 08:34	Phone Credits	ViaPath Technologies	PCD MRF 09.12.24		($20.00)	$17.93	MRF
09/23/2024 19:40	Kiosk Request	JPay Inc.			($1.93)	$16.00	COF
10/11/2024 19:40	Kiosk Request	JPay Inc.			($2.00)	$14.00	COF
10/14/2024 05:10	GTL	Tamara Hubbard		$100.00		$114.00	COF

Primary Trust Transactions

Date	Transaction Type	Payer / Paid To	Voucher Number	Deposit	Expense	Balance	Loc Code
10/22/2024 08:49	Phone Credits	ViaPath Technologies			($20.00)	$94.00	MRF
10/22/2024				$557.05	($669.42)	$94.00	

Savings

Date	Deposit	Expense	Balance	Loc Code
04/22/2024			$0.00	
No Activity				
10/22/2024	$0.00	$0.00	$0.00	

Holds - Current as of Date and Time of Report

Date Held	Hold Type	Notes	Amount
10/21/2024	Commissary		$76.02

Remaining Obligations - Current as of Date and Time of Report

Description	Paid To	Max Per Period	Ordered	Transfer	Outside Source	Held	Paid	Written Off	Total Remaining
No Remaining Obligations									

Total: $0.00

557.05
÷ 6
92.84

557.05
- 669.42
- 76.02
-188.39
÷ 6
-31.40

he took a cab home after seeing the dead body, but when the State subpoenaed the cab company, it apparently received no helpful records.

- An affidavit from Raymond Williams, who claimed that between August 31, 1992, and September 2, 1992 (the dates of Hubbard's trial), he heard Collins crying in a jail cell and moaning about how Sergeant Kinney forced him to lie about Hubbard.
- An affidavit from Elton Carter who claimed that Collins admitted to lying about Hubbard's involvement in Penn's murder.

II.

Because Hubbard's federal habeas petition was filed in 2013, AEDPA governs his claim. *White v. Warden, Ross Corr. Inst.*, 940 F.3d 270, 274 (6th Cir. 2019). We review de novo the district court's dismissal of Hubbard's habeas petition as untimely. *Souter v. Jones*, 395 F.3d 577, 584 (6th Cir. 2005). We review the district court's factual findings for clear error. *Id.*

III.

AEDPA imposes a one-year time bar on federal habeas claims, which, as relevant here. runs from the latest of, "(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" or, "(D) 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).[2] Despite AEDPA's clear language barring untimely petitions, the Supreme Court has held that the statute is subject to an equitable exception which allows petitioners to ignore the time bar in cases where they can credibly demonstrate actual innocence. *See McQuiggin*, 569 U.S. at 386.

This exception requires a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 399 (quoting *Schlup*, 513 U.S. at 327). If a petitioner meets this burden, he may belatedly file his underlying federal habeas claim. *See id.* at 401. Several facets of this doctrine bear mention.

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[2]While Hubbard argued before the district court that his petition was timely under § 2244(d)(1)(D), his argument was rejected, and he was not granted a certificate of appealability on that claim. His only claim before this court is an equitable-exception claim.

First, this equitable-exception doctrine is not a freestanding substantive claim for habeas relief. The Supreme Court has not decided whether actual innocence is a substantive ground for relief. *Id.* at 392 (citing *Herrera v. Collins*, 506 U.S. 390, 404-05 (1993)). Rather, it allows a petitioner to overcome a procedural barrier—in this case, AEDPA's time bar—based on the "miscarriage of justice" that results from the "incarceration of innocent persons." *Id.* (quotation marks and citation omitted). Actual innocence, in this sense, operates as a "gateway" by which a petitioner may belatedly file other constitutional and federally cognizable claims. *See id.* at 393.

Second, the petitioner's diligence (or lack thereof) in presenting new evidence is not a threshold barrier to presenting an equitable-exception claim. *Id.* at 399. Rather, unexplained delay in presenting new evidence is merely relevant to the credibility of the underlying claim, as part of a holistic assessment of the record. *See id.*

Third, an equitable-exception claim requires the presentation of "new reliable evidence." *Schlup*, 513 U.S. at 324. While the Supreme Court has not explicitly defined what evidence counts as "new," this court has held that evidence is "new" for the purposes of the actual-innocence inquiry so long as it was not presented at trial. *Souter*, 395 F.3d at 595 n.9 (citing *Schlup*, 513 U.S. at 324); *Freeman v. Trombley*, 483 F. App'x 51, 57 (6th Cir. 2012). As for reliability, the *Schlup* court illustratively listed "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence" as examples of "reliable evidence." *Schlup*, 513 U.S. at 324. Such evidence, the Court stated, is "obviously unavailable in the vast majority of cases," because actual-innocence claims are "rarely successful." *Id.*

Fourth, while a credible claim of actual innocence requires "new reliable evidence," federal courts must not limit their analysis to such evidence. *House v. Bell*, 547 U.S. 518, 537 (2006). The court must instead look at the entire record, "old and new" evidence, without regard to its admissibility, before determining whether a petitioner has credibly shown actual innocence sufficient to overcome a habeas procedural barrier. *Id.* at 538. Based on the entire record, the court must then determine whether "no reasonable juror would find [the petitioner] guilty." *Id.* This may require the federal court to make its own credibility determination as to witness testimony in the record. *Id.* at 538-39.

Fifth, and perhaps most importantly, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Sawyer v. Whiteley*, 505 U.S. 333, 339 (1992)). And in the "gateway" context, our court has said the same thing. *Gulertekin v. Tinnelman-Cooper*, 340 F.3d 415, 427 (6th Cir. 2003). This means that a petitioner may not pass through the equitable gateway by simply undermining the state's case. Rather, he must demonstrate that he *factually* did not commit the crime. Of course, dismantling the state's case is *relevant* and *helpful* to the petitioner because it leaves a vacuum to be filled by an exonerative explanation; but it is not sufficient in and of itself. This distinction between exonerating evidence and impeachment evidence undergirds both of the Supreme Court's landmark equitable-exception cases. *Schlup*, 513 U.S. at 324; *House*, 547 U.S. at 552–53.

Start with *Schlup*. The equitable exception adopted by the *Schlup* Court rested not on the notion that all convictions must be supported by constitutionally sufficient evidence, but on the fact that the writ of habeas corpus, at its core, is an equitable remedy designed to achieve the "ends of justice." *Schlup*, 513 U.S. at 319-20. A miscarriage of justice, in this context, does not include every legal wrong inflicted on a defendant but is instead confined to the "rare" and "extraordinary case" in which the petitioner is innocent. *Id.* at 321. To achieve the ends of justice and provide an equitable gateway for the innocent, the Court crafted a "standard of proof" to govern such claims, requiring a petitioner to show that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *Id.* at 322, 327. This probabilistic standard, despite its similarity to the sufficiency standard in *Jackson v. Virginia*, 443 U.S. 307 (1979), was *not* meant to serve as collateral sufficiency review. *Schlup*, 513 U.S. at 330 (explicitly distinguishing *Jackson*). Rather, this standard was simply meant to reflect the *degree of proof* needed to make a successful actual-innocence claim. Proof of actual innocence was the end; evaluating the effect of the evidence on a hypothetical factfinder was merely the means. In this regard, the two inquiries are markedly different. *Jackson* asks whether

sufficient evidence exists such that the government could constitutionally convict. *Schlup* asks whether the petitioner actually committed the crime. *Id.* at 330-31.[3]

The Court's analysis in *House*, 547 U.S. at 518, confirms this reading. In *House*, a woman named Carolyn Muncey was murdered and her body found in a ditch on the side of the road. *Id.* at 521-22. During the initial search for Muncey after her unexpected disappearance, her cousin noticed Paul House climbing out of an embankment with a rag, wiping his hands. *Id.* at 524. When authorities found Muncey's body near that ditch, House became the prime suspect and was charged with her murder. *Id.* at 524-28. The State presented voluminous evidence, but primarily relied on the finding of Muncey's blood on House's jeans and House's semen on Muncey's person. *Id.* at 528-29.

On collateral review, House conclusively demonstrated that the blood found on his pants was due to the negligent spillage of blood from Muncey's autopsy in the same evidence box carrying his jeans. *Id.* at 544. House further proved that the semen found on Muncey was not his but her husband's. *Id.* at 540-41. Despite these new revelations' effectively dismantling the State's entire case, the Court required more. Only *after* House provided a credible confession by Muncey's husband as the true perpetrator did the Court find that he met the actual-innocence test to permit his federal habeas claim to proceed. *Id.* at 548-553.

Consider too *Cleveland v. Bradshaw*, 693 F.3d 626 (6th Cir. 2012), in which this court found a credible claim of innocence. There, the petitioner produced a reliable recantation by the state's star witness. *Id.* at 629–30. But in addition, the petitioner produced evidence to establish an alibi—both an alibi witness and contemporaneous flight records. *Id.* at 637–38. By contrast, in *Davis v. Bradshaw*, 900 F.3d 315 (6th Cir. 2018), which concerned a co-defendant involved in the same crime, we rejected the innocence claim. There, we concluded that Davis had not "presented similar, reliable alibi evidence." *Id.* at 334. Like in *House*, these cases show that the relevant new evidence must go to the petitioner's actual innocence, not merely legal innocence.

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[3]This is further confirmed by the fact that *Schlup* allows for the examination of non-admissible evidence, demonstrating that the object of the *Schlup* standard is to ascertain truth, as opposed to guaranteeing a criminal procedural right. *Schlup*, 513 U.S. at 327-28.

The dissent disagrees. It argues that Hubbard is "actually innocent" if he demonstrates that "any reasonable juror would have reasonable doubt." *Dissent*, at 23 (quoting *House*, 547 U.S. at 538). That is, the dissent claims that this standard *defines* actual innocence, rather than simply providing a burden of proof by which courts *assess* actual innocence.

What's the difference? The dissent quotes a recent case of ours to explain: "A defendant who can clearly and convincingly dismantle the government's case against him could therefore overcome the procedural bar of § 2244(b)(2)(B)(ii)—by removing that 'certitude'—*even if he cannot show that he is, in fact, innocent.*" *Id.* (quoting *Keith v. Hill*, 78 F.4th 307, 315 (6th Cir. 2023) (emphasis added by dissent)). In other words, if a defendant can instill reasonable doubt as to his guilt by impeaching the State's case against him, he has proven "actual innocence," regardless of whether, in real time and space, it is more likely than not that he actually engaged in the conduct the state alleges to be criminal.

This argument is wrong. But to fully explain why, we must review the case the dissent relies on: *Keith v. Hill*. That case involved a habeas petitioner who, after his conviction for a drug-related triple homicide, sought to bring a fourth successive habeas petition alleging violations of *Brady v. Maryland*, 373 U.S. 83 (1963). *Keith*, 78 F.4th at 308-09, 312-14. AEDPA generally bars successive habeas petitions unless, as relevant in *Keith*,

> [T]he facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. at 314 (quoting 28 U.S.C. § 2244(b)(2)(B)(ii).

The government in *Keith* argued that Keith could not meet AEDPA's successive-petition standard unless he factually proved his innocence (i.e., that he literally did not commit the crime). *Id.* at 315. But the court, accepting the premise that the successive-petition provision requires a showing of actual innocence, claimed that "actual innocence" was distinct from "factual innocence." *Id.* "Actual innocence," the court stated, is proved whenever, based on the evidence as a whole, "no reasonable juror would have convicted [the defendant]." *Id.* (quoting

House, 547 U.S. at 526, and *McQuiggin*, 569 U.S. at 385, 393-94). "Factual innocence," the court distinguished, means what it says—the defendant didn't do it. *Id.*

The *Keith* court's reading of *House* and *McQuiggin* is both inapposite and inaccurate. Inapposite here because AEDPA's successive-petition provision—the provision at issue in *Keith*—involves a different inquiry than does the equitable-exception standard. The successive-petition provision considers whether, absent *the claimed constitutional error*, the new factual predicates would establish by clear and convincing evidence that no reasonable factfinder would have found the habeas petitioner guilty. *See Baugh v. Nagy*, No. 21-1844, 2022 WL 4589117, at *10 (6th Cir. Sept. 30, 2022) (alternatively arguing—in the successive petition context—that improper withholding of *Brady* material did not prejudice defendant because it could only be used as impeachment evidence, and that the defendant was guilty in any event). But the equitable-exception standard at issue here requires first a showing that the defendant, based on the entire record, is actually innocent; only then may the court even consider his assertions of constitutional error. *See McQuiggin*, 569 U.S. at 393 (describing equitable-exception claim as a "gateway" to consideration of constitutional error). Considering the differences between the two standards, *McQuiggin* and *House* were arguably irrelevant to *Keith's* analysis.

And *Keith* reads the Supreme Court's equitable-exception cases inaccurately. *Keith* reads *McQuiggin*'s and *House*'s standard of proof—that considering the evidence as a whole, "no reasonable juror would have convicted [the petitioner]"—as the Supreme Court's *definition* of actual innocence (as the dissent does), rather than its means of *assessing* actual innocence. *Keith*, 78 F.4th at 315 (citing *McQuiggin*, 569 U.S. at 385, 393-94, and *House*, 547 U.S. at 526). In doing so, the *Keith* court had to claim that "actual innocence" is somehow distinct from "factual innocence."[4] *Id.* But the Supreme Court, while adjudicating an equitable-exception claim, long ago explicitly stated otherwise: "It is important to note in this regard that 'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley*, 523 U.S. at 623.

[4]Despite the ironic reality that "actual" literally means "existing in fact." *Actual*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/actual (last accessed Apr. 11, 2024).

Keith's citation to *Jackson v. Virginia*, 443 U.S. 307, 315 (1979), the seminal sufficiency-review case, reveals its failure to consider *Bousley* or *Gulertekin*. *Keith*, 78 F.4th at 315.[5]

The simple premise undergirding our description of actual innocence or factual innocence (they are equivalent) is that objective, historical events occur, regardless of a third party's ability to gather evidence of that occurrence after the fact. Either Hubbard killed Rodnell Penn, or he did not. The government's evidence of that event in no way changes what actually occurred.

Of course, the government's ability to *convict* Hubbard depends entirely on the proof it provides. All evidentiary questions must in some way reference a standard of proof or certitude. That is why a guilty verdict is not a declaration that a defendant objectively committed a crime (though we often use that shorthand) but rather that the government has provided evidence that he did so sufficient to dispel all reasonable doubts. Inversely, a "not guilty" verdict is just that—an acquittal based on the government's inability to meet its burden of proof. An acquittal is not a declaration of innocence.

But the error of the dissent (and *Keith*) is that they equate the two. *Dissent,* at 23; *see also Keith*, 78 F.4th at 315. The dissent conducts its actual-innocence analysis under the presupposition of a hypothetical new trial, and *Keith* claims a defendant proves his innocence by removing the "certitude" of his conviction. But *Schlup* took pains to distinguish the burden of proof from the objective reality: "Our reference to *Winship* is intended merely to demonstrate that it is quite consistent with our jurisprudence to *give content through a burden of proof* to the understanding that a fundamental injustice would result from the erroneous conviction and execution of an *innocent person*." *Schlup*, 513 U.S. at 326 n.42 (emphasis added).

What role *does* the burden of proof play in our analysis of an equitable-exception claim? It establishes the required probability of the objective, historical fact. With the knowledge that factual innocence is the object of proof, the question of whether "it is more likely than not that no reasonable juror would have convicted him" simply gives us a metric by which to assess whether the petitioner has met that burden. *Id.* at 327. In this regard, we reject the assertion that

[5]At any rate, *Gulertekin* dealt with the gateway innocence context, which is this case, and *Keith* did not. Still, the Supreme Court has not indicated that the "innocence" definitions are different in these different contexts—even though the standards themselves are slightly different.

requiring a probabilistic showing of actual innocence necessarily requires "conclusive exoneration." *Dissent,* at 23 (quoting *House*, 547 U.S. at 553). We simply require that a petitioner show the probability of his *innocence*, rather than merely impeach the State's case. This means that a defendant must put forth some type of reliable evidence that is exonerative in nature. That evidence need not *conclusively prove* his exoneration to make the gateway showing, but it must, at minimum, go towards his innocence. *See Schlup*, 513 U.S. at 324 (describing "reliable evidence" of innocence as "exculpatory"); *see also Hyman v. Brown*, 927 F.3d 639, 665 (2nd Cir. 2019) (recanting eyewitness of shooting did not establish innocence because failure to inculpate the petitioner does not exonerate the petitioner). In other words, the new evidence mirrors requiring a showing that the petitioner did not do the crime.

Finally, the Supreme Court has repeatedly said that the actual-innocence remedy is reserved for only the most extraordinary case. *See Calderon v. Thompson*, 523 U.S. 538, 558 (1998); *House*, 547 U.S. at 536–37; *Murray v. Carrier*, 477 U.S. 478, 496 (1986); *Sawyer*, 505 U.S. at 339 n.6; *McQuiggin v. Perkins*, 569 U.S. 383, 393 (2013); *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Herrera v. Collins*, 506 U.S. 390, 426–27 (1993) (O'Connor, J., concurring). It would conflict with that directive to allow a petitioner to overcome procedural default only by calling the state's case into question. To be fair, at least one treatise asserts that "there is no requirement that the petitioner present affirmative proof of innocence. It is enough if the 'post-conviction evidence casts doubt on the conviction by undercutting the reliability of the proof of guilt . . . .'" Fed. Habeas Manual § 9B:80 at 155 (2023) (quoting *Sistrunk v. Armenakis*, 292 F.3d 669, 673 (9th Cir. 2002) (en banc)). In *Sistrunk*, the Ninth Circuit rejected the petitioner's actual-innocence claim, which was based largely on discrediting the state's main trial witness. *Sistrunk*, 292 F.3d at 675–77. But *Sistrunk* was decided pre-*House*. And in a post-*House* case, the Ninth Circuit rejected the petitioner's freestanding actual-innocence claim when it was "based on recantation testimony alone." *Jones v. Taylor*, 763 F.3d 1242, 1248 (9th Cir. 2014). So we are in good company in reading *House* and *Schlup* to require petitioners seeking to meet the equitable exception to point to new evidence that contemplates establishing the petitioner's actual innocence—in other words, to make a gateway showing that he didn't do the crime (which goes to actual innocence) instead of merely attacking the state's case (which could show legal innocence).

The genesis of this distinction comes from *Sawyer*. On "factual" or "actual innocence," the Supreme Court said a "prototypical example," at least in a "colloquial sense" is when the state "has convicted the wrong person of the crime."[6] *Sawyer*, 505 U.S. at 340. This would include those "rare instances" when "it may turn out later . . . that another person has credibly confessed to the crime, and it is evident that the law has made a mistake." And in this type of case, "the concept of 'actual innocence' is easy to grasp." *Id.* at 340–41.

Importantly, also in *Sawyer*—the Court notes that the argument that the state has convicted the wrong person is a common argument made in post-trial motions after conviction. But these arguments are regularly rejected "because the evidence adduced in support of them fails to meet the rigorous standards for granting such motions." *Id.* at 340. The "rare" instances that can lead to successful results are the ones, as noted above, whether the petitioner can establish his innocence. So the genesis of the distinction between arguments about legal sufficiency, on the one hand, and actual/factual innocence is in *Sawyer*.

What does all this mean? The bottom line is that Hubbard cannot satisfy the actual-innocence standard only by undermining the state's case alone. First, that scenario is not the "prototypical" scenario, as explained above, that *Sawyer* outlines. And that prototypical scenario is contrasted with post-trial sufficiency arguments. Second, the requirement that "new reliable evidence" be produced, "whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," *Schlup*, 513 U.S. at 324, is inconsistent with simply undermining the state's case. These types of new evidence (though admittedly not exclusive) all would appear to contemplate establishing the factual innocence of the petitioner. The Court was contemplating that the mine-run case would involve factual innocence. In other words, the character of the new evidence that the Court requires mirrors requiring a showing that the

[6]Under habeas law, courts have drawn distinctions drawn between the § 2244(b)(2)(B)(ii) context—a direct descendent of *Sawyer*; the "gateway" situation, which comes from *Murray v. Carrier*, 477 U.S. 478 (1986); and so-called freestanding actual-innocence claims, *see Carriger v. Stewart*, 132 F.3d 463, 476 (9th Cir. 1997). At the Supreme Court, however, the constitutional implications of a freestanding actual-innocence claim remain "an open question." *Dist. Att'y's Off. v. Osborne*, 557 U.S. 52, 71–72 (2009) (assuming without deciding a "federal constitutional right to be released upon" a freestanding actual-innocence claim). But the distinction in those cases is the burden of proof that the petitioner must meet, i.e., clear and convincing evidence, § 2244(b)(2)(B)(ii), versus more likely than not, *Bousley*, 52 U.S. at 623, versus requiring an "extraordinarily high" threshold showing, *see Herrera v. Collins*, 506 U.S. 390, 417 (1993). It is not about what "innocence" means.

petitioner didn't do the crime. To show he is entitled to equitable tolling, Hubbard must present new evidence that contemplates establishing his actual innocence—a lower bar than conclusively establishing that he did not do the crime, but one that requires him to do more than only undermine the state's case.

With the law established, we proceed to analyze Hubbard's newly presented evidence.

IV.

Hubbard presents new evidence that purportedly demonstrates that Curtis Collins's incriminating testimony is false and that a different man killed Rodnell Penn. We consider its reliability, and whether it establishes his innocence, in turn.[7]

—Curtis Collins's Testimony

Hubbard presents numerous affidavits purportedly demonstrating that Curtis Collins was likely not at the party store that night, and therefore could not have seen Hubbard shoot Penn. We first consider whether this evidence is reliable.

A vacillating witness who changes his story multiple times is often presumed to be unreliable. *See Davis v. Bradshaw*, 900 F.3d 315, 330 (6th Cir. 2018) (a change in story could "make it more difficult for reasonable juror to find it reliable"). In such circumstances, a reasonable juror would likely need "corroborating evidence" to discern which version of the witness's story is true. *Id.* Unexplained delay between long past events and a witness's decision to testify to those events also casts a pall of unreliability over the testimony. *See McQuiggin*, 569 U.S. at 399.

Collins's recantation affidavit marks the third time he has changed his story. This alone makes it difficult to credit his account unless reliable corroborating evidence indicates his truthfulness. The corroborating evidence that Hubbard now presents, however, is weak. All of

[7]Contra the dissent, we are not isolating our consideration of the evidence. *Dissent*, at 41. We do evaluate how the evidence interacts and aggregately contributes or detracts from a showing of innocence. *Infra*, at 17-19. We simply have chosen to organize our analysis differently than the dissent would.

the corroborating affidavits are decades after the fact, and many do not explain the reason for the delay.

While we could laboriously examine the motive of each affiant or criticize the reliability of the polygraph examination or question the relevance of the DOJ study, we need not do so here because Collins's recantation is not reliable. Even if it were, it does not go towards Hubbard's innocence—it goes only toward undermining the state's case. Even if we discredit Collins's testimony from Hubbard's trial, Hubbard is left with only the lack of an incriminating witness, not the presence of an exonerating one. *See Hyman*, 927 F.3d at 665. And, as stated previously, Hubbard must present some reliable exonerative evidence to succeed in his equitable-exception claim. So even though a reliable recantation could be one part of the actual-innocence analysis, Collins's unreliable recantation does not warrant consideration.

—An Alternative Suspect

Hubbard's evidence pointing to Mark Goings as an alternative suspect does not fit that bill. The first affidavit, from fellow inmate Askia Hill, claims that Hill saw Mark Goings arguing with someone on Gray Street on January 17, 1992. When the unknown man turned to walk away, Mark Goings shot him. The other two affidavits, from Roy Burford and Emmanual Randall, claim that the "word on the street" was that Goings shot Penn.

But these affidavits are patently unreliable. Consider Hill's affidavit. Although Hill claims that he does not know Hubbard, he was incarcerated with him at the time of the affidavit, rendering both that statement and his motives suspect. *Herrera*, 506 U.S. at 423 (O'Connor, J., concurring) ("It seems that, when a prisoner's life is at stake, he often can find someone new to vouch for him."). But even disregarding that, Hill's affidavit bears no indicia of reliability. Hill waited almost twenty years to come forward and tell anyone that the State had supposedly convicted the wrong man. His only explanation for this delay is that he was "afraid for [his] life" and "didn't want any trouble with anybody in the neighborhood." This hardly clears the cloud of skepticism over the twenty-year silence. Nor does Hill provide any corroborating evidence to bolster his account. The affidavit is barebones, claiming only that Hill saw Mark Goings kill *someone* (presumably Penn) in the Gray and Mack neighborhood that night. The affidavit lacks

even a shred of information corroborating that Hill was in the vicinity of the Gray and Mack neighborhood on January 17. Without more, Hubbard's actual-innocence-gateway claim cannot prevail based on this affidavit alone.

The Burford and Randall affidavits fare no better. Both are unreliable hearsay. While we *can* consider hearsay evidence when adjudicating an actual-innocence gateway claim, we do not have to give this "word on the street" hearsay a level of credibility that it does not deserve.

Even if we credited all this evidence as true, it does not actually establish what Hubbard claims. Believing every word of all three affidavits establishes only that 1) Mark Goings shot someone on Gray and Mack, and 2) the rumor in the neighborhood was that Mark Goings shot Rodnell Penn. This evidence does not actually establish that anyone, by first-hand account, saw Mark Goings shoot Rodnell Penn.

—The Alibi Witnesses

Although Hubbard has not presented any new evidence regarding his potential alibi, we review the whole record, "old and new," when faced with an actual innocence claim. *House*, 547 U.S. at 538. As explained previously, Collins's recantation is unreliable. However, to ensure we examine the whole record rather than isolated segments, we will reconsider the weight of Hubbard's alibi witnesses in light of Collins's recantation. Thomas and Vanessa Spells testified that Hubbard was with them at their apartment from approximately 6–9 p.m. on January 17, the time of Penn's shooting. Previously, this testimony, by people with a friendly relationship to Hubbard and therefore perhaps a motive to lie, was set against two witnesses (Collins and Andrew Smith) who testified that Hubbard was near the party store during that time. Now, however, assuming Collins's recantation is believable, the Spells's story seems somewhat more likely.

Unfortunately for Hubbard, however, their story falls short of the probabilistic burden established in *Schlup*. Consider first Smith's incriminatory testimony. While he did not see Hubbard fleeing from the vicinity of the shooting, he claims he *did* see Hubbard near the party store at around 8 p.m. with two other men, and a few minutes later he came out of the party store and saw a dead body down the street. This directly contradicts the Spells' story that Hubbard

was at their apartment. Furthermore, the prosecutor established a plausible motive for Hubbard to kill Penn: Penn had previously agreed to testify against Hubbard at a prior murder trial. On top of that, Hubbard and Penn were dealing drugs together around the time of Penn's death, and Hubbard planned to see Penn the day of Penn's death. In light of all this evidence, even assuming Collins's recantation is reliable, a reasonable trier of fact could still credit Smith's testimony as more reliable than the Spells's.

V.

Hubbard argues that even if we find he cannot make out an equitable-exception claim on this record, we should remand for an evidentiary hearing. Typically, "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." *Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). And we must consider the actual-innocence standard in determining whether an evidentiary hearing is appropriate. *See Turner v. Romanowski*, 409 F. App'x 922, 930 (6th Cir. 2011).

An evidentiary hearing wouldn't do much to bolster the inherent unreliability of Hubbard's evidence. Even if we credited all his evidence as true, for the reasons explained above, it is not more likely than not that no reasonable juror would have convicted Hubbard. In other words, "[n]either the existing record nor the additional affidavits submitted by [Hubbard] are sufficient to cast any significant doubt on the guilty verdict rendered by the state court, and the district court was not required to hold an evidentiary hearing on such insubstantial factual allegations." *Id.*

VI.

Hubbard waited over twenty years after his conviction to file his federal habeas petition. He now asks us to ignore this delay and allow his habeas petition to be considered on the merits, all in the hopes of overturning a conviction more than thirty years old. But the State of Michigan has an interest in the finality of Hubbard's conviction. Congress recognized as much by passing AEDPA and imposing a one-year time bar on federal habeas claims. That time bar can be ignored only when a petitioner shows that the State has imprisoned an innocent person.

Hubbard's new evidence does not meet that burden. He must therefore comply with the same law with which all other habeas petitioners must comply. Accordingly, we AFFIRM the district court's judgment.

DISSENT

COLE, Circuit Judge, dissenting. Petitioner Carl Hubbard appeals the district court's dismissal of his petition for a writ of habeas corpus. Hubbard, currently incarcerated in a Carson City, Michigan correctional facility, was convicted of the murder of Rodnell Penn in 1992. His 28 U.S.C. § 2244 petition was dismissed by the district court as untimely and ineligible for equitable tolling of AEDPA's one-year statute of limitations. But the district court granted a certificate of appealability on the latter ground, which is now before this court. Because I find that Hubbard has demonstrated a credible claim of actual innocence, I would hold he is entitled to equitable tolling. I would therefore reverse the district court's dismissal of his habeas petition and allow Hubbard to pursue the merits of his underlying claims, and would, at a minimum, remand for an evidentiary hearing on his new reliable evidence. For these reasons, I respectfully dissent.

I.

Before discussing the specifics of Hubbard's case, it is important to clarify a few of the governing legal standards, as I take issue with the majority's interpretation of the standard of review applied to the underlying facts and, more importantly, the actual innocence requirement as articulated in our court's and the Supreme Court's binding precedent.

We review a district court's dismissal of a writ of habeas corpus as barred by the statute of limitations de novo. *Souter v. Jones*, 395 F.3d 577, 584 (6th Cir. 2005). We also review a district court's refusal to apply equitable tolling based on actual innocence de novo, reflecting that a claim of actual innocence is "primarily a question of law" on which this court "do[es] not defer to the district court's judgment." *McSwain v. Davis*, 287 F. App'x 450, 459 (6th Cir. 2008) (citing *House v. Bell*, 547 U.S. 518, 539–40 (2006)).

Importantly, while a district court's factual findings are typically reviewed for clear error, *Souter*, 395 F.3d at 584, factual findings made without an evidentiary hearing—as is the case

here—are reviewed de novo, *Burton v. Renico*, 391 F.3d 764, 770 (6th Cir. 2004) (citing *Bugh v. Mitchell,* 329 F.3d 496, 500 (6th Cir. 2003)).

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) established a one-year limitations period during which a state prisoner can bring a federal habeas corpus petition. 28 U.S.C. § 2244(d)(1). As Hubbard does not challenge the district court's conclusion that his petition is untimely, this issue is waived. *Gregory v. City of Louisville*, 444 F.3d 725, 737 (6th Cir. 2006). So I, like the majority, focus on his remaining avenue for relief: equitable tolling.

AEDPA's limitations period is not jurisdictional, and does not require courts to dismiss a claim as soon as the "clock has run." *Day v. McDonough*, 547 U.S. 198, 208 (2006). "[A] petitioner who misses the deadline may still maintain a viable habeas action if the court decides that equitable tolling is appropriate." *Allen v. Yukins*, 366 F.3d 396, 401 (6th Cir. 2004).

Since *Souter*, this court has embraced equitable tolling of AEDPA's one-year period where a petitioner presents a credible claim of actual innocence. *Cleveland v. Bradshaw*, 693 F.3d 626, 631 (6th Cir. 2012) (citing *Souter*, 395 F.3d 577). A credible claim of actual innocence operates as a "gateway" through which a petitioner may pass and argue the merits of his underlying constitutional claims "despite a procedural bar that would ordinarily preclude such review." *Id.* at 632 (citing *Schlup v. Delo*, 513 U.S. 298, 315 (1995)). A petitioner is "actually innocent" when he (1) presents "new reliable evidence" of his innocence that, (2) when considered with all the old evidence in the record, makes it "more likely than not that no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 324, 327.

The gap between my view of the case and the majority's is at its widest with respect to this second requirement, so I begin there. If it is established that a petitioner has presented "new reliable evidence," we then evaluate the second prong of the inquiry: whether "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327–28. For this inquiry, we consider the "evidence in its entirety": "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 537 (cleaned up) (citing *Schlup*, 513 U.S. at 327–28).

The individual pieces of evidence need not, on their own, support a finding of actual innocence; "a reasonable jury might well disregard" a piece of evidence "[i]f considered in isolation." *Id.* at 552. Some pieces of evidence may "reinforce other doubts" as to the petitioner's guilt, while some pieces may support an inference of guilt. *See id.* at 553–54. This probability inquiry looks at the aggregate impact of all of the evidence, not the myopic impact of each piece itself. *Id.* at 537–38; *contra, e.g.*, Maj. Op. at 18 (that "the Spells's story . . . falls short of the probabilistic burden"). This approach mirrors how the government often secures convictions: In lieu of a smoking gun, a verified eyewitness, or other airtight evidence, the government presents a compilation of circumstantial evidence in a way that, together, may allow a judge or jury to draw the conclusion that the accused did, in fact, do the thing the government says they did. Indeed, this is precisely the foundation on which Hubbard was convicted.

So, to be eligible for equitable tolling, Hubbard must make "a credible claim of actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 391 (2013). This "actual innocence" inquiry does not require him to conclusively prove his innocence. Instead, Hubbard meets this burden—and is therefore "actually innocent"—if he demonstrates that "no reasonable juror would find him guilty beyond a reasonable doubt—or, to remove the double negative, that . . . any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538.

To be sure, a petitioner can be actually innocent even without "conclusive exoneration." *Id.* at 553. We have recently emphasized as much:

> Proof beyond a reasonable doubt requires jurors to "reach a subjective state of near certitude of the guilt of the accused"; it is proof "so convincing that you would not hesitate to rely and act on it in making the most important decisions in your own [life]." A defendant who can clearly and convincingly dismantle the government's case against him could therefore overcome the procedural bar of § 2244(b)(2)(B)(ii)—by removing that "certitude"—*even if he cannot show that he is, in fact, innocent.*

Keith v. Hill, 78 F.4th 307, 315 (6th Cir. 2023) (emphasis added) (citations omitted).

The majority nonetheless concludes that Hubbard fails to meet his burden after requiring he "demonstrate that he *factually* did not commit the crime." Maj. Op. at 9. But I am unaware of, and am not directed to, a case demanding as much. More importantly, our court just

explicitly denounced such a requirement in a published opinion. *See Keith*, 78 F.4th at 315. In so doing, we rejected the use of the "'actual innocence' standard as interchangeable with 'factual innocence,'" clarifying that a petitioner need not show that "he did not in fact commit the subject crime." *Id.*

As we have acknowledged, "the teachings of precedent are not always as clear as we might wish[,] [e]specially in a complicated area like habeas." *Wright v. Spaulding*, 939 F.3d 695, 699–700 (6th Cir. 2019). But one thing is crystal clear: "[T]he holding of a published panel opinion binds all later panels unless overruled or abrogated en banc or by the Supreme Court." *Id.* at 700. Here, that holding is *Keith*, a holding that is also clear: Under Supreme Court and Sixth Circuit precedent, a defendant can overcome AEDPA's procedural bar "even if he cannot show that he is, in fact, innocent." *Keith*, 78 F.4th at 315.

Even before *Keith*, though, the Supreme Court, and the statute itself, made the actual innocence inquiry clear: whether "no reasonable factfinder would have found the [petitioner] guilty of the underlying offense." § 2244(b)(2)(B)(ii); *Calderon v. Thompson*, 523 U.S. 538, 559 (1998); *House*, 547 U.S. at 537; *McQuiggin*, 569 U.S. at 395. So, in line with *Schlup* and its progeny, our analysis turns on whether Hubbard has presented new reliable evidence collected since trial that, when considered with the record as a whole, "raises sufficient doubt about his guilt and undermines confidence in the result of his trial," *Souter*, 395 F.3d at 590—not whether Hubbard has affirmatively demonstrated that he did not kill Rodnell Penn. The majority's focus on the idea of "factual innocence" is therefore misguided under both Supreme Court and our circuit's precedent.

Having articulated the underlying standards, I start from the top.

II.

Rodnell Penn was shot and killed down the street from a party store in Detroit, Michigan on January 17, 1992, around 9:30 p.m. As Hubbard walked by after Penn's body had been loaded into an ambulance, he asked Officer Craig Turner what happened and learned there had been a homicide. Hubbard was taken into custody four days later and interrogated by Sergeant Joann Kinney.

Curtis Collins gave a statement to police under the alias "Tony Smith," claiming he saw Hubbard at the party store the night of the shooting. The next day, Hubbard was charged with first-degree murder.

At the preliminary examination, the State called three witnesses: Collins, Officer Turner, and Sergeant Kinney. Here, Collins testified that he was in the party store for "five or ten minutes" that night, encountered Hubbard with Penn, and left the store before Hubbard. According to Collins, when he was "three" or "five" feet away from the store, he heard gun shots and saw Hubbard running through a field. He claimed to have recognized Hubbard as he ran based on "the scar on the back of his head" but noted that there were no streetlights, lamps, or house lights nearby and that it was dark. Collins testified that he "jumped in a cab and went home" after he saw the victim's body.

A.

Hubbard's single-judge trial began on August 31, 1992, and lasted three days. At trial, the government presented no eyewitnesses or physical evidence connecting Hubbard to the murder scene. The prosecution's key witness, and the only evidence tying Hubbard to the scene of Penn's murder at the time of the shooting, was Curtis Collins.

On the first day of trial, the government reiterated Collins's testimony from the preliminary examination in its opening statement, but Collins recanted this testimony once he took the stand that same day. He instead asserted he was not at the party store at any point that night and therefore did not see Hubbard at the store or running across the field near Penn's murder. To explain this change, Collins explained his fear of getting in trouble with the police as his reason for initially wrongly implicating Hubbard—specifically, threats that he would be charged with Penn's murder if he did not place the blame on Hubbard. This fear of the police was real, as he was subsequently arrested for perjury as a result of the change in his testimony.

The government's next witness, John Trammel, testified that he saw Hubbard wearing a black jacket and standing "among the spectators" near the scene of the crime after the ambulance arrived.

The second day of trial commenced. The police department's evidence technician, Randy Richardson, testified that the scene was "fairly dark," confirmed that there was no street lighting nearby, and estimated the distance between Penn's body and the party store was about 375 feet.

Another witness, Andrew Smith, testified to seeing Hubbard with "two other guys" while Smith was on his way to the party store that night, but could not remember what time that was or who he allegedly saw Hubbard with. He testified that he did not see Collins, whom he knew, anywhere in the area that night and that he stayed in the party store until the police arrived.

Lucinka Gross arrived at the party store after encountering Penn's dead body on the street on her way there and asked the store employees to call the police. She testified that she did not see either Smith or Collins that night.

On the third day of trial, after being charged with perjury, Collins took the stand again and withdrew his recantation—meaning, he changed his story to be closer to that of the preliminary examination, implicating Hubbard yet again. Collins said unknown individuals threatened him on the street after his testimony on the first day of trial. Collins's new testimony did not clarify how he had left the store three or four minutes before Hubbard but had made it only, at most, 25 to 30 feet, yet Hubbard somehow traveled a few hundred feet away—from the store to where the shooting occurred—in the same time period. Collins again said he recognized Hubbard by the scar on the back of his head as he never saw his face. Collins's perjury charges were subsequently dropped, and he did not face perjury allegations for the change to his testimony between the first and third days of trial.

Defense counsel called four witnesses. Collins's "best friend[]," Raymond Williams, testified that he and Collins were at a friend's house gambling the night of Penn's murder. That friend, Roney Fulton, agreed, stating that Collins spent "all day" and evening at Fulton's house on January 17, 1992. Williams said he was with Collins until at least 10:00 p.m., when Williams left to see a movie. Neither friend knew Hubbard well.

Hubbard's friends, Thomas and Vanessa Spells, independently testified as to an alibi for Hubbard: that Hubbard spent the relevant part of the evening of January 17, 1992, at their house

and otherwise with them. Thomas and Vanessa both testified that Thomas and Hubbard left their house around 10:00 p.m. On their way to pick up the Spells's baby from Hubbard's mother, Thomas and Hubbard saw an ambulance and Hubbard spoke to a detective. Thomas and Hubbard arrived back at the Spells's with the baby around 10:30 p.m.

After agreeing with defense counsel that "Collins's testimony at times was very conflicting and downright lying," the court convicted Hubbard of first-degree murder. He was subsequently sentenced to life without parole.

B.

Hubbard's conviction was affirmed on direct appeal, where the Michigan Court of Appeals acknowledged that "[t]he evidence upon which [Hubbard] was convicted was entirely circumstantial." (Mich. Ct. of Appeals, R.56-8, PageID 2560.) Hubbard then sought state post-conviction relief, which was denied at multiple points. *See People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 15, 2012); *reconsideration denied* No. 92-001856 (Wayne Cnty. Cir. Ct. May 31, 2012); *People v. Hubbard*, No. 311427 (Mich. Ct. App. May 7, 2013); *leave denied* 843 N.W. 2d 130 (Mich. 2013) (table).

Hubbard's habeas petition was signed and dated on October 22, 2013, which operates as the filing date for purposes of AEDPA's statute of limitations. *See Cretacci v. Call*, 988 F.3d 860, 865 (6th Cir. 2021) (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988)). After procedural back and forth between the state and federal courts, this court reopened Hubbard's federal habeas case and allowed him to amend his petition on July 15, 2020. His petition sought relief on several constitutional grounds, including due process claims arising from the prosecutor's coercion of Collins and withholding of evidence, and claims of ineffective assistance of trial and appellate counsel. Hubbard argued that AEDPA's statute of limitations was tolled because he had a colorable claim of actual innocence, and requested an evidentiary hearing.

The district court did not address Hubbard's request for an evidentiary hearing and dismissed his petition with prejudice. In dismissing, the court found that the statute of limitations under § 2244 had expired and that Hubbard was not entitled to equitable tolling of the limitations period. As to this latter ground, however, the court found that "reasonable jurists

could debate whether evidence obtained by [Hubbard] after trial which suggests that he did not commit the murder for which he was convicted could justify the application of equitable tolling to excuse the untimely filing of the petition," and granted a limited certificate of appealability.

Hubbard timely appealed, which brings us to the present dispute. On appeal, Hubbard again asserts a claim of actual innocence premised on new reliable evidence that he submits justifies equitable tolling of his habeas petition so that his underlying constitutional claims can be heard on the merits.

C.

It is important to note the specifics of the evidence submitted by Hubbard at various junctures in his state and federal post-conviction proceedings. The following summaries are taken verbatim from the preceding district court opinion, organized chronologically.[1]

- 1/2/2008 affidavit of Elton Carter:

  Carter asserts that Collins told him that his September 2, 1992 trial testimony was coerced and that the police threatened to charge him if he did not agree to so testify. Carter avers that Collins told him that he wasn't at the crime scene. Collins revealed this information after the petitioner was found guilty. There are two dates on this affidavit: 1/28/04 (the date of the affiant's subscription) and 1/2/08 (the date of the notary's certification).

- 6/25/2009 affidavit of Emanuel Randall:

  Randall swears that Collins was not near the crime scene on January 17, 1992. Randall avers that Collins was with him and Raymond Williams playing a dice game when the men received a call that someone had been killed. Randall also states that the "word on the street" was that Mark Goings killed the victim, Rodnell Penn, because Goings believed that Penn had killed Goings'[s] brother a few weeks earlier. Randall stated that no one understood why Collins would falsely accuse the petitioner of shooting the victim.

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[1]Op. & Order, R. 66, PageID 4179–82 (discussing Carter Aff., R. 1, PageID 72–73; R. 26, PageID 1474–75; Randall Aff., R. 1, PageID 64–65; R. 26, PageID 1459–60; Hill Aff., R. 1, PageID 57–59; R. 26, PageID 1451–53; Williams First Aff., R. 1, PageID 67–68; R. 26, PageID 1462–63; Burford Aff., R. 1, PageID 61–62; R. 26, PageID 1471–72; Williams Second Aff., R. 1, PageID 70; R. 26, PageID 1465; Hubbard Decl., R. 1, PageID 75; R. 26, PageID 1474–75; Samir and Raad Konja Affs., R. 26, PageID 1477, 1479; Checker Subpoena, R. 51, PageID 2309–10, 2312–17; Collins Aff., R. 51, PageID 2253–54; Collins Polygraph, R. 51, PageID 2306–07).

- 2/1/2011 affidavit of Askia Hill:

  Hill avers that he saw Mark Goings shoot the victim on January 17, 1992, but that he never told anyone because he feared for his life. Hill did not know the petitioner but had seen him in the neighborhood. Hill indicates that the petitioner was not the shooter.

- 5/23/2011 affidavit of Raymond Williams:

  Williams swears that while being detained at the Detroit Police Homicide Section between August 31 and September 2, 1992, he overheard Collins crying in his nearby cell. When Williams asked Collins what was wrong, Collins indicated that two police officers made him testify falsely against the petitioner at his trial on September 2, 1992. Williams advised Collins not to lie because the men weren't near the crime scene that night. Collins informed Williams that if he did not implicate the petitioner, the police would charge him with the murder. Williams never told anyone about what Collins had told him while in lockup until he contacted the petitioner in late 2010 and 2011.

- 9/8/2011 affidavit of Roy Burford:

  Burford avers that he was at the Special K party store on January 17, 1992, where the shooting took place, from 6:00 p.m. until closing and that at one point the store owner called police. Burford states he saw neither Curtis Collins nor the petitioner that night in the store or near it, that Collins informed Burford that he "lied on" the petitioner because the petitioner robbed him in 1986, and that after the petitioner was convicted, people were saying that Mark Goings was the actual killer.

- 1/9/2012 second affidavit of Raymond Williams:

  Williams avers in his second affidavit that on October 2, 2011, he discussed the case with the Special K party store owner, Steve Konja, who informed Williams that never saw Collins in the store on January 17, 1992.

- 10/22/2013 unsworn declaration of Hubbard:

  [Hubbard] asserts that:

  - He was unaware of the contents of Hill's affidavit until January 2011, when they had a random and unplanned encounter while incarcerated.
  - He was unaware of the contents of Burford's affidavit until August 2011, when they had a chance encounter while incarcerated, and in October 2011, when Burford talked to Steve Konja.
  - He was unaware of the contents of Randall's affidavit until June 2009, when they had a chance encounter while incarcerated.

- He was unaware of the contents of Carter's affidavit until January 2004, when Carter wrote to him.
- It was only through further conversation with Raymond Williams that the petitioner was able to get Williams' second affidavit.

- 7/28/2014 affidavits of Raad and Samir Konja:

  [Samir] Konja indicates that he was a co-owner of the Special K Party Store on January 17, 2014. Konja states that neither he nor his brothers permitted Collins in the store because of problems they had with him. Konja indicates that he was never spoken to by the police or the prosecutor[.] Raad Konja's affidavit mirrors that of his brother except he also indicates that Collins was not in the store on the night of the murder.

- 1/14/2016 request to subpoena records from the Checker Cab Company:

  The petitioner has evidence that the assistant prosecutor in his case requested Sergeant Kinney to subpoena the records from the Checker Cab Company to attempt to corroborate whether Collins, in fact, took a taxicab from the location of the shooting. The petitioner only discovered the existence of the subpoena after filing a Freedom of Information Act request and receiving the information on January 14, 2016.

- 10/31/2017 affidavit of Curtis Collins:

  Curtis Collins signed an affidavit averring that he was not present anywhere near the Special K Party Store on January 17, 1992. Collins avers that he did not see the petitioner fleeing from where the victim was found shot to death. Collins claims that Sergeant Kinney forced him to testify falsely at the petitioner's preliminary examination that he saw the petitioner fleeing the murder scene. Collins states he testified truthfully on the first day of trial. He says that he spent two days at the 1300 Precinct [Detroit Police Department Headquarters] where he was threatened by Sergeant Kinney and Sergeant Gale that he would be charged with the victim's murder if he didn't implicate the petitioner. Collins also states that as a result of this coercion, he returned on the third day of the petitioner's trial and falsely implicated him in the victim's murder. Collins avers that he contacted Raymond Williams in 2014 and told him that he had perjured himself at the petitioner's trial but only did so because the assistant prosecutor and the police had threatened him and he did not want to go to jail for perjury. Collins told Williams he would sign an affidavit to that effect. Collins went to prison in 2014 and 2015 and during the nine months there, realized how difficult prison was. Upon his release from prison, Collins learned that the assistant prosecutor in the petitioner's case was no longer working and the police on his case were now retired. Collins said he no longer had to worry about threats from these

individuals to prosecute him and was "tired from running from the fact that he had put an innocent man, Carl Hubbard, in prison."

- 2/21/2018 polygraph examination of Curtis Collins:

  Petitioner attached as an exhibit to his second amended petition the results of a polygraph examination performed by Michael Anthony on Curtis Collins on February 21, 2018. Anthony asked the following questions of Collins:

  1. Did you see Carl Hubbard shoot that man?

  Answer: No

  2. Did you see Carl Hubbard shoot anyone at Gray and Mack in January of 1992?

  Answer: No

  3. Were you present when Carl Hubbard shot that man?

  Answer: No

  Anthony opined that Collins was being truthful regarding his answers to these questions.

III.

With the proper context in mind, I now turn back to what has come to be known as the *Schlup* standard: whether Hubbard has presented new reliable evidence that makes it "more likely than not that no reasonable juror would have convicted [him]" based on all the evidence, old and new. *Schlup*, 513 U.S. at 327–28.

A.

Because *Schlup* instructs that additional evidence of actual innocence must be new and reliable before it can be considered, 513 U.S. at 324, I examine both characteristics before considering the probabilistic question.

1.

In this circuit, evidence is new so long as it was never presented at trial. *Souter*, 395 F.3d at 595 n.9 (quoting *Schlup*, 513 U.S. at 324). Some aspects of newness—notably, age and timing of the evidence's submission—factor into reliability. *Freeman v. Trombley*, 483 F. App'x 51, 57

(6th Cir. 2012) (citing *House*, 547 U.S. at 537). Whether the evidence is "new" is not at issue here, as both the district court and the government focus their analyses on the reliability of the new evidence.

True, the government refers to the evidence as "purportedly new," which is hardly a concession. But the government provides no rationale as to why any of the additional evidence is not new, instead focusing on the evidence's reliability. The district court analyzed the additional evidence in more detail in its timeliness inquiry, as Hubbard argued that "[AEDPA's one-year] limitations period should not start when his conviction became final, because he has newly discovered evidence [challenging his conviction]." (Op. & Order, R. 66, PageID 4178.) This analysis has no bearing on the question of newness, as timeliness turns on when Hubbard discovered the "factual predicate" for his underlying claims, not when he discovered the actual pieces of evidence, as is relevant for equitable tolling. *Compare* § 2244(d)(1)(D) (referring to "the date on which the factual predicate of the claim or claims presented *could have been discovered* through the exercise of due diligence" (emphasis added)), *with Cleveland*, 693 F.3d at 636 ("Under the district court's reasoning, Green's affidavit was 'available' to Lloyd at the time of his trial. However, this had no effect on the Court's determination that the information contained in Green's affidavit *constituted new evidence*." (emphasis added)).

Accepting the evidence as new, I move on to its reliability.

2.

Our circuit does not appear to have one succinct definition of reliability, but a few characteristics warrant discussion based on the evidence at play in this case.

While *Schlup* provided three examples of presumably reliable evidence when announcing the rule—"exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence," 513 U.S. at 324—we have since emphasized that "the examples following the words 'new reliable evidence' [in *Schlup*] were not meant to be an exhaustive list of everything upon which an actual innocence claim may be based," *Souter*, 395 F.3d at 593 n.8. Hubbard correctly asserts as much, quoting an out-of-circuit case to articulate that "there are no categorical limits

on the type of evidence that can be offered under *Schlup*." (Appellant Br. 28 (quotations omitted) (quoting *Howell v. Superintendent Albion SCI*, 978 F.3d 54, 60 (3d Cir. 2020)).)

Generally speaking, we consider whether the source has an "evident motive to lie," such as if the new evidence is proffered without a reward or pressure, and whether the source is willing to testify to their statements. *See House*, 547 U.S. at 552; *Cleveland*, 693 F.3d at 640; *see also Jimenez v. Lilley*, No. 16CIV8545, 2017 WL 4535946, at *10 (S.D.N.Y. Oct. 10, 2017), report and recommendation adopted, 2018 WL 2768644 (S.D.N.Y. June 7, 2018) (acknowledging that an affiant's "willingness to testify" live may also support his reliability). While some courts subject statements from "inmates, suspects, or friends or relations of the accused" to additional scrutiny, evidence from these sources is not per se unreliable. *House*, 547 U.S. at 552. These statements are instead considered with an eye toward the same reliability concerns as any other source—concerns which often serve as the basis for the rejection of statements from "suspicious" sources, inasmuch as the statements are not rejected because of the source itself. *Compare Cleveland*, 693 F.3d at 641 (deeming evidence from a petitioner's neighbor reliable due to lack of bias), *with Milton v. Sec'y, Dep't of Corr.*, 347 F. App'x 528, 531 (11th Cir. 2009) (discounting evidence due to relationship *and* unexplained delay).

An individual's status as a recanting witness is relevant to—and can detract from—their reliability. *United States v. Chambers*, 944 F.2d 1253, 1264 (6th Cir. 1991); *see also Byrd v. Collins*, 209 F.3d 486, 508 n.16 (6th Cir. 2000). But recantation status alone is insufficient to render otherwise convincing or helpful evidence unreliable. *Cleveland*, 693 F.3d at 640 (finding a recantation to be credible); *see also Fairman v. Anderson*, 188 F.3d 635, 646–47 (5th Cir. 1999) ("While Prewitt's status as a recanting witness detracts from the credibility of his new testimony . . . it is not a bar to the acceptance of such testimony. Indeed, . . . Prewitt proffered a convincing reason for his recanting affidavit: the prosecution coerced him to lie at Fairman's trial by threatening to charge him with murdering Jones." (internal citation and parenthetical omitted)). In fact, the circumstances surrounding a recantation can make it more credible than one's prior inconsistent statements, such as if a petitioner does not subsequently withdraw the currently asserted testimony. *See Cleveland*, 693 F.3d at 640.

And the same is true for the passage of time, which we have explicitly rejected as a standalone basis on which to deem an affidavit unreliable. *Id.* at 641. "[A] federal habeas court, faced with an actual-innocence gateway claim, should count *unjustifiable* delay on a habeas petitioner's part, not as an absolute barrier to relief, but as a factor in determining whether actual innocence has been reliably shown." *McQuiggin*, 569 U.S. at 387 (emphasis added). So, we look to see if the affiant provided a reasonable justification for failing to come forward earlier. *Cleveland*, 693 F.3d at 640–41. "Reasonable" is not an insurmountable bar: We have deemed lack of appreciation for the importance of one's statements to a case and "personal issues during [the relevant] period" as adequate justifications for waiting to come forward, particularly where that person has no reason to lie. *Id.*; *see also House*, 547 U.S. at 552. On the other hand, we view "tactical maneuvers," like "waiting to provide the statement until" the declarant "was no longer subject to further punishment" for their actions in the charged crime, as "highly suspect." *In re Byrd*, 269 F.3d 561, 574 (6th Cir. 2001).

All of this notwithstanding, where neither the government nor the district court attacks a piece of evidence's reliability, the appellate court can proceed on the petitioner's assertions of reliability. *See Cleveland*, 693 F.3d at 638. As neither the district court nor the government makes any argument attacking the reliability of the affidavits from the Konjas, the party store owners, I presume these are reliable. This is important, as the Konjas provide yet another first-hand account corroborating Collins's recantation, explaining that Collins both was not and *could not* have been in the party store the night of Penn's murder: Not only do they own the store, were working that night, and did not see Collins near the store that night, but they had banned Collins from the store, so he was not allowed in.

With these principles laid out, I analyze each piece of evidence's reliability. *Schlup*, 513 U.S. at 327–28.

Collins. I review Collins's affidavit with the importance of his trial testimony to Hubbard's conviction in mind.

The existence of a delay in coming forward on its own does not render an affidavit unreliable. *Cleveland*, 93 F.3d at 641. Instead, the inquiry takes into account all of the case-by-

case situations in which long-belated affidavits factor into a petitioner's actual innocence claims. *See, e.g.*, *Cleveland*, 693 F.3d at 639–40 (crediting a recanting affidavit offered 15 years after trial); *Howell*, 978 F.3d at 60–61 (granting evidentiary hearing based on recantations three decades later); *Arnold v. Dittmann*, 901 F.3d 830, 838–39 (7th Cir. 2018) (remanding for an evidentiary hearing to determine a recantation's reliability); *Teleguz v. Pearson*, 689 F.3d 322, 331–32 (4th Cir. 2012) (remanding for consideration of an actual-innocence claim based on new evidence, including recantation affidavits).

Crucially, Collins's delay was not unexplained. Collins's fear of the involved prosecution and police—who, as Collins asserts, threatened him into incriminating Hubbard—abated only after he learned both were no longer working on Hubbard's case. (Collins Aff., R. 51, PageID 2253–54.) This was not until after his release from prison in 2015, during which his guilt over "put[ting] an innocent man, Carl Hubbard, in prison" grew. (*Id.*) It is unfair to characterize Collins's delay as 25 years without considering the fact-specific context of his delay, including well-documented and corroborated fear of the prosecution for all of those years. Other circuits have explicitly found factually similar coercion—threats to charge the witness with the murder—to be an adequate justification for delay. *See, e.g.*, *Fairman*, 188 F.3d at 646–47 ("While Prewitt's status as a recanting witness detracts from the credibility of his new testimony . . . it is not a bar to the acceptance of such testimony. Indeed, . . . Prewitt proffered a convincing reason for his recanting affidavit: the prosecution coerced him to lie at Fairman's trial by threatening to charge him with murdering Jones."). The same is true here.

Taking all of the circumstances together, Collins is not closely aligned with the petitioner, has an adequate explanation for his delay in coming forward, and received no benefit from testifying in a way that favors the petitioner. In fact, regarding this latter point, the opposite is true: Collins faced punishment for testifying about his recollection of the evening that favored Hubbard in the form of a perjury charge—a charge that was dropped only after he was recalled and incriminated the petitioner—and Collins was given a deal by which he would remain on parole or probation if he testified against the petitioner. To the extent the government refers to "Collins's most recent recantation" as "yet another change in his story," the same would be true of Collins's day three testimony, which recanted his testimony from the first day of trial. Yet the

prosecution had no issues accepting Collins's "flipped" testimony when it supported their goal: Hubbard's conviction. I am otherwise unaware of a bright line rule that renders his third story reliable but his fourth unreliable. *Contra* Maj. Op. at 18.

Our review is de novo, but the district court's analysis of Collins's affidavits bears mentioning, as the district court discounted Collins's affidavit for a different reason than the majority: the length of time between trial and submission of his affidavit. In support of its finding that this delay bars Collins's most recent affidavit from holding weight, the district court relied on two cases. But as the affidavits in those cases could not be relied on due to other indicia of unreliability, those cases do not seal the fate of Collins's affidavit.

First, in *Lewis v. Smith*, we accepted the district court's conclusion that the petitioner's girlfriend's decision to come forward with an undated recanting affidavit two years post-trial was not "cause" to excuse the party's failure to raise the issue in state court. 100 F. App'x. 351, 355 (6th Cir. 2004). In so finding, we relied on dicta explaining this court's "suspicion of exculpatory affidavits *submitted by someone closely aligned with a defendant*." *Id.* (emphasis added) (citing *United States v. Willis*, 257 F.3d 636, 647 (6th Cir. 2001)). It was not the delay, on its own, that led to the affidavit's demise; rather, the relationship between the petitioner and affiant set it over the edge.

Then, in *Strayhorn v. Booker*, we rejected an affidavit that "d[id] not explain why the witnesses waited nearly two years after petitioner's trial to come forward" and that came from a source who "received the supposed benefit from testifying against petitioner—leniency with respect to his own crimes—and had nothing to lose by recanting." 718 F. Supp. 2d 846, 874 (E.D. Mich. 2010). So, that affiant's statements were unreliable due to a combination of three things: the delay, the lack of explanation for the delay, and the benefit received from testifying in the way they seek to now.

Because Collins's affidavit is distinguishable from both of the above cases, and for the reasons stated above, I find Collins's affidavit sufficiently reliable.

Hill, Burford, and Randall. The majority then writes off the Hill, Burford, and Randall affidavits as "patently unreliable." Maj. Op. at 17. I disagree.

The district court characterized Hill's affidavit as Hubbard's main proof of innocence, because Hill testifies that he saw Mark Goings shoot Penn. The district court says Hill's incarceration with Hubbard and Hill's delay in coming forward "cast a pall of suspicion" on his affidavit. (Op. & Order, R. 66, PageID 4188.)

As to Hill's delay, Hill explained that he "never told anybody" what he witnessed because he lived in the same neighborhood where the shooting took place and so "was afraid for [his] life." (Hill Aff., R. 51, PageID 2238.) His delay, then, is not unjustified. *See McQuiggin*, 569 U.S. at 387. This delay is just as rational as not knowing the importance of one's testimony to a case or a "personal issue[]," *see Cleveland*, 693 F.3d at 641, and is much more than a desire to not "get involved," which has been labeled an inadequate justification for delay, *Milton*, 347 F. App'x at 531 (citing *Schlup*, 513 U.S. at 332). And while Hill was incarcerated with Hubbard, there is no evidence that he has a motive to lie: He testified that he does not know Hubbard "personally." So his affidavit does not have "the same risk of bias as an affidavit made by close friends or relations of [Hubbard]." *Cleveland*, 693 F.3d at 641; *see, e.g.*, *Freeman*, 483 F. App'x at 60 (discrediting an exculpatory affidavit where the affiant—the petitioner's girlfriend—was pregnant with the petitioner's child at the time of the murder and continued to co-parent with him at the time of her affidavit).

What is more, with Collins's damaging testimony effectively rendered null and void, Hill is not simply a "possible eyewitness . . . among purported eyewitnesses." (Appellee Br. 37.) He is, at this point, the only alleged eyewitness. The government attempts to discredit Hill's eyewitness account by pointing to an alleged lack of cross-corroboration of Hill's "presence near the scene of the crime back in 1992. For example, none of the other witnesses, new or old, have testified that they saw Hill or Goings near or at the scene of the crime." (Appellee Br. 37.) But the government cannot have its cake and eat it too when it comes to the reliability of evidence: Collins is willing to testify that he was not at the scene of the crime, removing the prosecution's only key witness. Yet the government clings to the reliability of Collins's testimony to the contrary to counter Hill's eyewitness testimony. To the extent that the government secured Hubbard's conviction based on evidence from one witness's account when that witness's presence at the scene was not corroborated, it makes sense to consider another witness's account

who claims to have actually witnessed the murder even if his presence is not independently corroborated. Given the circumstances surrounding Hill's affidavit, I find it to be reliable.

As to Burford and Randall, substantively, their affidavits are not entirely "word on the street." For example, Randall provides corroborated personal knowledge that Collins was not on Gray Street the night of the murder because he was with him that night playing dice. Randall is one of many people to negate the idea that Collins was at the murder scene, including a consistent corroborating account that Randall, Williams, and Collins were together. This cuts in favor of the reliability of the notion that Collins was in fact not at the scene of the crime, thereby weakening the prosecution's case.

Some of the "word on the street," including Randall's assertion that he heard that "Mark Going [sic] kill[ed]" Penn, cannot be discredited due to its hearsay nature alone. (Randall Aff., R. 51, PageID 2321–22.); *House*, 547 U.S. at 537–38 (instructing habeas courts to consider all evidence without regard for the rules of admissibility). Multiple individuals assert that Mark Goings is responsible for Penn's death for the same reason, so those reports cross-corroborate each other, thereby increasing each statement's reliability. *See Goodwin*, 552 F. App'x at 547. And having a cross-corroborated suspect becomes even more important where the prosecution's only key witness connecting Hubbard to Penn's death has been increasingly called into question.

In rejecting Burford's affidavit as unreliable hearsay, the district focused on only one aspect of his testimony—that community members believe Mark Goings to be the actual killer. But this overlooks—and does not call into question—the more significant, novel aspect of Burford's affidavit: his personal knowledge that he was at the party store the night of Penn's murder and that neither Hubbard nor Collins were there at any point.

While neither affidavit provides a reason for their delay, the record lacks information about any bias, reward, or reason to lie, beyond that Randall and Collins knew each other, which alone is insufficient to undermine his otherwise reliable statements. And Randall's accounts are cross-corroborated, which weighs in favor of the statement's reliability. The same is true of Burford's assertion that Collins "lied on" Hubbard, as it is cross-corroborated and is relevant to the extent that this is further proof that Collins did, in fact, lie when implicating Hubbard. Given

the corroborated nature of their statements, I find Burford and Randall's affidavits to be reliable and important.

Other Evidence. The majority discards much of the other new evidence—including, at least, Williams's and Carter's affidavits claiming personal admissions from Collins that his testimony was untruthful, Collins's polygraph, the FOIA request for Collins's alleged cab ride receipts, and the DOJ investigation implicating Sergeant Kinney for coercing false testimony—as "weak," based on the delay of some and lack of explanation for these delays for some, and as not being independently "exonerating." Maj. Op. at 17–19.

But these pieces of evidence are also reliable. First, Williams's delay is not unexplained. He did not understand the importance of his testimony until Hubbard contacted him, after which there was hardly a delay. Second, Sergeant Kinney's rampant coercion became more important once Hubbard had more proof that Collins was, in fact, coerced, which occurred once they were imprisoned together years after the fact. Such a delay is justified. The same goes for the cab records, which Hubbard did not have access to until early 2016.

Regarding the polygraph, the district court made a logical jump that because polygraph examinations are not considered admissible or scientifically valid in Michigan state courts, they are not "exculpatory evidence" and are therefore not "new reliable evidence." (Op. and Order, R. 6,, PageID 4191–92.) This is flawed for more than one reason. First, the Supreme Court instructs lower courts to consider all evidence without regard to whether it would necessarily be admitted under "rules of admissibility that would govern at trial." *House*, 547 U.S. at 537–38. Second, evidence does not need to fall under any of *Schlup*'s three example categories to be considered new reliable evidence, as that list was "not meant to be [] exhaustive." *Souter*, 395 F.3d at 593 n.8.

More generally, evidence need not, on its own, exonerate a petitioner in order to be reliable, so long as it generally supports a claim of innocence. *Cleveland*, 693 F.3d at 633. Corroborated evidence that the State's only witness connecting Hubbard to Penn's murder lied about multiple aspects of his testimony and was not anywhere near the scene goes towards Hubbard's innocence. Imagine a Jenga tower. The tower might stand strong as one block is

removed. And another. But when a crucial block is removed, the tower tumbles—and the player loses. Collins's testimony is this crucial block to the State's case. Without it, the State loses. The further evidence that places Collins elsewhere represents each tap to this crucial block. It is not each tap on its own that knocks this block out of place, but rather the aggregate impact of all—as is the case with this evidence.

Underlying the majority's brushing aside of this evidence appears to be the sentiment that much of this evidence is provided only to undercut the validity of Collins's most recent affidavit and so the evidence is duplicative or cumulative in some way—as the district court touched on and the government argued. (*See* Appellee Br. 42, 31 n.3; Op. & Order, R. 66, PageID 4186.) But whether evidence is cumulative or duplicative is more relevant to a statute of limitations "factual predicate" argument, which Hubbard waived. *See* § 2244(b)(2)(B)(i). Evidence is "redundant" for purposes of Hubbard's waived timeliness argument if it is "additional information about an issue that Hubbard was aware of several years earlier" even if that specific piece of evidence had not been presented before. (Op. & Order, R. 66, PageID 4184 (quoting *Jefferson v. United States*, 730 F.3d 537, 547 (6th Cir. 2013)).) But as to equitable tolling, additional information about a known issue functions as cross-corroboration, supporting a source's credibility and the evidence's reliability, particularly where multiple parties present the same information. *United States v. Goodwin*, 552 F. App'x 541, 547 (6th Cir. 2014); *see also United States v. Leppert*, 408 F.3d 1039, 1041 (8th Cir. 2005) (finding that "the cross-corroboration of some details of the statements of [the informant] and the [confidential informant] supports the reliability of [the informant's] statements as a whole"). "By telling consistent yet independent stories, informants provide cross-corroboration, and enhance the reliability" of the information. *Goodwin*, 552 F. App'x at 547 (cleaned up) (quoting *United States v. Lancaster*, 145 F. App'x 508, 510 (6th Cir. 2005)).

Beyond cross-corroboration, even where evidence makes similar points, new evidence is not to be brushed aside as "cumulative" where the evidence "do[es] not merely add to the defense, but also deduct[s] from the prosecution." *Souter*, 395 F.3d at 593. The "cumulative" nature of the evidence is relevant, then, only to the extent that it piles on to make one interpretation of the facts more likely than a lesser supported interpretation. Hubbard's case

tracks *Souter* in this regard: In both cases, the petitioner's new evidence—evidence underpinning a pre-existing factual predicate—called the prosecution's key evidence into question (the bottle in *Souter* and Collins's testimony here). *Id.* Evidence supporting the fact that Collins was indeed not near the party store the night of the murder—a pre-existing factual predicate—takes on a new significance where Collins's own account of his proximity to the murder has changed. *See id.* The stronger the case against the government's portrayal of Collins, the more the evidence "deduct[s] from the prosecution." In this way, whether evidence, like Williams's and Carter's affidavits, is duplicative is irrelevant to its reliability. Here, this evidence is reliable, which ends our inquiry (for now).

B.

Having established that Hubbard submitted new reliable evidence in support of his claim of actual innocence, I turn to the probabilistic inquiry: whether "any reasonable juror would have reasonable doubt" about Hubbard's conviction based on "all the evidence, old and new, incriminating and exculpatory[.]" *House*, 547 U.S. at 538 (cleaned up) (citing *Schlup*, 513 U.S. at 327–28); *see supra* pp. 1–5. While "the *Schlup* standard is demanding," it "does not require absolute certainty about the petitioner's guilt or innocence." *House*, 547 U.S. at 538; *see Keith*, 2023 78 F.4th at 315; *contra* Maj. Op. at 2 ("[H]e fails to present evidence affirmatively demonstrating his *actual* innocence; he cannot prove that he did not, in fact, commit murder."), Maj. Op. at 9 ("Rather, he must demonstrate that he *factually* did not commit the crime.").

Not only does the majority err in requiring factual innocence, but it also errs in its isolated consideration of the evidence. The majority's discussion of the evidence's reliability appears to answer the *Schlup* probability question based on each piece of evidence individually. For example, the opinion concludes that Hubbard's alibi (from Thomas and Vanessa Spells) "falls short" of *Schlup*'s probabilistic burden. Maj. Op. at 18. But we have been instructed to evaluate the evidence *in totality*. *House*, 547 U.S. at 538; *Keith*, 78 F.4th at 317.

To put this standard into perspective, the *Souter* court granted relief in a somewhat analogous situation: where only one piece of evidence—there, a bottle; here, Collins's day three testimony—directly tied the petitioner to the victim's death. 395 F.3d at 596–97. Once the

bottle was called into question by new reliable evidence, other evidence—new and old—became more relevant and more important, undermining the prosecution's original case and conviction. The same was true in *House*, where the "central forensic proof connecting [the petitioner] to the crime" was "called into question" based on the "substantial evidence" to the contrary. 547 U.S. at 554.

And the same is true here. Multiple aspects of Collins's day three testimony are less than plausible—or even implausible—based on the record as a whole at this point. This is even more pronounced when considering the new reliable evidence, which bolsters support for the veracity of Collins's day one testimony that he reasserts as the truth and to which he is willing to testify and be cross-examined. As discussed in the reliability analysis, the district court's main contentions with Hubbard's evidence are that it is cumulative, hearsay, and from someone who was incarcerated at some point.

But none of these challenges negates the *aggregate* impact of Hubbard's new reliable evidence, as we are required to evaluate. *See House*, 547 U.S. at 538; *Keith*, 78 F.4th at 317. If Hubbard's trial had included all of the evidence in the record before us now, it is likely that Collins would repeat his day one testimony, so Hubbard is not connected to the scene at the time of the murder, and Hill would testify that he witnessed Mark Goings shoot Penn. When you remove Collins from the scene of Penn's murder, as the evidence would indicate, and add in a more-corroborated suspect, the case against Hubbard seemingly falls apart.

This is true *even if* the evidence does not establish that Goings shot Penn, because the question at this stage is not whether Hubbard can construct a fail-proof case against an exonerating suspect. *Contra* Maj. Op. at 17–20. The question we are required to answer is whether "any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. This inquiry remains the same regardless of whether we label "*McQuiggin*'s and *House*'s standard of proof—that considering the evidence as a whole, 'no reasonable juror would have convicted [the petitioner]'—as the Supreme Court's *definition* of actual innocence" or "its means of *assessing* actual innocence." Maj. Op. at 12; *see Hilliard v. United States*, 157 F.3d 444, 450–51 (interpreting *Bousley v. United States*, 523 U.S. 614, 623 (1998)).

Applying *Bousley* here, "the focus of our inquiry is limited to whether no reasonable juror would have otherwise concluded that" Hubbard shot Penn. *Hilliard*, 157 F.3d at 450–51. Hubbard's new evidence, taken with the old, unequivocally "chips away at the rather slim circumstantial evidence upon which [Hubbard] was convicted," *Souter*, 395 F.3d at 592 (cleaned up), thereby instilling "reasonable doubt" in "any reasonable juror," *House*, 547 U.S. at 538. This doubt may not be the result of an "exonerating" witness in Hubbard's case. But as is the case at trial, reasonable doubt is doubt "based on reason which arises from the evidence *or lack of evidence*." *Jackson v. Virginia*, 443 U.S. 306, 317 n.9 (1979) (emphasis added). In the same way an exonerating witness could, surely, be the source of a reasonable juror's reasonable doubt, so, too, can the lack of incriminating witness when taken with all of the other evidence. And here, any reasonable juror would doubt a conviction based on such a shaky foundation that all has since collapsed: where the new evidence impeaches the key parts of the old evidence, the State's key witness has been discredited, and an unquestioned suspect is at play. Such doubt demands relief.

I need not decide whether I would grant Hubbard relief under the majority's flawed recitation of the standard—whether Hubbard "affirmatively demonstrat[ed]" or "prove[d] that he did not, in fact, commit murder." Maj. Op. at 2. Certainly, if a petitioner were to prove as much, they, too, would be "actually innocent." Nonetheless, under the *Schlup* standard, including its interpretation by *Keith*, Hubbard is "actually innocent": He has presented new reliable evidence that, when considered with the record as a whole, undermines confidence in his conviction such that no reasonable jury would be able to convict him beyond a reasonable doubt. Because he has therefore made a credible showing of actual innocence, Hubbard is entitled to pass through AEDPA's gateway in order to have his constitutional claims heard on the merits. *See Cleveland*, 693 F.3d at 632.

I believe *Keith* is rightly and soundly decided, but I can appreciate the frustration that accompanies being bound to precedent with which you disagree. *See, e.g.*, *Nayed v. Garland*, No. 22-4002, 2023 WL 5237458, at *5 (6th Cir. Aug 15, 2023) (Cole, J., concurring). Nonetheless, "[t]he prior decision remains controlling authority[.]" *Salmi v. Sec. of Health and Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985). And under *Keith*, Hubbard deserves relief.

C.

Hubbard alternatively requested an evidentiary hearing in the case that we do not reverse the district court's dismissal of his habeas petition. As I find Hubbard to be "actually innocent" based on the record before us today, an evidentiary hearing is unnecessary. But I understand that the additional reliable evidence may bring new questions to light. Should one require answers to these questions before resolving his actual innocence inquiry, there is a remedy for that—a remedy Hubbard has repeatedly requested: an evidentiary hearing.

"[I]t may frequently be appropriate to require the district court to hold an evidentiary hearing to enable a procedurally-barred habeas petitioner to develop the factual record necessary to support equitable tolling under the actual innocence standard." *McSwain*, 287 F. App'x at 461–62. "[A] petitioner is due some form of hearing suited to the circumstances, [u]nless the motion and the files and records of the case *conclusively* show that the prisoner is entitled to no relief." *Christopher v. United States*, 605 F. App'x 533, 537 (6th Cir. 2015) (emphasis added).

Based on the new reliable evidence, the record cannot be said to "conclusively show that [Hubbard] is entitled to no relief." *Id.* For the reasons explained above, particularly given the hypocritical treatment of affiants (for example, using Collins's testimony for conviction but rejecting Hill's for equitable tolling), these individuals deserve a chance to testify in court to have their reliability ascertained once and for all. Many of our sister circuits have granted evidentiary hearings based on long-delayed affidavits, and I see no reason to not follow suit here. *See, e.g.*, *Howell*, 978 F.3d at 60–62 (granting evidentiary hearing based on recantations three decades later); *Dittmann*, 901 F.3d at 838–39, 842 (remanding for an evidentiary hearing to determine a recantation's reliability); *Teleguz*, 689 F.3d at 331–32 (remanding for consideration of an actual-innocence claim based on new evidence, including recantation affidavits).

IV.

For these reasons, I would reverse the district court's denial of Hubbard's habeas petition or, at a minimum, remand for an evidentiary hearing. Therefore, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 21-2968

CARL HUBBARD,

Petitioner - Appellant,

v.

RANDEE REWERTS, Warden,

Respondent - Appellee.

FILED
Apr 16, 2024
KELLY L. STEPHENS, Clerk

Before: BATCHELDER, COLE, and NALBANDIAN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Eastern District of Michigan at Detroit.

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

Kelly L. Stephens

Kelly L. Stephens, Clerk

No. 21-2968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL HUBBARD,

Petitioner-Appellant,

v.

RANDEE REWERTS,

Respondent-Appellee.

ORDER

Before: STRANCH, Circuit Judge.

Carl Hubbard, a pro se Michigan prisoner, appeals the district court's dismissal of his 28 U.S.C. § 2254 habeas corpus petition as time-barred. The district court granted a certificate of appealability (COA) as to Hubbard's claim that his actual innocence excuses the untimeliness of his petition, but it otherwise declined to issue a COA. Hubbard's notice of appeal has been construed as a request to expand the COA. He also moves for the appointment of counsel.

In 1992, following a bench trial, Hubbard was convicted of first-degree murder, in violation of Michigan Compiled Laws § 750.316. He was sentenced to life in prison without the possibility of parole. The Michigan Court of Appeals affirmed, *People v. Hubbard*, No. 159160 (Mich. Ct. App. Dec. 19, 1995), and the Michigan Supreme Court denied leave to appeal, *People v. Hubbard*, 554 N.W. 2d 910 (Mich. 1996) (table).

In 2011, Hubbard filed a motion for relief from judgment. The trial court denied the motion, *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 15, 2012), *reconsideration denied*, No. 92-001856 (Wayne Cnty. Cir. Ct. May 31, 2012), and the state appellate courts denied leave to appeal, *People v. Hubbard*, No. 311427 (Mich. Ct. App. May 7, 2013), *appeal denied*, 843 N.W. 2d 130 (Mich. 2013) (table).

Hubbard filed the present action on October 22, 2013, by placing his original petition in the prison mail. Hubbard was then granted a stay so that he could file a second motion for relief from judgment in state court. The trial court denied the motion, *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 30, 2015), and the state appellate courts denied leave to appeal, *People v. Hubbard*, No. 326995 (Mich. Ct. App. June 2, 2015), *appeal denied*, 881 N.W. 2d 476 (Mich. 2016) (table).

The district court then lifted the stay in Hubbard's habeas proceeding, and Hubbard filed an amended petition. But Hubbard then filed a second motion to stay; he sought to file a third motion for relief from judgment in state court. The district court granted the motion to stay. Hubbard's third motion for relief from judgment was denied by the trial court, *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Oct. 2, 2019), and, again, the appellate courts denied his applications for leave to appeal, *People v. Hubbard*, No. 351605 (Mich. Ct. App. Mar. 19, 2020), *appeal denied*, 944 N.W.2d 120 (Mich. 2020) (table).

The district court then lifted the stay, and Hubbard filed another amended petition, claiming that (1) his petition is timely under 28 U.S.C. § 2244(d)(1)(D) and he is actually innocent, (2) he was denied his due process right to a fair trial when the trial court denied his motion for a new trial, (3) he was denied his right to a fair trial because the prosecutor solicited perjured testimony from Curtis Collins, (4) he was denied his right to a fair trial because the police and prosecutor threatened and intimidated Collins into committing perjury, (5) he was denied his right to a fair trial because the prosecutor withheld evidence, (6) he was denied his right to due process because the State failed to disclose its agreements with Collins, (7) his trial counsel was ineffective in various respects, (8) the evidence was insufficient to support his conviction, (9) his Fourteenth Amendment rights were violated in view of an inconsistent verdict, and (10) his appellate counsel was ineffective for failing to raise Claims 2, 3, 6, and 7 on direct appeal.

The district court dismissed the petition as time-barred. It concluded that Hubbard knew of the factual basis for his claims by 2011 at the latest and thus could not rely on § 2244(d)(1)(D), which provides that the statute of limitations begins to run when "factual predicate of the . . . claims

presented could have discovered through the exercise of due diligence." The district court further concluded that Hubbard failed to show that statutory or equitable tolling or his actual innocence salvaged his untimely claims. The district court did, though, find that "reasonable jurists could debate whether evidence obtained by [Hubbard] after trial[,] which suggests that he did not commit the murder . . . could justify the application of equitable tolling to excuse the untimely filing of the petition." It therefore granted a COA "on the actual innocence issue." Thereafter, the district court denied Hubbard's motion for reconsideration filed under Federal Rule of Civil Procedure 59(e).

Standard of Review

This court may issue a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court "denies a habeas petition on procedural grounds without reaching the prisoner's underlying constitutional claim," the petitioner can satisfy § 2253(c)(2) by establishing 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 v. McDaniel*, 529 U.S. 473, 484 (2000).

Statute of Limitations

Under 28 U.S.C. § 2244(d)(1)(A), the one-year statute of limitations began to run on January 27, 1997, the day after the last day on which Hubbard was permitted to file a petition for a writ of certiorari in the United States Supreme Court after the Michigan Supreme Court denied leave to appeal from the Michigan Court of Appeals' decision affirming his conviction and sentence. *See Lawrence v. Florida*, 549 U.S. 327, 333 (2007). Hubbard filed his petition in October 2013, over fifteen years after the statute of limitations expired. The filing of Hubbard's motions for relief from judgment did not toll the statute of limitations because those motions themselves were filed outside the one-year period, and the tolling provision of § 2244(d)(2) does not revive an expired limitations period. *See Vroman v. Brigano*, 346 F.3d 598, 602 (6th Cir. 2003). Thus, reasonable jurists could not debate the district court's procedural ruling that Hubbard's habeas corpus petition was time-barred under § 2244(d)(1)(A).

Hubbard argued in the district court that he is entitled to a later commencement of his limitations period under § 2244(d)(1)(D). Section 2244(d)(1)(D) states that the one-year statute of limitations for filing a habeas petition begins running on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence," if that date is later than the date on which the petitioner's conviction became final. Hubbard points to the following "new" evidence: (1) several affidavits, including a recanting affidavit from Collins dated October 31, 2017; (2) evidence that the prosecutor had subpoenaed a cab company; he claims that he did not discover the evidence until he submitted a Freedom of Information Act request in 2016; and (3) a polygraph examination report of Collins in which Collins indicated that he did not see Hubbard shoot the victim, which differs from his trial testimony that implicated Hubbard in the shooting; this examination did not take place until February 21, 2018.

But Hubbard knew of the factual predicates for his claims by 2000, at the latest, as described below:[1]

- Hubbard knew of the factual predicate for his second claim when the trial court denied his motion for a new trial;

- Hubbard knew of the factual predicate for his third, fourth, fifth, and sixth claims by 2000, when Hubbard's counsel sent him an affidavit indicating that Collins was charged with perjury but that the charge was later dropped in exchange for him testifying against Hubbard;

- Hubbard knew or should have known of the factual predicate for his seventh and tenth claims by the conclusion of direct review because the alleged instances of trial and appellate counsel's ineffectiveness would or should have been apparent to him at that time;

- Hubbard knew or should have known of the factual predicate for his eighth and ninth claims right after trial because it would or should have been apparent to him at that time that the evidence was insufficient to support his conviction and that the verdict was inconsistent with the evidence; and

- Hubbard knew or should have known of the factual predicate for his tenth claim during the pendency of his direct appeal because Hubbard knew or should have known at that time that his appellate counsel failed to raise certain issues on appeal.

[1] Because Hubbard has been granted a COA on his claim of actual innocence, that claim is not discussed here.

As noted by the district court, Hubbard's "new" evidence is largely cumulative of knowledge that Hubbard already possessed that would support his claims. And evidence that is merely cumulative cannot form the newly discovered factual predicate for a habeas claim, even if the evidence lends additional support to the claim. *See Souter v. Jones*, 395 F.3d 577, 587 (6th Cir. 2005). Because Hubbard knew or should have known of the factual predicate for each claim by 2000, application of § 2244(d)(1)(D) would not render timely his habeas petition filed in 2013.

Equitable Tolling

Section 2244(d) is subject to equitable tolling when a petitioner shows "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland v. Florida*, 560 U.S. 631, 649 (2010) (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

Hubbard does not expressly argue that he is entitled to equitable tolling; rather, his arguments focus on § 2244(d)(1)(D) and actual innocence. To the extent that Hubbard claims that he acted diligently to pursue his rights by filing motions for relief from judgment in the state trial court within one year of receiving each piece of alleged new evidence, he nevertheless knew or should have known of the factual predicates for his claims long before he filed his first motion for relief from judgment in December 2011. As alluded to above, the various "new" pieces of evidence might have bolstered some of Hubbard's claims, but they did not serve as the first or sole indicators that Hubbard's constitutional rights might have been violated so as to support habeas relief. No reasonable jurist could therefore debate the district court's conclusion that Hubbard could not invoke the doctrine of equitable tolling to excuse the untimeliness of his petition.

Actual Innocence

As noted, the district court has already granted Hubbard a COA as to his claim that his actual innocence excuses the untimeliness of his petition.

Accordingly, the court **DENIES** the request to expand the COA. Because the court would be aided by the appointment of counsel, it **GRANTS** Hubbard's motion for the appointment of counsel. *See* 18 U.S.C. § 3006A(a)(2)(B). The clerk is directed to issue a briefing schedule.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL HUBBARD,

Petitioner,

v.

Case Number 13-14540
Honorable David M. Lawson

WILLIE SMITH,

Respondent,
_____/

OPINION AND ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS

Michigan prisoner Carl Hubbard is serving a nonparolable life sentence for first-degree murder following a 1992 conviction by a judge sitting without a jury in the Wayne County, Michigan circuit court. His conviction was affirmed on direct appeal, and his motions for post-conviction relief all were rejected by the state courts. In 2013, he filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254. The petition was held in abeyance at Hubbard's request so he could return to state court for more post-conviction litigation, which was unsuccessful. Hubbard acknowledges that the petition was not filed within one year of most of the triggers in the habeas statute of limitations, 28 U.S.C. § 2244(d)(1), except for one: the newly-discovered-evidence provision. He also argues that equitable tolling and his actual innocence excuse the tardy filing. The Court disagrees and will dismiss the petition.

I.

Hubbard was convicted of shooting Rodnell Penn outside a party store in Detroit, Michigan. The prosecution's key witness was Curtis Collins, who initially was uncooperative at trial and denied knowledge of any information incriminating Hubbard. He had testified earlier at a preliminary hearing, however, that he saw Penn and Hubbard together outside the party store and

after walking a short distance away heard gunshots. He turned and saw Hubbard standing over Penn's body and then saw Hubbard running from the scene. When confronted with this inconsistent testimony, Collins said that the police pressured him to incriminate Hubbard. Collins promptly was charged with perjury, and when he was recalled at trial two days later, he switched his testimony again, this time conforming it to the version from the preliminary hearing. He blamed the earlier flip on threats he said he received if he were to identify Hubbard as the shooter.

Hubbard was convicted on September 2, 1992. On direct appeal, the Michigan Court of Appeals rejected Hubbard's argument that the prosecutor improperly intimidated Collins to coerce the testimony incriminating Hubbard and otherwise affirmed the conviction. *People v. Hubbard*, No. 159160 (Mich. Ct. App. Dec. 19, 1995). The Michigan Supreme Court denied leave to appeal. *People v. Hubbard*, 453 Mich. 918, 554 N.W. 2d 910 (1996) (table).

Hubbard took no further action until July 16, 2007, when he filed a motion to expand the record and for an evidentiary hearing. He filed a similar motion on May 27, 2008. He alleged in the motions that Collins may have received concessions from the prosecutor in exchange for his testimony and that he committed perjury at trial. Both motions were denied. *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 18, 2009).

Around December 16, 2011, Hubbard filed a post-conviction motion for relief from judgment under Michigan Court Rule 6.500. Among the grounds raised were that Hubbard had "newly discovered evidence" that another person shot Rodnell Penn and that Collins testified falsely because he was coerced by the prosecution and had a personal motive to incriminate Hubbard. That motion also was denied initially and on reconsideration. *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 15, 2012); *reconsideration den.* No. 92-001856 (Wayne Cnty. Cir. Ct. May 31, 2012). The Michigan appellate courts denied leave to appeal. *People v.*

Hubbard, No. 311427 (Mich. Ct. App. May 7, 2013); *lv. den.* 495 Mich. 866, 843 N.W. 2d 130 (2013) (table).

Hubbard signed and dated the present petition for a writ of habeas corpus on October 22, 2013, which is considered the filing date. *See Cretacci v. Call*, 988 F.3d 860, 865 (6th Cir. 2021) (citing *Houston v. Lack*, 487 U.S. 266, 270 (1988)). After overcoming his confusion about paying the filing fee and working through a dismissal and reinstatement of the case, Hubbard filed a motion on October 2014 to stay the case so that he could return to the state courts to file a second post-conviction motion for relief from judgment to exhaust additional claims. The Court granted the motion.

Hubbard filed his second post-conviction motion for relief from judgment in state court on February 25, 2015. The state court denied that motion, citing the rule barring successive post-conviction motions for relief from judgment. *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Mar. 30, 2015) (citing Mich. Ct. R. 6.500). Once again, the Michigan appellate courts denied leave to appeal. *People v. Hubbard*, No. 326995 (Mich. Ct. App. June 2, 2015); *lv. den.* 499 Mich. 982, 881 N.W. 2d 476 (2016) (table).

On July 26, 2016, Hubbard moved in this Court to reinstate the habeas petition and filed a separate amended habeas petition. This Court reinstated the petition and granted the petitioner permission to file an amended habeas petition.

On February 26, 2018, Hubbard filed a second motion to stay the proceedings so that he could present to the state courts new evidence that he recently had obtained in the form of an affidavit and a report of polygraph examination of Curtis Collins, who lately averred that he testified falsely when he implicated Hubbard at trial. On March 16, 2018, the Court granted the motion and directed the petitioner to return to state court promptly to file a third post-conviction

motion for relief from judgment to exhaust these claims. Hubbard did so on June 21, 2018. And again, the trial court denied the motion because the petitioner was barred from filing a successive post-conviction motion for relief from judgment. *People v. Hubbard*, No. 92-001856 (Wayne Cnty. Cir. Ct. Oct. 2, 2019) (citing Mich. Ct. R. 6.502(G)). The Michigan appellate courts denied his application for leave to appeal. *People v. Hubbard*, No. 351605 (Mich. Ct. App. Mar. 19, 2020); *lv. den.* 944 N.W.2d 120 (Mich. 2020) (table).

Hubbard returned to this Court, which granted his motion to reopen the case and to amend his petition on July 15, 2020. In his original and amended petitions, the petitioner seeks relief on the following grounds:

> I. Petitioner timely filed his petition within the one-year statute of limitations period as defined by 28 U.S.C. § 2244(d)(1)(D) and, additionally, has made a colorable claim of actual innocence which equitably tolls the AEDPA's statute of limitations, overcomes any procedural bars applicable to any issues presented, permits an evidentiary hearing in this Court, and supports a freestanding claim of actual innocence.
>
> II. Petitioner was denied his Fourteenth Amendment due process right to a fair trial where the trial court's denial of his motion for a new trial based on newly discovered evidence was so egregious that it violated his right to a fundamentally fair trial.
>
> III. Petitioner was denied his Fourteenth Amendment due process right to a fair trial where the prosecutor knowingly used perjured testimony to obtain a conviction.
>
> IV. Petitioner was denied his Fourteenth Amendment right to a fair trial where [the] police and prosecutor threatened and intimidated Curtis Collins into committing perjury.
>
> V. Petitioner was denied his Fourteenth Amendment right to a fair trial where the prosecutor withheld evidence.
>
> VI. The Due Process Clause of the Fourteenth Amendment was violated to the extent that the State failed to disclose agreements for Mr. Collins' favorable testimony.

> VII. Petitioner was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel where his trial counsel failed to (A) Investigate and call Roy Burford, Steve Konja, Samir Konja, and Raad Konja, and also failed to call "Barbara" to testify on the third day of trial, (B) Question Curtis Collins about his pending parole violation and whether he believed or even only hoped that he would secure immunity and whether he believed or even only hoped that he would secure immunity or a lighter sentence, or any other favorable treatment from the prosecutor, (C) Move for the suppression of Mr. Collins' in-court identification of petitioner, (D) Object to the admission of petitioner's statements obtained in violation of the Fourth Amendment, and (E) Do all of the above which, when considered cumulatively, demonstrates that petitioner was prejudiced by counsel's errors.
>
> VIII. Petitioner's conviction should be reversed because the evidence presented at trial failed to prove guilt beyond a reasonable doubt.
>
> IX. The inconsistent verdict of the trial court violated the Fourteenth Amendment.
>
> X. Petitioner was denied his Sixth and Fourteenth Amendment right to the effective assistance of appellate counsel where his appellate counsel failed to raise arguments II, III, VI and VII.

Am. Pet. at 6, ECF No. 51, PageID.2136. The warden opposes the petition on several grounds, most notably because it is untimely.

II.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became effective on April 24, 1996 and governs the filing date for this action because the petitioner filed his petition after the AEDPA's effective date. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). The AEDPA amended 28 U.S.C. § 2244 to include a one-year period of limitations for habeas petitions brought by prisoners challenging state court judgments. *Vroman v. Brigano*, 346 F.3d 598, 601 (6th Cir. 2003). The one-year statute of limitations runs from the latest of:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) 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). A habeas petition filed outside the prescribed time period must be dismissed. *See Isham v. Randle*, 226 F.3d 691, 694-95 (6th Cir. 2000) (case filed 13 days after limitations period expired dismissed for failure to comply); *Wilson v. Birkett*, 192 F. Supp. 2d 763, 765 (E.D. Mich. 2002). Subparagraphs A and D of the statute are at play in this case.

A.

Hubbard's direct appeal of his conviction ended when the Michigan Supreme Court denied leave to appeal on October 28, 1996. His conviction became final under section 2244(d)(1)(A) 90 days later, when the time for filing a *certiorari* petition in the United States Supreme Court expired, which was on January 26, 1997. *See Jimenez v. Quarterman*, 555 U.S. 113, 119 (2009). Unless some other provision tolled the limitations period, Hubbard had to file his petition for writ of habeas corpus in this Court no later than January 26, 1998.

It is well accepted that "[t]he limitation period is tolled . . . during the pendency of 'a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim.'" *Wall v. Kholi*, 562 U.S. 545, 550-551 (2011) (quoting 28 U.S.C. § 2244(d)(2)). That does not help Hubbard, however, because he did not file his post-conviction motion before the one-year limitation period expired. A state court post-conviction motion that is filed after the limitations period expires cannot toll that period because there is no period remaining

to be tolled. *Hargrove v. Brigano*, 300 F.3d 717, 718 n.1 (6th Cir. 2002). The AEDPA's limitations period does not begin to run anew after the completion of state post-conviction proceedings. *Searcy v. Carter*, 246 F.3d 515, 519 (6th Cir. 2001). Hubbard's second and third motions for relief from judgment also did not toll the limitations period because they likewise were filed in the state court after the expiration of the limitations period. *See Parker v. Renico*, 105 F. App'x 16, 18 (6th Cir. 2004).

The petition was not filed within the time allowed by section 2244(d)(1)(A).

B.

Hubbard argues that the limitations period should not start when his conviction became final, because he has newly discovered evidence that establishes Collins lied at trial and that the prosecution coerced Collins's incriminating testimony. Between February 2011 and October 2017, he gathered a number of affidavits from individuals who undermined the prosecution's case and asserted that Collins lied in court when he incriminated Hubbard at trial.

Section 2244(d)(1)(D) states that the one-year limitations period begins to run from the date that "the factual predicate" for a habeas claim "could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D); *see Ali v. Tennessee Board of Pardon and Paroles*, 431 F.3d 896, 898 (6th Cir. 2005). Due diligence is the key. The trigger trips when the petitioner knows or could have discovered the important facts for his claims, not when he recognizes the legal significance of that evidence. *Redmond v. Jackson*, 295 F. Supp 2d 767, 771 (E.D. Mich. 2003). And "factual predicate" refers to the core facts of a claim, not "every possible scrap of evidence that might support his claim." *Ibid.*

A habeas petitioner bears the burden of showing that he exercised due diligence in discovering the factual predicate for his claims within the year preceding his petition

filing. *DiCenzi v. Rose*, 452 F.3d 465, 471 (6th Cir. 2006); *Carter v. Klee*, 286 F. Supp. 3d 846, 852 (E.D. Mich. 2018).

Hubbard's "factual predicates" take the form of affidavits from several individuals, which are attached to his original and amended habeas petitions, summarized below:

- 2/1/11 Affidavit from prisoner Askia Hill

  Hill avers that he saw Mark Goings shoot the victim on January 17, 1992 but that he never told anyone because he feared for his life. Hill did not know the petitioner but had seen him in the neighborhood. Hill indicates that the petitioner was not the shooter.

ECF No. 1, PageID.57-59; ECF No. 26, PageID.1451-53.

- 9/8/11 Affidavit from prisoner Roy Burford

  Burford avers that he was at the Special K party store on January 17, 1992, where the shooting took place, from 6:00 p.m. until closing and that at one point the store owner called police. Burford states he saw neither Curtis Collins nor the petitioner that night in the store or near it, that Collins informed Burford that he "lied on" the petitioner because the petitioner robbed him in 1986, and that after the petitioner was convicted, people were saying that Mark Goings was the actual killer.

ECF No. 1, PageID.61-62; ECF No. 26, PageID.1471-72.

- 6/25/09 Affidavit from prisoner Emanuel Randall

  Randall swears that Collins was not near the crime scene on January 17, 1992. Randall avers that Collins was with him and Raymond Williams playing a dice game when the men received a call that someone had been killed. Randall also states that the "word on the street" was that Mark Goings killed the victim, Rodnell Penn, because Goings believed that Penn had killed Goings' brother a few weeks earlier. Randall stated that no one understood why Collins would falsely accuse the petitioner of shooting the victim.

ECF No. 1, PageID.64-65; ECF No. 26, PageID.1459-60.

- 5/23/11 Affidavit from Raymond Williams

  Williams swears that while being detained at the Detroit Police Homicide Section between August 31 and September 2, 1992, he overheard Collins crying in his nearby cell. When Williams asked Collins what was wrong, Collins

> indicated that two police officers made him testify falsely against the petitioner at his trial on September 2, 1992. Williams advised Collins not to lie because the men weren't near the crime scene that night. Collins informed Williams that if he did not implicate the petitioner, the police would charge him with the murder. Williams never told anyone about what Collins had told him while in lockup until he contacted the petitioner in late 2010 and 2011.

ECF No. 1, PageID.67-68; ECF No. 26, PageID.1462-63.

- 1/9/12 Second Affidavit from Raymond Williams

> Williams avers in his second affidavit that on October 2, 2011, he discussed the case with the Special K party store owner, Steve Konja, who informed Williams that never saw Collins in the store on January 17, 1992.

ECF No. 1, PageID.70; ECF No. 26, PageID.1465.

- 1/28/04 Affidavit from prisoner Elton Carter

> Carter asserts that Collins told him that his September 2, 1992 trial testimony was coerced and that the police threatened to charge him if he did not agree to so testify. Carter avers that Collins told him that he wasn't at the crime scene. Collins revealed this information after the petitioner was found guilty. There are two dates on this affidavit: 1/28/04 (the date of the affiant's subscription) and 1/2/08 (the date of the notary's certification).

ECF No. 1, PageID.72-73; ECF No. 26, PageID.1474-75.

The petitioner also provided his own unsworn declaration, dated October 22, 2013, where he asserts that:

- He was unaware of the contents of Hill's affidavit until January 2011, when they had a random and unplanned encounter while incarcerated.

- He was unaware of the contents of Burford's affidavit until August 2011, when they had a chance encounter while incarcerated, and in October 2011, when Burford talked to Steve Konja.

- He was unaware of the contents of Randall's affidavit until June 2009, when they had a chance encounter while incarcerated.

- He was unaware of the contents of Carter's affidavit until January 2004, when Carter wrote to him.

• It was only through further conversation with Raymond Williams that the petitioner was able to get Williams' second affidavit.

ECF No. 1, PageID.75; ECF No. 26, PageID.1474-75.

• 7/28/14 Affidavit from Samir Konja

Konja indicates that he was a co-owner of the Special K Party Store on January 17, 2014. Konja states that neither he nor his brothers permitted Collins in the store because of problems they had with him. Konja indicates that he was never spoken to by the police or the prosecutor.

ECF No. 26, PageID.1477.

• 7/28/14 Affidavit from Raad Konja

Mr. Raad Konja's affidavit mirrors that of his brother except he also indicates that Collins was not in the store on the night of the murder.

ECF No. 26, PageID.1479.

• Affidavit from the petitioner

The petitioner filed an affidavit claiming that he could not obtain the affidavits from the Konja brothers earlier and had to rely on Williams to obtain these affidavits, which Williams was unable to do until July of 2014.

ECF No. 26, PageID.1481.

The petitioner attached additional new evidence and affidavits to his second amended habeas petition:

• 10/31/17 Affidavit from Curtis Collins

Curtis Collins signed an affidavit averring that he was not present anywhere near the Special K Party Store on January 17, 1992. Collins avers that he did not see the petitioner fleeing from where the victim was found shot to death. Collins claims that Sergeant Kinney forced him to testify falsely at the petitioner's preliminary examination that he saw the petitioner fleeing the murder scene. Collins states he testified truthfully on the first day of trial. He says that he spent two days at the 1300 Precinct [Detroit Police Department Headquarters] where he was threatened by Sergeant Kinney and Sergeant Gale that he would be charged with the victim's murder if he didn't implicate the petitioner. Collins also states that as a result of this coercion, he returned on the third day of the petitioner's trial and falsely implicated him in the victim's murder. Collins avers

that he contacted Raymond Williams in 2014 and told him that he had perjured himself at the petitioner's trial but only did so because the assistant prosecutor and the police had threatened him and he did not want to go to jail for perjury. Collins told Williams he would sign an affidavit to that effect. Collins went to prison in 2014 and 2015 and during the nine months there, realized how difficult prison was. Upon his release from prison, Collins learned that the assistant prosecutor in the petitioner's case was no longer working and the police on his case were now retired. Collins said he no longer had to worry about threats from these individuals to prosecute him and was "tired from running from the fact that he had put an innocent man, Carl Hubbard, in prison."

ECF No. 51, PageID.2253-54.

• Polygraph examination of Curtis Collins dated February 21, 2018.

Petitioner attached as an exhibit to his second amended petition the results of a polygraph examination performed by Michael Anthony on Curtis Collins on February 21, 2018. Anthony asked the following questions of Collins:

1. Did you see Carl Hubbard shoot that man? Answer: No

2. Did you see Carl Hubbard shoot anyone at Gray and Mack in January of 1992?

Answer: No

3. Were you present when Carl Hubbard shot that man?

Answer: No

Anthony opined that Collins was being truthful regarding his answers to these questions.

ECF No. 51, PageID.2306-07.

• The petitioner's request to subpoena records from the Checker Cab Company.

The petitioner has evidence that the assistant prosecutor in his case requested Sergeant Kinney to subpoena the records from the Checker Cab Company to attempt to corroborate whether Collins, in fact, took a taxicab from the location of the shooting. The petitioner only discovered the existence of the subpoena after filing a Freedom of Information Act request and receiving the information on January 14, 2016.

ECF No. 51, PageID.2309-10, 2312-17.

This evidence was presented to the state courts with Hubbard's several post-conviction motions. Hubbard provided more context to those courts, pointing out that Collins was on escape status for removing a tether and testified that the police threatened him that he would receive a maximum sentence for escape if he did not incriminate the petitioner at the preliminary hearing. Hubbard has insisted that Collins perjured himself when he denied that he had been coerced by the police or prosecutor to change his initially exculpatory trial testimony, and again when he denied that the prosecutor agreed to drop a perjury charge against him and agreed to allow Collins to remain on parole if he would incriminate the petitioner. Hubbard also argues that the prosecutor withheld from the defense evidence that the prosecutor offered lenient treatment to Collins if he would return to court and incriminate the petitioner in violation of *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

As noted above, Hubbard's habeas petition was deemed filed in this Court on October 22, 2013. Under 28 U.S.C. § 2244(d)(1)(D), Hubbard had to discover the "factual predicate" for his claim that Collins's testimony against him was coerced by the prosecution and that he was offered an inducement to testify sometime after October 22, 2012. That date can be carried back further in this case because Hubbard "properly filed" a post-conviction motion renewing these arguments and citing come of the "new" information on December 16, 2011. *See* 28 U.S.C. § 2244(d)(2). However, Hubbard may well have known the factual basis of the perjury and *Brady* claims at trial. During the trial, defense counsel asked Collins about whether he had changed his story after being charged with perjury. Collins denied changing his story for that reason but admitted that he had been charged with perjury after initially testifying that he did not witness the shooting and further acknowledged that he had been released from prison. Hubbard raised a claim in his direct appeal in 1994 that Collins's trial testimony was the product of improper coercion by the prosecutor and

the police. He also separately argued that the prosecutor permitted Collins to commit perjury. Because Hubbard appeared to know about the factual basis for his perjury and *Brady* claims at the time of his direct appeal, the limitations period under section 2244(d)(1)((D) would have been triggered well before 2011.

Moreover, the petitioner acknowledges that he was informed by his trial lawyer, Ronald L. Giles, in a letter dated January 27, 1998, that Collins was charged with perjury after he initially testified favorably at trial for Hubbard but that the perjury charge was dropped after he was recalled and incriminated the petitioner. Defense counsel also indicated that Collins was given a deal by which he would remain on parole or probation if he testified against the petitioner. *See* ECF No. 1, PageID.92. Giles signed an affidavit to that effect on June 15, 2000. *Id.* at PageID.94. Hubbard had sufficient evidence by no later than June 15, 2000 to raise his perjury and *Brady* claims.

As summarized earlier, Hubbard has presented additional evidence that he says came to him after December 2011. It appears that he has devoted considerable effort to gathering more information that contradicts Collins's ultimate trial testimony. But those affidavits are just that: additional information about an issue that Hubbard was aware of several years earlier. The start of the limitations period "does not await the collection of evidence which supports the facts." *Brooks v. McKee*, 307 F.Supp.2d 902, 906 (E.D. Mich. 2004). Newly discovered information "that merely supports or strengthens a claim that could have been properly stated without the discovery . . . is not a 'factual predicate' for purposes of triggering the statute of limitations under § 2244(d)(1)(D)." *Jefferson v. United States*, 730 F.3d 537, 547 (6th Cir. 2013) (quoting *Rivas v. Fischer*, 687 F.3d 514, 535 (2nd Cir. 2012)).

The additional affidavits in support of Hubbard's perjury and *Brady* claims are revealing and perhaps compelling, but they are cumulative of other information within Hubbard's knowledge

before 2011. Hubbard contends that Collins's own affidavit from 2017 recanting his trial testimony is not merely cumulative of other evidence in support of the perjury claim but actually adds additional support for the claim, because Collins indicates in the affidavit that the police threatened to charge him with the victim's murder if he did not agree to return to court and reaffirm his earlier preliminary examination testimony and implicate Hubbard. Hubbard also asserts that Collins now admits to committing perjury, which conclusively would establish Hubbard's perjury claim. That affidavit, though, does not change the date on which "the factual predicate" for the perjury and *Brady* claims "could have been discovered through the exercise of due diligence." As discussed above, those claims already were presented on direct appeal in 1994.

Likewise, Collins's polygraph examination results in 2018 is supporting evidence, but it does not establish a new factual predicate for an old claim.

The same must be said of the several affidavits Hubbard presented in support of his claim that trial counsel was ineffective for failing to call Roy Burford, Steve Konja, Samir Konja, and Raad Konja to testify that Collins was not present at the party store or near it at the time of the shooting and thus could not have witnessed the shooting. At trial, defense counsel elicited testimony from Andrew Smith that he knew Collins but did not see him near the store on the night of the shooting. Raymond Williams, one of the affiants, actually testified at trial and indicated that Collins was gambling at "Big Ron's" house from 8:00 p.m. to around 10:00 p.m. on the night of the shooting. Williams testified that when he left the house at around 10:00 p.m., Collins was still there. Defense counsel also called Ronney Fulton, who testified that Collins spent the entire day and night of January 17, 1992 gambling at his house. Fulton confirmed that Williams was at his house also from about 8:00 p.m. to 10:30 p.m. Fulton became aware that there had been a shooting at Mack and Gray Streets in Detroit around 9:30 p.m. Fulton testified that Collins was

still at his house when he learned about the shooting. The other witnesses' affidavits asserting that Collins was not present at the crime scene at the time of the shooting are cumulative of evidence already introduced at trial and thus do not constitute a newly discovered factual predicate for a fresh claim. *See Souter v. Jones,* 395 F. 3d 577, 586-87 (6th Cir. 2005).

Hubbard says that he received evidence on August 9, 2016 that the prosecutor's office subpoenaed records from the Checker Cab Company regarding Collins's activity on the night of the shooting. He has not yet obtained the actual cab company records. That evidence played no role in his first or second post-judgment motions for relief. But even if that evidence can be deemed "newly discovered," Hubbard did not file his third post-conviction motion for relief from judgment until June 21, 2018, more than two years after learning that information. And that evidence is just more support for the previously asserted perjury claim, of which Hubbard already knew the factual predicate well before then.

Hubbard's final piece of new evidence is Hill's affidavit, in which he claims that he witnessed Goings kill Penn. Even if that affidavit could not have been obtained earlier through due diligence, it does not trigger the limitations period in section 2244(d)(1)(D) on any of the claims stated in the original or amended petition. Section 2244(d)(1)(D) is applied on a claim-by-claim basis, rather than on all of the claims in the petition. *See Ege v. Yukon's*, 485 F. 3d 364, 373-74 (6th Cir. 2007) (holding that section 2244(d)(1)(D) did not start the limitations period for the petitioner's ineffective assistance of counsel claim, but it did save the petitioner's due process claim because the factual predicate of that claim was discovered at a later date); *see also DiCenzi v. Rose*, 452 F. 3d 465, 469-70 (6th Cir. 2006) (holding that statute of limitations on the claim that the state appellate court improperly denied a motion for delayed appeal began on a different date than the claims that related to issues that occurred at sentencing). The factual predicates for all of

the claims stated in the original and amended petitions for a writ of habeas corpus were known by Hubbard well before the one-year window closed on his state court post-conviction motions and federal habeas petition filing dates.

C.

The AEDPA's statute of limitations "is subject to equitable tolling in appropriate cases." *Holland v. Florida*, 560 U.S. 631, 645 (2010). A habeas petitioner is entitled to equitable tolling "only if he shows '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way'" and prevented the timely filing of the habeas petition. *Id.* at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). It is a "doctrine" that "is used sparingly," and the burden is on a habeas petitioner to show that he is entitled it. *Ibid.* Hubbard does not satisfy these criteria because he has not explained why he waited for over ten years before pursuing his post-conviction relief in state court, and he has not identified an "extraordinary circumstance" that inhibited the pursuit of his rights. *See Giles v. Wolfenbarger,* 239 F. App'x. 145, 147 (6th Cir. 2007).

D.

Hubbard also says that the evidence he has furnished shows that he is actually innocent of the murder. Both the Supreme Court and the Sixth Circuit have held that a credible claim of actual innocence may equitably toll the one-year statute of limitations. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013); *Souter v. Jones*, 395 F.3d 577, 588-90 (6th Cir. 2005). The courts, however, have set the bar high for such a showing. "'[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.'" *McQuiggin*, 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)); *see also Souter*, 395 F.3d at 590. The habeas

petitioner must 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.

Hubbard's main proof of innocence is the affidavit of Askia Hill, who states that he saw Mark Goings shoot Rodnell Penn. Hill signed his affidavit in February 2011, some nineteen years after the shooting, explaining that he was afraid to come forward earlier. Hill was an inmate in the same prison as Hubbard when he signed the affidavit.

Hill's delay in bringing out this evidence and the co-incidence of his incarceration with Hubbard are factors that cast a pall of suspicion on this evidence. Affidavits from fellow inmates that are created after trial generally are not sufficiently reliable evidence to support a finding of actual innocence. *See Milton v. Secretary, Dep't Of Corr.*, 347 F. App'x. 528, 531-32 (11th Cir. 2009). And a long-delayed affidavit that attempts to exonerate a habeas petitioner should be "treated with a fair degree of skepticism." *Herrera v. Collins*, 506 U.S. 390, 423 (1993). That level of skepticism is appropriate here. Hill's evidence does not amount to "new reliable evidence" that would undermine a jury's beyond-a-reasonable-doubt determination. *See Freeman v. Trombley*, 483 F. App'x. 51, 60 (6th Cir. 2012) (affidavit of petitioner's former girlfriend who provided alibi, signed 15 years after petitioner had been convicted of first degree murder, did not provide the kind of extraordinary showing that was required to establish petitioner's factual innocence, to support equitable tolling of statute of limitations).

Nor do the affidavits of Roy Burford and Emanuel Randall shore up Hill's assertions. Those individuals assert that they overheard from persons in the community that Mr. Goings was the actual killer. Those accounts of the word on the street, however, do not show actual innocence because they recount only hearsay. *See Herrera*, 506 U.S. at 417 (holding that hearsay statements

are insufficient to support a freestanding habeas claim of actual innocence); *see also Knickerbocker v. Wolfenbarger*, 212 F. App'x. 426, 433 (6th Cir. 2007) (stating that an affidavit by a codefendant's fellow inmate stating that the codefendant had told him that the petitioner had nothing to do with the strangling murder of the victim was insufficient to demonstrate the petitioner's actual innocence of felony murder, since hearsay statements are presumptively less reliable).

Hubbard also contends that Collins's recantation of his trial testimony amounts to new, reliable evidence of actual innocence. However, like inmate affidavits, recanting affidavits by witnesses are viewed with "extreme suspicion." *United States v. Chambers*, 944 F. 2d 1253, 1264 (6th Cir. 1991); *see also Byrd v. Collins*, 209 F. 3d 486, 508, n.16 (6th Cir. 2000). Courts "may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence." *Schlup*, 513 U.S. at 332.

Collins did not sign the affidavit recanting his trial testimony until October 31, 2017, 25 years after Hubbard's trial. Collins explains in his affidavit that he was afraid to recant his trial testimony for a number of years because of the prior threats by the prosecutor and the police to prosecute him for perjury and even the victim's murder. He says that he contacted Raymond Williams in 2014 and told him that he had perjured himself at Hubbard's trial but only did so because the assistant prosecutor and the police had threatened him and he did not want to go to jail for perjury. Collins told Williams at the time that he would sign an affidavit to that effect, but then he went to prison in 2014 and 2015. Upon his release from prison, Collins says that he learned that the assistant prosecutor in Hubbard's case was no longer working and the police on the case were now retired, so he no longer had to worry about threats from these individuals to prosecute him. He also confided that he was "tired from running from the fact that he had put an innocent

man, Carl Hubbard, in prison." But it still took Collins two more years to sign a recanting affidavit, even though his epiphany belatedly occurred 23 years after allegedly bearing false witness. That by itself calls into question the credibility of his affidavit and recantation. *See Lewis v. Smith*, 100 F. App'x. 351, 355 (6th Cir. 2004) (holding that it was proper for the district court to reject as suspicious a witness' recanting affidavit made two years after the petitioner's trial); *see also Strayhorn v. Booker*, 718 F. Supp. 2d 846, 874 (E.D. Mich. 2010) (holding that a long-delayed affidavit of an accomplice recanting a statement to police did not establish the petitioner's actual innocence when it was made almost two years after the petitioner's trial).

This new evidence did not convince the state court of Hubbard's innocence. Rejecting Hubbard's perjury and actual innocence claims made in his third post-conviction motion, the state trial court noted that the additional circumstantial evidence of Hubbard's guilt "was surprisingly strong." ECF No. 56-6, PageID.2555. Collins' testimony that Hubbard was present at the crime scene was supported by the testimony of Andrew Smith, who saw Hubbard with two other persons before he went into the party store where Collins testified the murder took place. Smith was inside the store for three or four minutes before he heard gunshots. That evidence supports Collins's testimony that Hubbard was in front of the party store before the shooting, as opposed to after the shooting as his alibi witnesses asserted. John Tramel also testified that he saw Hubbard in the area of Gray and Dickerson Streets on the evening of January 17, 1992. Tramel states that he saw Hubbard standing with a crowd of people around an ambulance and police cars right after the shooting.

The victim's brother, Leon Penn, saw the victim with Hubbard the day before the shooting. Hubbard told the victim that he would see him "tomorrow." The victim's brother testified that the victim had been selling drugs for Hubbard for years. A stipulation was entered that an earlier first-

degree murder case against Hubbard was dismissed because the witnesses failed to appear and one of those witnesses was the victim, Rodnell Penn. The victim's cousin testified that the victim had a large amount of money on him when he dropped off the victim at the bus stop. The victim's girlfriend also said that the victim had a large amount of money on him that day and that when he called her later, it sounded like he was calling from an outdoor telephone booth and someone was trying to hurry him off the telephone. There was a telephone booth outside the party store.

Hubbard also gave a false statement to the police following his arrest, in which he asserted that although he knew the victim, he had not seen him since the 1980s, he denied being with the victim on either the 16th or the 17th of January, he did not know about the shooting on Gray and Mack, and had not been on Gray and Mack at the time of the shooting. Hubbard denied that there had been a murder charge against him where Penn had been a witness. Hubbard's statement was contradicted by other evidence in the case, including the testimony of Officer Craig Turner, who knew Hubbard from the neighborhood and had seen him at the scene as the ambulance was taking the victim away. During a conversation with Hubbard about the shooting, Hubbard made a remark about the rough nature of the illegal narcotics scene at Gray and Mack, even though Turner had not told him that the shooting was drug related. Turner thought that Hubbard had a "fake look of shock" on his face.

Evidence that Collins passed a polygraph examination regarding his alleged perjured testimony does not seal the deal for Hubbard. Although in limited circumstances, evidence that a person was willing to take a polygraph test may be admissible, *see Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273 (6th Cir. 1985), the use of polygraph results to prove a party's innocence generally is prohibited, *Barnier v. Szentmiklosi*, 810 F. 2d 594, 596 (6th Cir. 1987). Remember that a habeas petitioner must show actual innocence with "new reliable evidence," which can

include "exculpatory scientific evidence." *Schlup*, 513 U.S. at 324. But "polygraph examinations are not admissible evidence in Michigan state courts, which have held that they are not scientifically valid and thus not reliable." *Bolton v. Berghuis*, 164 F. App'x. 543, 549-50 (6th 2006) (citing *People v. Ray*, 431 Mich. 260, 430 N.W.2d 626, 628 (1988)).

On this record considered as a whole, Collins's recantation, even when considered with the other information that Hubbard has submitted, is insufficient to establish Hubbard's actual innocence that would toll the habeas limitations period. *See Davis v. Bradshaw*, 900 F.3d 315, 329–33 (6th Cir. 2018).

III.

The petitioner filed his habeas corpus petition after the one-year statute of limitations expired under both 28 U.S.C. § 2244(d)(1)(A) and (D). He is not entitled to equitable tolling of the limitations period.

Accordingly, it is **ORDERED** that the petition for a writ of habeas corpus is **DISMISSED WITH PREJUDICE.**

It is further **ORDERED** that the petitioner's motion to compel disclosure of the Checker Cab Company records (ECF No. 60) is **DENIED** as moot.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 31, 2021

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CARL HUBBARD,

Petitioner,

v.

WILLIE SMITH,

Respondent,
_____/

Case Number 13-14540
Honorable David M. Lawson

ORDER GRANTING IN PART CERTIFICATE OF APPEALABILITY

Petitioner Carl Hubbard filed a petition under 28 U.S.C. § 2254 on October 30, 2013. On August 31, 2021, the Court issued an opinion and order dismissing the petition with prejudice, after concluding that all of the claims raised were untimely and equitable tolling could not excuse the petitioner's failure to present his habeas claims within the applicable limitations period.

Pursuant to Rule 11 of the Rules Governing Section 2254 Cases in the United States District Courts:

> The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. . . . If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22.

Rule 11 of the Rules Governing Section 2254 Cases.

A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Courts must either issue a certificate of appealability indicating which issues satisfy the required showing or provide reasons why such a certificate should not issue. 28 U.S.C. § 2253(c)(3); Fed. R. App. P. 22(b); *In re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997). To receive a certificate of

appealability, "a petitioner must show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotes and citations omitted).

The Court finds that reasonable jurists could not debate the Court's conclusion that all of the claims raised in the original and amended petitions were untimely. However, the Court finds that reasonable jurists could debate whether evidence obtained by the petitioner after trial which suggests that he did not commit the murder for which he was convicted could justify the application of equitable tolling to excuse the untimely filing of the petition. The Court therefore will grant a certificate of appealability on the actual innocence issue.

Accordingly, it is **ORDERED** that a certificate of appealability is **GRANTED IN PART** solely on the question whether the petitioner's showing of actual innocence warrants the application of equitable tolling to excuse the late filing of his petition. A certificate of appealability is **DENIED** as to all other claims and issues presented by the original and amended petitions.

s/David M. Lawson
DAVID M. LAWSON
United States District Judge

Dated: August 31, 2021

Appendix

Order

Michigan Supreme Court
Lansing, Michigan

June 17, 2020

Bridget M. McCormack,
Chief Justice

161212 & (16)

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 161212
COA: 351605
Wayne CC: 92-001856-FC

CARL HUBBARD,
Defendant-Appellant.

/

On order of the Court, the motion for immediate consideration is GRANTED. The application for leave to appeal the March 19, 2020 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

a0610

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 17, 2020

Clerk

Appendix D

Court of Appeals, State of Michigan

ORDER

People of MI v Carl Hubbard

Docket No. 351605

LC No. 92-001856-01-FC

Kirsten Frank Kelly
Presiding Judge

Michael J. Riordan

Thomas C. Cameron
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The motion to remand is DENIED.

The delayed application for leave to appeal is DISMISSED in part under MCR 6.502(G). With regard to the proffered polygraph evidence, defendant has failed to demonstrate that the trial court abused its discretion by refusing to consider such new "evidence" in the first instance. See *People v Barbara*, 400 Mich 352, 412-413, 415; 255 NW2d 171 (1977). In all other respects, the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment. MCR 6.508(D).

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAR 19 2020
Date

Chief Clerk

Appendix E

Received by MCOA 11/21/2019 at 3:08PM via Prisoner Efiling Program

STATE OF MICHIGAN
CIRCUIT COURT FOR THE COUNTY OF WAYNE
CRIMINAL DIVISION

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

vs.

Case No. 92-001856-01-FC
Hon. Lawrence S. Talon

CARL HUBBARD,
Defendant.
_____/

ORDER AND OPINION DENYING DEFENDANT'S SUCCESSIVE (3RD) MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the Frank Murphy Hall of Justice on OCTOBER 2, 2019
PRESENT: HON. LAWRENCE S. TALON
Circuit Court Judge

PROCEDURAL POSTURE

On September 2, 1992, following a bench trial before Judge Richard P. Hathaway, Defendant was found guilty of **Homicide – Murder First Degree – Premeditated MCL 750.316-A;** the Defendant was found not guilty of Weapons Felony Firearm and the Court dismissed the Habitual Fourth Offense Notice.

On September 23, 1992 Judge Richard P. Hathaway sentenced Defendant to a term of life imprisonment for the **Homicide-Murder First Degree-Premeditated** conviction.

On December 19, 1995 the Michigan Court of Appeals unpublished per curiam Opinion [Docket No. 159160] Affirmed Defendant's conviction and life sentence for Homicide-Murder First Degree-Premeditated.

On October 28, 1996 Michigan Supreme Court Order [Docket No. 105540] Denied Defendant's Application for Leave to Appeal.

On March 18, 2009 Judge James R. Chylinski Denied Defendant's Motion to Expand the Record or for an Evidentiary Hearing.

On March 15, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Relief from Judgment.

On May 31, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Reconsideration.

On May 7, 2013 the Michigan Court of Appeals [Docket No. 311427] Denied Defendant's Delayed Application for Leave to Appeal the March 15, 2012 Order Denying Defendant's Motion for Relief from Judgment and Motion to Remand.

On September 30, 2013 the Michigan Supreme Court Order [Docket No. 147211] Denied Defendant's Application for Leave to Appeal the Michigan Court of Appeals Order; Defendant failed to meet the burden of establishing entitlement to relief under **MCR 6.508(D).**

On March 30, 2015 Judge Michael M. Hathaway Denied Defendant's successive Motion for Relief from Judgment.

On June 2, 2015 Michigan Court of Appeals Order [Docket No. 326995] Motion to Remand is Denied; Defendant's Delayed application for Leave is Dismissed; no appeal

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may be taken from the denial or rejection of a successive motion for Relief from Judgment **MCR 6.502(G)(1).**

On July 26, 2016 Michigan Supreme Court Order [Docket No. 151806] Denied Defendant's Leave to Appeal the June 2, 2015 Michigan Court of Appeals Order.

On May 17, 2018 Defendant filed pro se the instant Motion for Relief from Judgment (3rd Successive).

On June 21, 2018 Defendant filed a supplement to the Motion for Relief from Judgment with a DVD recording in which Defendant contends he obtained a videotaped copy of the polygraph examination of Curtis Collins that reveals his demeanor in answering questions prior to and during the polygraph examination.

Defendant now claims and contends in his third (3rd) successive MRJ that he is entitled to a new trial based on new evidence that was not discovered before his earlier motions which shows that his conviction was obtained through perjured testimony and in Defendant's Supplement to the Motion for Relief from Judgment[1] requests the Court to allow him to supplement Exhibit B[2] of the Motion for Relief from Judgment to include a recorded polygraph examination of Curtis Collins[3] which reveals his demeanor in answering questions prior to and during the polygraph examination. Defendant argues that this will better assist the Court in determining whether or not to grant his motion for an evidentiary hearing pursuant to MCR 6.508(C).[4]

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[1] DVD/disk included with Defendant's Motion to Supplement Motion for Relief from Judgment
[2] Motion for Relief from Judgment Exhibit B Copy of a Polygraph Report dated February 1, 2018
[3] Prosecution's key witness (COA Opinion December 19, 2015 Dkt No. 159160)
[4] March 18, 2009 Order Denying Defendant's Motion to Expand the Record Pursuant to MCR 6.507(A) or for an Evidentiary Hearing Pursuant to MCR 6.508(D)

Following review and inspection of the DVD/disk submitted by Defendant, the DVD/disk was found to be unreadable to play any audio or content and appears defective.

On October 17, 2018 the Court held Defendant's Motion for Relief from Judgment and Supplemental Motion for Relief from Judgment were held in abeyance for thirty (30) days to allow the Defendant to present to the Court a working DVD/disk and to file a proper proof of service.[5]

On or about November 14, 2018 Defendant presented to the Court a working DVD/Disk representing a recorded polygraph exam of Curtis Collins.

January 22, 2019 Defendant by and through his attorney filed a Stipulated Adjournment of Defendant's 6.500 Motion for (60) days to allow counsel for defendant to supplement Defendant's existing successive 6.500 motion and to have the prosecutor's conviction and integrity unit review the underlying conviction.

On April 3, 2019, the Court entered an Order Granting Defendant's Counsel Motion to Withdraw and Order for the Prosecutor to Respond to Defendant's Successive Motion for Relief from Judgment.

FACTUAL SUMMARY

Defendant was tried for the homicide of Rodnell Penn. Defendant stipulated that he had been charged with a prior murder and that the case had been dismissed after Rodnell Penn and other witnesses failed to come to court on the date of the trial.

[5] MCR 6.503(B)

Penn had testified against defendant at the preliminary examination. Defendant also agreed that he has a three to four inch scar on the left and backside of his head.[6]

The victim's brother, Leon Penn, testified that the night before the murder he saw his brother Rodnell with the defendant. He heard Defendant tell Rodnell that he would see Rodnell the next day. Penn knew that his brother was selling drugs for Defendant for approximately two years and had personally seen Defendant picking up money from the victim and dropping of drugs.

The first witness called at trial was twenty-year-old Curtis Collins. Contrary to his police statement given under the alias of Tony Smith, and his preliminary examination testimony, Collins, testified that he was not at the party store or in the area at the time of the crime. He claimed unfamiliarity with the area of Gray and Mack. He also claimed to know Defendant as Ghost. Collins was impeached with his preliminary examination testimony. He admitted that at the preliminary examination he had testified that he was in the party store on that date and time, that he saw Defendant and the deceased in the store. He stated that he left before Defendant, that he heard gunshots, turned around and saw Defendant running and when Collins ran back across Mack, he saw the deceased lying in a driveway. Collins knew it was the Defendant because he could see the scar on Defendant's head and he had gotten a good look at him. He also testified that he saw no one else in the area. Collins was very particular about what he did and did not say at the exam about the events at the store, while at the same time claiming that it was all a lie because he had not been at the scene at all.

[6] Trial Transcript, Vol. 9/2/1992, Page 96

Collins also admitted giving a statement to the police just days after the crime further admitting that he had given a false name to the police when he gave them a statement because he was on escape status and did not want the police to know. Collins admitted at trial that in his police statement he said he was inside the party store, saw the defendant with the victim, that he left the store first, after he heard a gunshot, he looked back and saw a body lying in front of a house, and he saw the defendant run across a vacant lot towards Springfield.[7] When asked why he told the police that he was present, Collins claimed that he was on a tether and the police told him "they were going to do this and this to me because I was on escape on a tether."[8] Collins did not explain how the officers could have known he was on tether considering he had given a false name. Collins was already in custody when he gave his testimony at the preliminary examination. On cross examination Collins added that the police offered him $10,000 to send him to Texas and give him a new identity. He felt that something could happen to him because he was lying on someone so he wanted to clear it up to stop being afraid. This was part of Defendant's explanation for recanting his preliminary examination testimony.

The trial judge asked him if he had ever had a problem with Defendant before the crime. Collins stated that they had started disliking each other, but there was nothing specific between them. The judge asked why "out of all the people in the world", did he tell the police that you saw Carl Hubbard after you heard the shot; that you saw Mr. Hubbard standing over the deceased and that you saw Mr. Hubbard

[7] Trial Transcript, Vol. 8/31/1992, Pages 35-38
[8] Trial Transcript, Vol 8/31/1992, Page 39

running away from the deceased?[9] Why did you pick out Mr. Hubbard? Collins' reply was long, unclear and did not tell the judge why he chose to say that it was Hubbard.

During his testimony, Collins admitted that he was worried about his life and that of his mother and children. He also stated that he had not been threatened and it was not why he was recanting. "Homicide" had made him lie. "Homicide" was telling him little stuff, and he was really upset about his best friend who had been killed and "the first thing that was coming through my mind I was just saying it, you know. It wasn't meant to be said, you know"[10]

On the third day of trial the People called Collins back to the stand. He testified that he wanted to tell the truth. He admitted that he had lied to the Court on the first day of trial.[11] He was present on the scene on January 17, 1992 at approximately 9:30 p.m. He had lied because he heard rumors about what was going to happen to his family. He believed the rumors and that is why he "told the judge a story."[12]

Collins affirmed that he had been at the party store on January 17th and did see Defendant with a person he would later find out was the victim. He had heard gunshots after he left the store and he had turned around and looked back across Mack in the direction of the victim. He seen the deceased lying in the driveway and he had seen the Defendant running through the field. He recognized the Defendant from the scar on his head.[13]

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[9] Trial Transcript, Vol 8/31/1992, Page 58
[10] Trial Transcript, Vol 8/31/1992, Page 42
[11] Trial Transcript, Vol 9/2/1992, Page 37
[12] Trial Transcript, Vol 9/2/1992, Page 40
[13] Trial Transcript, Vol 9/2/1992, Page 66

Defendant presented four witnesses in his defense. Raymond Williams and Rodney Fulton both testified that they were with Curtis Collins at the time of the murder. Defendant also presented the testimony of Thomas and Vanessa Spells. On the evening of the 17th Thomas Spells and Defendant left the house at about 9 or 10 p.m. to go to Defendant's mother's house to pick up their son. Vanessa Spells testified that on the 17th she came home from work around 8:15 or 8:20 p.m. Her husband and Defendant were at the house at the time she arrived and they left at 10 p.m.[14]

The trial judge found that Collins seemed quite nervous when he testified. The judge then reiterated all of the testimony that he heard and found Defendant guilty of first-degree murder.[15]

On appeal, Defendant moved the Court of Appeals for a remand to explore the reasons for Curtis Collins' trial recantation. The People argued that the reasons for recantation were of record.[16] The Court denied the motion.

In March of 1994, defendant filed a supplemental brief on appeal including a claim that Curtis Collins lied to the police initially. However, at trial Collins admitted that he had given that first statement using the alias Tony Smith.

The Court of Appeals affirmed Defendant's conviction in 1995 and Defendant continued to raise questions about Curtis Collins in the Michigan Supreme Court.

Defendant filed several motions in the trial court. He filed a motion for an evidentiary hearing in 2009[17] and his first motion for relief from judgment in 2011.

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[14] Trial Transcript, Vol 9/2/1992, Page 148
[15] Trial Transcript, Vol 9/2/1992, Pages 176, 185
[16] People's response filed August 18, 1993

Attached to this motion were affidavits from prisoners Askis Hill, Ray Burford, Emmanuel Randall, and Elton Carter. This motion was denied in 2012.[18]

Defendant filed his second motion for relief in 2015. To this motion he attached affidavits from the party store owners who claim to remember that on January 17th, 20 years ago Collins had not been allowed in the store that night. The motion was denied in 2015.[19]

Defendant's third motion for relief is based on his claim that Curtis Collins is again recanting his police statement, preliminary examination testimony, and the trial testimony taken on September 2, 1992. He also provides a report stating Collins passed a polygraph examination on three questions and a video of the polygraph test and the interview.

This court ordered the People to answer Defendant's current motion. The People reached out to Curtis Collins. He agreed to come to the Prosecutor's office on Friday, May 17th, but did not keep his appointment and would not return the call. During a visit to his home on May 20, 2019 he told Detective Richard Pomorski that his attorney, Jon Posner, told him not to talk to the prosecutors. Jon Posner, however, died in 2017 leaving the People without a way to interview the witness.

Defendant fired his most recent attorney and insisted that the prosecutor's conviction and integrity unit not to investigate the case.

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[17] On March 18, 2009 Judge James R. Chylinski Denied Defendant's Motion to Expand the Record or for an Evidentiary Hearing.
[18] On March 15, 2012 Judge Michael M. Hathaway Denied Defendant's Motion for Relief from Judgment.
[19] On March 30, 2015 Judge Michael M. Hathaway Denied Defendant's successive Motion for Relief from Judgment.

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STANDARD OF REVIEW

The standard of review is de novo for all issues of law on appeal. *People v. Laws,* 218 Mich App 447; 554 NW2d 586 (1996). Factual findings are reviewed to see if they are clearly erroneous. **MCR 2.613(C);** *People v. Tracey,* 221 Mich App 321; 561 NW2d 133 (1997). Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made. *People v. Lombardo,* 216 Mich App 500; 549 NW2d 596 (1996).

In order to advance an allegation in a motion for relief from judgment that could have been made in a prior appeal or motion, a defendant must demonstrate "good cause" for failure to raise the grounds on appeal and actual prejudice resulting from the alleged irregularities that support the claim of relief, pursuant to **MCR 6.508(D)(3)(b).** The cause and prejudice standards are based on precedent from the United States Supreme Court. *Wainwright v Sykes,* 433 US 72; 97 S Ct 2497; 53 L Ed 2d 594 (1977).

A court may not grant relief, if the defendant alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction of the sentence or in a prior motion for relief from judgment; unless defendant demonstrates good cause for the failure to previously raise the grounds and actual prejudice from the alleged irregularities that support the claim. **MCR 6.508(D)(3);** *People v Brown,* 196 Mich App 153; 492 NW2d 770 (1992), *People v Watroba,* 193 Mich App 124; 483 NW2d 441 (1992).

ANALYSIS

To file a successive motion for relief from judgment defendant must show a retroactive change in the law or new evidence that was not discovered before the prior motion. In the case at bar Defendant presents a recanting witness who had already recanted at trial and his polygraph results regarding questions were not relevant. Defendant's evidence does not meet the test for filing a successive motion.

Even if a defendant could meet the test barring a successive motion for relief, the proposed evidence would have to meet the *Cress* test for newly discovered evidence. *People v. Cress*, 468 Mich 578, 692 (2003). Collins recanted at trial and his current recantation is not new, and is considered cumulative, as the evidence would not make a different result probable on retrial, and was actually discovered before his prior to Defendant's first motion for relief. As such, Defendant cannot meet the *Cress* test for newly discovered evidence. *Id.*

Defendant moves for relief from judgment raising four issues. He maintains that he may file a successive motion because he has new evidence that was not discoverable before his other motions for relief. The witness now providing an affidavit had already recanted at trial, thus his recanting affidavit is not actually new. This fact bars his successive motion.

Defendant claims that the affidavit amounts to new evidence because Collins is claiming at trial he disavowed his prior recanting testimony because of pressure by the police and prosecutor. However, the only relevancy of the affidavit is a reiteration of the claim that Collins was not near the area of Gray and Mack the night of the murder.

This is the exact claim he made in his recanting testimony at trial. Even the reasons for the disavowal are not new, as Collins has already claimed that pressure from the police caused him to lie. Cress, *Id.*

Moreover, Defendant provides a report and videotape of Collins' polygraph examination and interview. However, none of the questions that were used in the test are new evidence. Indeed, the polygraph questions are things both sides agreed to in 1992. Collins never testified that he was with Hubbard when Hubbard shot Penn or that he saw the shooting or that Hubbard shot anyone else. The questions all presupposed that Collins had testified to seeing the shooting. Because the questions do not prove anything that was not known in this case, the polygraph test results cannot meet the test for new evidence not discovered before the previous motions. **MCR 6.502(G).** Therefore, the polygraph results also do not help Defendant meet the bar against successive motions.

In the affidavit, Collins states that he told Raymond Williams in 2014 that he was again willing to claim that he had not been present on Gray and Mack. Williams was the person Collins claimed had told him to say he was on Corbet Street on the night of the crime and Williams himself testified at trial that Collins was with him on Corbet. In paragraph six Collins states, "I contacted Raymond Williams in 2014 informing him that I had lied on Carl Hubbard...and that I would do an affidavit..."

Raymond Williams, then, was helping defendant gather affidavits in 2014, and Williams had this information in 2014. As such, Collins' desire to sign an affidavit was known to Defendant in 2014 before his 2015 motion for relief. **MCR 6.502(A)** requires

that every motion for relief from judgment must include all of the grounds for relief which are available to the defendant. Collins' newest desire to recant is not new evidence. Defendant had the information in 2014 and was required to raise the claim in his 2015 motion.

Defendant also contends that the cab company subpoena is new evidence but he does not include the results of the subpoena. Knowing that the People attempted to gather information before trial is not new evidence. Absent the results of the subpoena and a *Brady* violation regarding those results, the subpoena is not evidence of anything. *Brady v. Maryland*, 373 US 83 (1963).

Defendant attached other evidence for the court's consideration, but all of the other exhibits have been previously presented in other motions for relief and cannot be considered newly discovered so as to meet the successive motion bar.

Therefore, Defendant's motion should be barred because it is a successive motion which does not present new evidence not discovered before his previous successive motion.

Even if Defendant could get past the successive motion bar, the affidavit from Collins and the polygraph test result would not merit Defendant a new trial. *People v. Cress*, 468 Mich 578, 692 (2003), held that evidence is newly discovered if: (1) the evidence, not just its materiality, is newly discovered; (2) is such that its admission would render a different result probable upon a retrial of the case; and (4) the defendant could not, with reasonable diligence, have discovered and produced the evidence at trial.

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As argued above, the evidence is not newly discovered. The witness testified on the first day of trial that he was not on Gray and Mack. Two days later he admitted that he was present on Gray and Mack and that his new testimony was a lie. Moreover, because Collins had told Williams the information in 2014 and Williams was helping Defendant gather the information in 2014 which was part of Defendant's 2015 motion, Defendant had the information about Collins in time for the 2015 motion for relief. The polygraph results add nothing because the questions upon which it was based are all new things both parties agree on during trial. Collins' latest claims are not new.

Even if it was new, the evidence would be cumulative because this exact witness testified to this same claim at trial and the polygraph results would not be admissible. Defendant cannot meet the second prong of the *Cress* test.

The evidence would not render a different result probable on retrial. Under Michigan law, affidavits recanting prior sworn testimony are suspect. *People v. Dailey,* 6 Mich App 99, 102 (1967). Recantation alone does not require the court to order a new trial if the court determines that the recanted testimony is untrustworthy. *People v. Van den Dreissche,* 233 Mich 38, 46 (1925).

The circumstantial evidence against Defendant was surprisingly strong and Collins' recanting at a retrial would not make a difference. Defendant's presentation of other new evidence provided by other prisoners who have heard Collins regret his testimony against Defendant or who now remember that they were at the party store that night and Collins was not in there would also not likely change the result.

The last thing Defendant has to show is that he could not have, with reasonable diligence, discovered and produced the evidence at trial. This factor points out that not only could Defendant have presented this evidence at trial, this evidence was actually was presented at trial. Collins testified at trial that he was not on Gray and Mack that night. This is exactly what he would testify to at a new trial. As such, Defendant cannot show any of the *Cress* factors and his motion would be denied, even if he could get past the successive motion bar.

Defendant attempts to use Collins' affidavit to prove that the Court should grant him a new trial. He avers that the People used perjured testimony. However, when Collins recanted on the first day of trial, the prosecutor immediately impeached him with his preliminary examination testimony.

Neither the police nor the prosecutor intimidated the witness after his initial recanting. The police and prosecutor have not intimidated the witness because the witness was forced to face perjury charges or testify against a man accused of murder. There was no intimidation, only a tough choice that Collins had brought about by his own actions.

The prosecutor did not withhold evidence. Neither the police nor the prosecutor had a reason to threaten Collins. As the facts have shown, there was no *Brady* violation.[20]

Even if these claims could be sustained now, Defendant would still have to show good cause for failing to raise the issues previously and prejudice in order to prevail.

[20] *Brady v Maryland*, 373 US 83, 87 (1963).

Defendant argues that he does not need to do so because he is actually innocent. However, Defendant was seen in the area both before and after the shots. Indeed, Defendant's multiple lies to the police showed his guilty state of mind. This court also finds that Defendant's alibi witnesses were not credible.

As Defendant proffers no claim upon which relief may be granted, his argument, and his motion for relief from judgment must be denied for lack of merit.

Therefore, **IT IS HEREBY ORDERED** that Defendant's Successive (3rd) Motion for Relief from Judgment is **DENIED**.

DATED: OCT 02 2019

LAWRENCE S. TALON

Judge Lawrence S. Talon
Circuit Court Judge

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on 10/02/2019.

Name

Appendix F

1992?

A. (No response)

Q. Were you familiar with that area on January 17, 1992, the area of Mack and Gray?

A. No, I wasn't.

Q. Okay.

Are you familiar with a party store that's on the corner of Mack and Gray?

A. Yes, I am.

Q. Have you ever been to that party store?

A. Yes, I have.

Q. Okay.

Do you know anybody that works at that party store?

A. Yes, I know everybody that works in there.

Q. Okay.

Sir, I'd like to call your attention to the date of January 17th, 1992.

On that date at approximately some moments before 9:30 in the p.m., did you have occasion to be at that party store?

A. No, I wasn't.

Q. Sir, on that date in time, did you subsequently have occasion to ever be in the area of the corner of Mack and Gray in the City of Detroit?

A. No, I wasn't.

Q. Okay.

Sir, on that date and time, January 17th, 1992, did you ever have occasion to observe the person you've identified in court as Goff or Carl Hubbard?

A. Excuse me again?

Q. I will repeat the question for you, Mr. Collins.

On January 17th, 1992, at approximately 9:30 in the p.m., or thereabouts, did you ever have occasion to observe the person you've identified in court here as Carl Hubbard?

A. No, I haven't.

Q. Sir, do you recall, do you not, testifying in a prior time regarding this case in court?

A. Yes, I did.

Q. Well, isn't it true, sir, that you testified on Tuesday, February 4, 1992, before the Honorable Willie Lipscomb in the 36th District Court for the City of Detroit?

A. Yes, I did.

Q. At that time, sir, were your sworn in under oath to testify to the truth.

A. Yes, I did.

Q. You recall, sir, being asked questions regarding

A. Yes.
Q. From where you located the body, could you see the store on the corner of Gray and Mack?
A. Yes.
Q. Approximately how far is it?
A. Maybe two hundred yards. A rough estimate, two hundred yards.
Q. More than a half a block; approximately half a block?
A. Less than half a block.
Q. At little less than half a block?
A. Yes.
Q. Just a couple more questions.

It is your testimony that when you arrived at the scene, was there anyone else at that general area that you saw?
A. Not that I can recall.
Q. Were there other police cars in the area? Had the ambulance arrive when you arrived?
A. No.
Q. You were the first to arrive?
A. Yes.

Yes. We were the first patrol unit, yes, sir.
Q. Were the other people in the area?
A. Not that I can recall.

Appendix H

A. Right.

Q. You know it was on Mack and Gray?

A. No.

Q. Thank you.

No further question, Your Honor.

THE COURT: Anything further?

MR. GILES: No further questions, Your Honor.

MR. GONZALES: Nothing else, Judge.

THE COURT: You can step down, thank you.

MR. GONZALES: Last witness, Judge.

MR. GONZALES: Let me indicate that I recall Curtis Collins to the stand. And I provided counsel with a new statement that Mr. Collins has given to Sergeant Ron Gale, G-a-l-e. Of the Detroit Police homicide section.

MR. GILES: Your Honor, I am in receipt of this statement, Your Honor.

THE COURT: Thank you.

You may continue.

MR. GONZALES: All right. Mr. Collins, will you take the stand, please.

C U R T I S C O L L I N S

called as a witness by the People, being duly sworn by the Court Clerk, was examined and testified upon his oath, as follows:

DIRECT EXAMINATION

BY MR. GONZALES:

Q. Mr. Collins, you testified in this matter yesterday. You testified in this case the day before yesterday; is that right?

A. Yes, I did.

Q. Mr. Collins, do you wish to testify again today?

A. Yes, I do.

Q. Is it at your request that you come in here and testify and tell this Judge the truth?

A. Yes, I do.

Q. Okay. Is what you told the truth when you testified Monday morning; was that the truth?

A. No.

Q. What was the truth, what happened on January 17th, 1992, what you told Judge Lipscomb at 36th District

(34)

Court, when you testified at the preliminary examination?

A. Yes, it was.

Q. All right.

Mr. Collins, since this time you have been arrested; is that correct?

A. Yes, I have.

Q. Mr. Collins, is the only reason you are coming in and telling this Judge that you lied Monday morning merely because now you are facing potential charges?

A. No.

Q. Why is it then that you chose to lie about what you testified to -- strike that.

You testified Monday morning that you weren't there January 17th, 1992; you were at home; is that correct?

A. Yes.

Q. Now, was that -- and that was true or not true?

A. That was not true.

Q. Were you there January 17th, 1992 at approximately 9:30 in the p.m. in the area of the Special K Store on Mack and Gray?

A. Yes, I was.

Q. Why is it, sir, that you chose to tell the first story that you were at home and not there Monday morning to

THE COURT: Thank you.

BY MR. GONZALES:

Q. Now, let's talk about January 17th, 1992, Mr. Collins. On January, 17th, '92, did you go into the Special K Party Store on Mack and Gray?

A. Yes, I did.

Q. On that date in time, did you have occasion to see Goft?

A. Yes, I did.

Q. Is that is the same person you've identified in court prior to today?

A. Yes, it is.

Q. Did you see him also with a person you later came to know as Rodnell Penn?

A. Yes, I did.

Q. Did you have occasion to leave the party store?

A. Yes, I did.

Q. And at that date in time, sir, did you hear anything unusual?

A. Yes, I did.

Q. What did you hear?

A. Gunshots.

Q. When you heard gunshots, how many did you hear?

A. About three or four.

Q. And when you heard three or four gunshots, what did you

do?

A. Turned around and looked back across Mack and then I ran. I ran. I ran across Mack. And I saw this guy laying in the driveway.

Q. That person that was laying in the driveway, is that the same person you had seen with Goft earlier in the store?

A. Yes, it is.

Q. Approximately how many minutes earlier?

A. Between five and ten minutes.

Q. Between five and ten minutes?

A. Yes.

Q. When you turned around and you looked; did you have occasion to see Goft?

A. Yes, I did.

Q. Where did you see him?

A. Running through the field.

Q. Did you see him with any weapon?

A. No, I didn't.

Q. Did you see anyone else in the area other than the person on the driveway; and the person you identified as Goft running through -- running away?

A. No, I didn't.

Q. Are you saying this merely because you have been arrested since this incident?

A. No, I am not.

Q. Okay.

MR. GONZALES: No further questions, Judge.

THE COURT: Cross-examination.

CROSS-EXAMINATION

BY MR. GILES:

Q. All right, Mr. Collins.

It is your testimony now that when you were hear on Monday that you lied; is that correct; is that right?

A. Yes.

Q. You are saying now when you were in 36th District Court, when you testified, you were telling the truth; is that right?

A. Yes.

Q. When you talked to -- let me ask you this:

When you talked to the police officer and gave the police a statement, was that a lie or was that the truth?

A. The truth.

Q. Yes.

When you talked to the police officer, You gave your statement to the police, I

believe it was on January 23rd, did you lie or did you tell the truth?

A. The truth.

Q. You told the truth?

When you left out of the courtroom on Monday, you were arrested?

A. Yes, I was.

Q. What was your understanding of the reason why you were arrested?

A. For sitting there telling the -- telling the Judge a lie because I was scared.

Q. And who talked to you about that?

A. About what?

Q. About anything after you were arrested?

A. Who talked to me?

Q. Did the officer come up and tell -- talk to you and say: I am arresting you because you told a lie?

A. No, he didn't.

Q. What did he tell you?

A. He just told me I was being arrested for -- I don't recall what you call it.

Q. Perjury?

A. Perjury.

Q. Is that all he told you?

A. Yes.
Q. He read your rights?
A. Yes, he did.
Q. Did he ask you any questions?
A. Yes, he did.
Q. What kind of questions did he ask you?
A. He asked me why I lied.
Q. What did you tell him?
A. I told him the reason. The same reason I told the prosecutor.
Q. In Court today?
A. Yes.
Q. And when did he ask you the question?
A. About three and a half hours later after I was on the 9th floor.
Q. Okay. Let's back up.

When you were arrested and told you were being charged with perjury here in this courtroom, outside this courtroom, okay?

A. Yes.
Q. One second, Your Honor.

We have a potential witness in the Courtroom.

THE COURT: Have the witness wait in the hallway.

MR. GILES: Thank you, Your Honor.

MR. GONZALES: Let me indicate that that woman has been in the courtroom since the beginning of this case I am not sure of her name but I have seen her throughout.

In fact I spoke to her at the beginning of case Monday morning and asked her if she wasn't a witness; and she said she wasn't. And I'm indicating that --

MR. GILES: Your Honor, I don't believe she's in the courtroom.

She has been outside the courtroom. I have talked to her on several occasions.

THE COURT: You can ask her some questions as soon as she takes the stand by way of voir dire, if you like.

MR. GILES: Thank you.

BY MR. GILES:

Q. When you were arrested outside the courtroom, the officer read you your rights, then; is that correct, Mr. Collins?

A. Yes, he did.

Q. Okay. Did he ask you any questions then?

A. No, he didn't.

Q. He didn't say anything to you?
A. No.
Q. He just took you and locked you up?
A. Yes, he did.
Q. Is it your -- did he later come back and see you?
A. Yes, he did.
Q. Okay. On your request or he just came on his own?
A. On my request.
Q. That's when you told him you lied?
A. Yes, I did.
Q. Okay.
Did he at any time tell you anything to the effect that if you came back and told the truth that you would not be charged with perjury?
A. No, he didn't.
Q. Did he make any promises to you?
A. No, he didn't.
Q. Okay.
Did he tell you about testifying today that they would not charge you?
A. No, he didn't.
Q. Did he tell you about testifying today they could not charge you?
A. No, he didn't.
Q. So is it you are frame of mind now that you believe

when you walk out of this courtroom today, you are still going to be charged with perjury?

A. I ain't?

Q. Is that yes or no.

Do you believe when you leave here that you are still charged with perjury?

A. Yes.

Q. Is it your testimony that you were on -- that you were in the area of Gray and Mack on January 17th; is that correct?

A. Yes.

Q. And you were in the party store?

A. Yes.

Q. What is the name of that party store?

A. Gray and Mack Party Store.

Q. It is the Gray and Mack Party Store?

A. Yes.

Q. Do you live in that area?

A. Yes, I do.

Q. Was the name of that party store the Special K?

A. Yes, Special K.

Q. Now, it is Special K?

A. Special K.

Q. Not the Gray and Mack Party Store?

A. (Interposing) Not --

Q. I want to understand your testimony.

It is Special K?

A. Special K.

Q. You are inside the store?

A. Yes.

Q. How long were you inside the store?

A. About five or ten minutes.

Q. Oklay.

So it is your testimony today that while inside the store, you saw Mr. Carl Hubbard?

A. Yes.

Q. You saw him with anybody else?

A. Yes.

Q. Who did you see him with?

A. The deceased person.

Q. The deceased person.

Do you know the deceased person's name?

A. Not right offhand.

Q. Had you ever seen that person before you saw them in the party store?

A. No, I haven't.

Q. Did you talk to that person while you were in the party store?

A. No, I haven't.

Q. Okay.

You got approximately twenty-five, thirty feet. You heard some gunshots; is that correct, Mr. Collins?

A. Yes.

Q. You turned around ; is that correct?

A. Yes.

Q. You looked down Gray?

A. Yes.

Q. Okay.

What did you see when you looked down Gray?

A. I seen -- I looked down Gray and I seen Carl Hubbard running through the field.

Q. Running through what field?

A. Springer.

Q. So when you saw him, which side -- if I show you this diagram, again.

I am going to show you the diagram again identified as People's Exhibit Number 21. According -- this is the building here, Special K Party Store on the diagram, the side, the telephone is towards the back of the building and that's in the approximate area that you were; is that correct?

A. Yes.

Q. It is your testimony that you turned and looked down Gray. And you saw Mr. Hubbard running through a field. These are the houses on Gray.

This shows one vacant lot on this side of the street.

Is this the field that you are speaking anout?

A. Yes.

Q. Where the vacant lot is.

You saw Mr. Hubbard in the vacant lot when you saw him?

A. Running through the vacant lot.

Q. You saw him running through.

So the first time you saw Mr. Hubbard is he was running through this vacant lot?

A. Yes.

Q. When you turned around and saw Mr. Hubbard running through this vacant lot, did you also see the body?

A. On on the ground.

Q. So from standing back near this party store on Gray and Mack, you could see the body laying on the ground?

A. No, not -- I didn't see it until I got close.

Q. Okay.

So it is your testimony you heard the gunshots, you turned around and saw Mr. Hubbard

(62)

THE COURT: Go right ahead.

MR. GILES: Your Honor, the motion goes primary to the prosecutor has not in fact presented a prima facie case here.

Moreover going to the point that they have not shown that the defendant in this case, Mr. Carl Hubbard, ddid in fact kill, especially with malice aforethought, Rodnell Penn.

There was no testimony going to the fact that, or any evidence presented regarding a weapon, other than the bullets taken out of the deceased.

No guns were found on my client. No weapons. There is no testimony that he was ever seen with a weapon.

There -- the only testimony that even remotely -- that put my client in the general vicinity, two witnesses testified that he was in the general vicinity, Your Honor. Mr. Andrew Smith, who testified that he was in the area with two other males. And at sometime afterwards, he heard the shots. He came out and didn't see anybody in the area.

He also testified that he did not see Mr. Curtis Collins in the area.

The only testimony, the only other

He couldn't -- he testified that he did not see his face.

He testified that he identified him by the scar on the back of Mr. Hubbard's head which you have already taken judicial notice of.

Your Honor, I would say a picture is worth a thousand words.

The prosecutor has put in, I believe, the photo, People's Exhibit Number 21 which shows was taken February, during the daytime, Your Honor. And it was taken from the area during the front -- the side of the store, a picture going down the street on Mack -- I am sorry, Your Honor.

People's Exhibit Number 13 in the in photo, Your Honor, taken during the daytime, shows the officer standing in the general vacinity of where the crime scene was and from this distance during the daytime, you can just make out the silhouette of the officer.

On cross-examination with this officer and in viewing the picture, I asked him could he even make out his head. As I recall his testimony was that: No, he couldn't make it out but that he knew he had one because he knew this was him standing in the picture.

not the People have presented proof where a jury could find guilt beyond a reasonable doubt.

This Court specifically listened to the testimony of Curtis Lenell Collins.

This Court had an opportunity to examine that witness on Monday.

And also had an opportunity to exam that witness today while he testified.

And this Court knows full well that this Court is free to accept and believe all, some or none of the testimony of any of the witnesses.

But based upon all the witnesses that I have heard thusfar, and based upon some of the testimony that this Court does believe centering in and around Curtis Linell Collins' testimony, this Court does find that this prosecution has satisfied its burden of proof at this point in time.

I am going to deny your request for a directed verdict.

Do you have any defense that you'd like to present at this time, counsel?

MR. GILES: Yes, Your Honor.

I'd like to call Raymond Williams.

R A Y M O N D W I L L I A M S

Q. I said: Do you know a person by the name of Roney Fuller?
A. No, sir.
Q. You know a person by the name of big Ron?
A. Yes, I do.
Q. Okay.

Mr. Williams, I am going to ask you to recall the day of January 17th, 1992.

But before I do that, I want to ask you: Did you know a person by the name of Rodnell Penn?

A. No, sir, I don't.
Q. Do you know about a fatal shooting that occurred on Gray Street in January?
A. I heard about the shooting the next day but I don't know about it. No, I do not.
Q. The next day. That would be the 18th, correct?
A. Yes, sir.
Q. January 17th of 1992, did you see Curtis Collins?
A. Yes, I did.
Q. At what time did you see him?
A. Around about prior to about, around about 8 o'clock.
Q. Where were you at when you saw him?
A. I was at big Ron's house on Dickerson and Corbett around about five houses off the corner.

Q. Curtis Collins was at the house?
A. Yes, sir, he was.
Q. You said this was around 8 o'clock?
A. Yes, sir, it was.
Q. And what time did you leave the house?
A. I left the house around about ten o'clock or 10:05. Somewhere around in there.
Q. Okay.
And during the time you were at the house, Curtis Collins was there?
A. Yes, sir, he was.
Q. He was there the entire time from 8, around 8 o'clock to 10 o'clock?
A. Yes, he was. We were gambling.
Q. To your knowledge did he leave your presence?
A. No, sir, he didn't.
Q. During that two-hour period?
A. No, sir, he didn't.
Q. Okay.
You had left the house around 10 o'clock?
A. Yes, sir, I did.
Q. When you left the house, was Curtis Collins still there?
A. Yes, he was.

MR. GILES: Yes, Your Honor.

T H O M A S S P E L L S

called as a witness by the Defendant, being duly sworn by the Court Clerk, was examined and testified upon his oath, as follows:

DIRECT EXAMINATION

BY MR. GILES:

Q. Good afternoon, Mr. spells.

Could you please give your full legal name to the Court?

A. Thomas James Spells.

Q. And, Mr. Spells, do you know a person by the name of Carl Hubbard?

A. Yes.

Q. How long have you known him?

A. About ten, twelve years.

Q. What is your relationship to Mr. Hubbard?

A. Friend.

Q. A friend?

A. Yes.

Q. All right.

Mr. Spells, I want to call your attention to the evening of January 17th, 1992.

Do you recall seeing Mr. Hubbard that day?

A. Yes.

Q. Okay. Where did you see him at?

A. At my house.

Q. What time was he at your house?

A. About 6, 7 o'clock.

Q. Was anyone else there?

A. No.

Q. He was at your house until what time?

A. We had left and then came back. That's after my wife had came.

We were going to go pick my son up from the babysitter.

Q. You left with Mr. Hubbard?

A. Yes.

Q. Do you know approximately what time?

A. About 9, 10 o'clock.

Q. When you left with Mr. Hubbard, where did you go?

A. We was going over to see mother's house.

Q. Over to Carl Hubbard's mother house?

A. Carl's mother's house.

Q. Did anything happen on your way to Carl's mother's

house?

A. We seen an ambulance over on the next street.

Q. That was on the next street. What street is that?

A. On Gray.

Q. Gray?

A. Yes, Gray.

Q. Did you go over on Gray?

A. Yes.

Q. What happened?

A. We got over there.

The ambulance was there and the police was there. And one of the detectives had talked to Carl and then we left.

Q. Where did you go then?

A. To Carl's mother's house.

Q. You said your wife came home while you and Carl were still at your house?

A. Yes.

Q. Is that a house or apartment?

A. Apartment.

Q. Approximately what time did she come home?

A. About 8:15, 8:20.

Q. During the period between 6 or 7, when you described that Carl first came to your house; and between 9 and 10 when both you and he left, did Mr. Hubbard ever

leave your apartment?

A. No.

Q. You were with him the entire time?

A. Yes.

Q. Thank you.

MR. GILES: No further questions Your Honor.

CROSS-EXAMINATION

BY MR. GONZALES:

Q. Good afternoon, Mr. Spells?

A. Good afternoon.

Q. Mr. Spells, you attended the preliminary examination, did you not, of this case?

A. Yes.

Q. Did you know the officer-in-charge on this case by the name of Sergeant Joann Kenny?

A. No.

Q. Did you ever talk to her?

A. No.

Q. The testimony you have given relates to the whereabouts of Mr. Hubbard.

On what date are you, sir, saying on what date?

A. I can't exactly remember the day.

A. Yes.
Q. And you never went down there?
A. No.
Q. So you never told the police at all about the whereabouts of Mr. Hubbard; is that correct?
A. No.
Q. Thank you.

MR. GONZALES: Nothing else.

THE COURT: Anything else.

MR. GILES: Nothing further.

THE COURT: You can step down.

Thank you.

V A N E S S A S P E L L S

called as a witness by the Defendant, being duly sworn by the Court Clerk, was examined and testified upon her oath, as follows:

DIRECT EXAMINATION

BY MR. GILES:
Q. Miss Spells, please give your full legal name for the Court?
A. Venessa Spells.
Q. Okay.

Miss Spells, are you married to Thomas Spells?

A. Yes.

Q. And you have one child?

A. Yes, a son.

Q. Do you know a person by the name of Carl Hubbard?

A. Yes, I do.

Q. How long have you known Mr. Hubbard?

A. About a year or so.

Q. You've known him for about a year.

Miss Spells, I am going to ask you to direct your attention to January 17th, 1992.

Can you recall approximately what time you came home from work? You did -- you went to work that day?

A. Yes, I did.

Q. Do you recall what time you came home from work?

A. Around 8:15, 8"20.

Q. And who was at your home when you arrived there?

A. My husband Thomas Spells and Carl Hubbard.

Q. And at any time did your husband and Carl leave your home while you were there?

A. Yes, they did.

Q. And what time did they leave?

A. Around 10 o'clock.

145

Q. And did you see your husband and Carl any time again that day?
A. Yes, I did.
Q. Around, approximately what time?
A. Half hour later. About 10:30.
Q. Are you aware of a Detroit Police Officer by the name of Sergeant Kenny?
A. Yes.
Q. And how are you aware of her?
A. She called me at my home and asked me could I come down to police station to give a statement.
Q. Did you go down to the police station and give a statement?
A. No.
Q. Did you talk to Sgt. Kenny about what you know of January 17th?
A. No, I didn't.
Q. Did she ask you any questions about what you know of January 17th?
A. No.
She just wanted me to come down.
Q. Thank you.
MR. GILES: No further questions, Your Honor.
THE COURT: Any questions?

produce any magic in changing the facts.

Due to the fact that the prosecution, I see on the Information, has charged Mr. Hubbard with a count of felony firearm, specifically felony must be committed with a firearm; they have listed in the Information a handgun.

This Court has not seen a handgun. There has been no exhibit marked as a handgun. I don't know as a result of this close range firing that this was a saw-off rifle; what the length of any gun might have been.

I do not believe that the People have satisfied Count 2 to this Court.

However, this Court does believe after looking at all of the elements and listening to all the facts in this case that all of the elements of Murder in the First Degree have been satisfied to this Court beyond a reasonable doubt.

That is what this Court is going to find Mr. Hubbard guilty of is Murder in the First Degree.

As a result of this Court so finding, Mr. Hubbard is going to have to come back for sentencing on the date of September 22, 1922. 9:00 in the morning.

Appendix I

A I was inside the store. I was in the back of the store for about five or ten minutes then I came out the back of the store. I see him walk in the store with the defendant that was laying on the ground that's dead. I walk out of the store. I went to my right down the street.

Q Let me stop you, sir. You say with the defendant - You say you saw him with the defendant, you mean the decease?

A Yeah, the deceased guy.

Q The person who's the decease, did you know that person before in your life before January 17, 1992?

A I ain't never seen him in my life.

Q When you were in the store what were you doing in the store?

A I was in the store. I had bought me a beer and I was talking to the owner because I know him.

Q Let me stop you there, sir. When you were in the store you saw Carl or Ghost come in the store with a person you refer to as the decease?

A Yes.

Q And who left the store first?

A I left first.

Q When you left the store first where did you go?

A I walked up the street.

A

STATE OF MICHIGAN ☐Third Judicial Circuit Court ☒Recorder's Court	SUBPOENA and DUCES TECUM	CASE NO. 92-001856

PEOPLE OF THE STATE OF MICHIGAN Vs. Carl Hubbard Defendant	FRANK MURPHY HALL OF JUSTICE 1441 ST. ANTOINE, DETROIT, MICHIGAN 48226

(SEAL)	SUBPOENA FOR ☒PERSON ☒DOCUMENT(S) or OBJECT(S)
	TO: KEEPER OF THE RECORDS CHECKER CAB COMPANY 2128 TRUMBELL DETROIT, MI. (963-7000)

YOU ARE HEREBY COMMANDED to appear in the Frank Murphy Hall of Justice at the place, date and time specified below to give evidence in the above-entitled case.

PLACE	COURT ROOM
HON. M. JOHN SHAMO COURTROOM 403 FRANK MURPHY HALL OF JUSTICE 1441 ST. ANTIONE DETROIT, MI	403 DATE AND TIME FRIDAY, MARCH 13, 1992 @9:00AM

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):(1)

Any and all Checker Cab Company records, notes, logs, etc., including Cab Driver's name, address, and phone, for any and all fares handled in the approximate area of E. Warren and Gray streets in the City of Detroit in the PM hours (approximately between 9:30PM and 10:30PM) on FRIDAY, JANUARY 17, 1992.

☐*See additional information on reverse*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

GEORGE L. GISH, Clerk of The Court JAMES R. KILLEEN, Wayne County Clerk (BY) DEPUTY CLERK Patricia Parsons	DATE 2-11-92

This subpoena is issued upon application of the: ☒Plaintiff ☐Defendant	ATTORNEY'S NAME AND ADDRESS APA JAMES D. GONZALES P-36359 (224-5758) WAYNE CO. PROSECUTOR'S OFFICE 1200 FRANK MURPHY HALL OF JUSTICE DETROIT, MI

(1) If not applicable, enter "none"

Form #19 (Rev. 10/86) SUBPOENA

JOHN D. O'HAIR
PROSECUTING ATTORNEY
GEORGE E. WARD
CHIEF ASSISTANT

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN

1200 FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
DETROIT, MICHIGAN 48226
TEL. 224-5777

MEMORANDUM

DATE: 2/11/92

TO: SGT. JOANN KINNEY SQ. 6

FROM: APA Jim Gonzales 224-5758

RE: Peo. v. CARL HUBBARD, Rec. Ct. No. 92-1856

JOANN,

(1) Please Submit ET 913301 to LAB FOR Comparison w/ Slugs on LAB No. 279-92. This apparantly was not compared along with other slugs recovered from M.E.; (See LAB No. 280-92)

(2) Please serve attached subpoena for Checker Cab records to corroborate Curtis Collins AKA "Tony Smith".

Thank You.

Appendix J

92061494

STATE OF MICHIGAN

CASE NO: 92211402 PA

INFORMATION
FELONY

36TH DISTRICT COURT
Recorders Court

The People of the State Of Michigan

vs

CARL HUBBARD 82-92211402-01

Offense Information

Date of Offense
1/17/92 bab

Police Agency Report No.
DPHO-92-43

Place of Offense
f/o 3960 gray, DETROIT

Complainant or Victim
RODNELL PENN

Complaining Witness
RODNELL PENN

Charge

State Of Michigan, County of Wayne
In the name of the People of the State of Michigan: The Prosecuting Attorney for this county appears before the Court and informs the Court that on the date and at the location above described, the Defendant(s)

COUNT 1 Defendant(s) 01 MURDER 1ST DEGREE-PREMED
did, deliberately, with the intent to kill, and with premeditation, kill and murder one RODNELL PENN; contrary to MCL 750.316; MSA 28.548. [750.316-A]
FELONY: Life

COUNT 2 Defendant(s) 01 WEAPONS-FELONY FIREARM
did carry or have in his/her possession a firearm, to-wit: HANDGUN, at the time he/she committed or attempted to commit a felony, to-wit: MURDER FIRST DEGREE; contrary to MCL 750.227b; MSA 28.424(2). [750.227B-A]
FELONY: 2 Years consecutively with and preceding any term of imprisonment imposed for the felony or attempted felony conviction

and against the peace and dignity of the State of Michigan.

Date 2/10/92

John D. O'Hair
Prosecuting Attorney
by [signature] P43974

Bar Number P24502

9211858

92001494

STATE OF MICHIGAN

CASE NO: 92211402 PA

MITTIMUS
FELONY

36-92 55963

36TH DISTRICT COURT
Recorders Court

The People of the State Of Michigan

vs

CARL HUBBARD 82-92211402-01

Offense Information

Date of Offense		Police Agency Report No.	
1/17/92	bab	DPHO-92-43	
Sex	**Race**	**DOB**	**SID**
M	B	09/19/64	

Charge

750/316-A 01
750/227B-A 01

Defendant Alias(s):

BOLDS:

Bond History

Date Set	Date Posted	Type	Amount

Cautions:

Scheduled Court Appearances:

Date	Time	Court Location

(SEAL)

To the Sheriff or Custodial Agency: You are directed to hold the above named Defendant(s) in your care and custody until further order of the Court, or until such time as bail bond or personal recognizance is posted. When the Defendant is in your custody, you are to bring the Defendant to all hearings and Court appearances, or otherwise as directed by the Court.

Date:

Appendix K

January 27, 1998

Carl Hubbard #205988
Saginaw Correctional Facility 12-170
9625 Pierce Road
Freeland, MI 48623

Dear Mr. Hubbard:

I received your letter dated January 21, 1998. Currently you have all the information that I have in regards to your file, which I have sent to you previously. I have no additional written documents or information.

In regards to the perjury charge against Mr. Curtis Collins, alias Tony Smith, it is my recollection that on the first day of his testimony, when he changed his testimony to be different from that given during the preliminary examination, once he left the courtroom he was arrested in regards to perjury. He was held in the police station overnight. He agreed to change his testimony back to the original version and he was never officially charged with perjury. As a result, there is no written documentation in regards to this matter as to Mr. Collins (Smith).

It is also my recollection that Mr. Collins was on probation or parole, and was given a "deal" in order to maintain his probation or parole, after his testimony. Again, if there is anything documented on this subject, it would be in the papers I sent you. But if I remember correctly, that was brought out during the trial and should be in the transcript.

Other than the foregoing information, I have nothing else that I can add. I don't see how I can assist you any further as I have given you everything that I have in relation to your file.

Very truly yours,

Ronald Giles

RG:dg

1575 E. Lafayette • Suite 209 • Detroit, MI 48207 • Office (313) 259-4742 • Fax (313) 259-5314

STATE OF MICHIGAN)
)
COUNTY OF WAYNE)

AFFIDAVIT OF FACTS

I, RONALD GILES, being first duly sworn, deposes and says:

1. I represented Mr. Carl Hubbard in his Bench Trial in Recorder's Court for the City of Detroit, wherein he was charged with First-Degree Murder.

2. In my representation of Mr. Hubbard there came a time during the testimony when the Prosecution called one Curtis Collins to the witness stand.

3. That on cross-examination of Mr. Collins, he drastically changed his testimony and according to my recollection, testified contrary to his testimony at the preliminary examination.

4. That Mr. Collins was arrested and detained following his trial testimony.

5. To the best of my information and belief, Mr. Collins was released and not charged when he changed his testimony the following day.

6. That Mr. Collins' testimony was especially critical to the Judge's verdict of guilt against Mr. Hubbard.

I declare under penalty of perjury that the statements made herein by me are true and accurate to the best of my knowledge, information and belief.

Affiant further sayeth not.

Ronald Giles (P38107)

Subscribed to and sworn before me
on June 15, 2000
Notary Public, Wayne County, Michigan

DOROTHY J. GILES
NOTARY PUBLIC WAYNE CO., MI
MY COMMISSION EXPIRES May 27, 2003

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

AFFIDAVIT OF CURTISS COLLINS

After being duly sworn, I, Curtis Collins, swear that I am willing to testify to the following:

1. That I was not present on, or anywhere near, the corner of Gray and Mack of January 17, 1992, i.e., Special K party store.

2. That I did not witness Carl Hubbard fleeing from where Mr. Rodnell Penn was found dead.

3. Sergeant Kinney forced me to falsely testify at the preliminary examination that Carl Hubbard was running from the scene.

4. I testified truthfully on the first day of Carl Hubbard's trial.

5. I returned on the third day of Carl Hubbard's trial after spending two days at the 1300 Precinct where I was threatened by Homicide Officers Sergeant Kinney and Sergeant Gale with being charged with the murder of Mr. Penn if I didn't say that I saw Carl Hubbard at the murder scene of Mr. Penn. This is why I testified in the manner I did on the third day of Carl Hubbard's trial, because of the fear I had of Sergeant Kinney and Gale's threats of charging and prosecuting me for a crime that I had no knowledge of.

6. I contacted Raymond Williams in 2014, informing him that I had lied on Carl Hubbard and I told him that it was because Assistant Prosecutor Mr. James Gonzalez, Sergeant Kinney and Sergeant Gale continued to threaten me and that I would do an affidavit saying that but I backed out of it because I was afraid and feared what AP Gonzalez, Sergeant Kinney and Sergeant Gale would do to me and I didn't want to face perjury charges again and be put in jail and threatened by these government officials.

7. I went to prison in 2014 and got out in 2015. While in prison I realized how hard and difficult it was in prison during that ten months. I

also learned that AP Gonzalez was no longer prosecuting cases and that Sergeant Kinney and Sergeant Gale were no longer on the police force. As a result, I no longer had to worry about their threats and I was tired of running from the fact that I had put an innocent man, Carl Hubbard, in prison.

8. That my statements that I provided on January 23, 1992 to Sergeant Kinney and Sergeant Gale, on February 4, 1992 at Carl Hubbard's preliminary examination, and on September 2, 1992 at Carl Hubbard's trial, were false. Whereas today I recant those statements which were coerced from me by threats from AP Gonzalez, Sergeant Kinney and Sergeant Gale.

9. That today I am willing to take a polygraph test to prove that my statements to AP Gonzalez, Sergeant Kinney and Sergeant Gale were false statements, and that the statements in this affidavit is the truth.

Furthermore, Deponent sayeth not.

Dated: 10-31-2017

Curtis Collins

Curtis Collins

On 10-31, 2017, Curtis Collins appeared before me and declared that the above statements are true to the best of his knowledge, information and belief, and acknowledged that he signed the above Affidavit of his own free act and deed.

Subscribed and sworn before me this 31 day of October, 2017

James O Sain

NOTARY PUBLIC

03-28-2022

My Commission Expires

JAMES QTRIC SAIN
Notary Public - State of Michigan
Wayne County
My Commission Expires Mar 28, 2022
Acting in the County of

Dated: 10-31, 2017

AFFIDVIT OF SAMIR KONJA

7/28/2014

STATE OF MICHIGAN

COUNTY OF WAYNE

I, Samir Konja, being duly sworn, deposes and says:

1. That on January 17, 1992, I was one of the co owners of the Special K Party Store, located in Detroit, Michigan, on the corner of Gray and Mack.

2. That Mr. Curtis Collins was not allowed in the Special K Party Store by myself, nor my brothers, who were also co owners during the years of 1990 threw 1999, because of problems we had with him.

3. That no one came to question me about what i saw the night of January 17, 1992, including any lawyer, police officers or anyone from the prosecutor's office.

NOTARY PUBLIC

Juanita Peterson

JUANITA PETERSON
Notary Public - Michigan
Wayne County
My Commission Expires Oct 2, 2018
Acting in the County of WAYNE

SAMIR KONJA

AFFIDAVIT OF RAAD KONJA

STATE OF MICHIGAN

COUNTY OF WAYNE

7/28/2014

I, Raad Konja, being duly sworn, deposes and says the following:

1. On October 2, 2011, I was discussing Mr. Hubbard's case with Raymond Williams, during this discussion I came to understand the importance of the fact that I knew Curtis Collins and that he was not in the Special K Party Store on January 17, 1992. I was the co-owner of the store then and Mr. Collins was not allowed in my store because of problems I had with him.

2. On January 17, 1992, I was working in the front of the Special K Party Store, where I would have seen anyone who entered the store and Mr. Curtis Collins did not enter the store.

3. No one came to question me about what I saw that night including any lawyer, police officer or anyone from the prosecutor's office.

Juanita Peterson

NOTARY PUBLIC

JUANITA PETERSON
Notary Public - Michigan
Wayne County
My Commission Expires Oct 2, 2018
Acting in the County of WAYNE

Raad Konja

RAAD KONJA

AFFIDAVIT OF CARL HUBBARD

COUNTY OF MONTCALM)
)ss
STATE OF MICHIGAN)

Carl Hubbard, being duly sworn, deposes and says:

I could not have previously obtained the affidavits of Samir and Raad Konja as I do not know these people and had to rely on Raymond Williams to obtain these affidavits as I have no immediate family in this State. Furthermore, Mr. Williams informed me that it was not until July of 2014 that he was able to obtain these affidavits for me.

Carl Hubbard

Carl Hubbard

NOTARY PUBLIC

JENNIFER GEHOSKI
NOTARY PUBLIC, STATE OF MI
COUNTY OF MONTCALM
MY COMMISSION EXPIRES Jan 23, 2019
ACTING IN COUNTY OF

DECLARATION OF CARL HUBBARD

I, Carl Hubbard, hereby certify the following facts:

1. I was unaware of the contents of Askia Hill's affidavit until sometime in January of 2011 when we had a chance encounter while incarcerated.

2. I was unaware of the contents of Roy Burford's affidavit until sometime in August of 2011 when we had a chance encounter while incarcerated and in October of 2011 after Mr. R. Williams conversation with Steve Konja.

3. I was unaware of the contents of Emanuel Randall's affidavit until sometime in June of 2009 when we had a chance encounter while incarcerated.

4. I was unaware of the contents of Elton Carter's affidavit until sometime in January of 2004 when he wrote me while I was incarcerated.

5. It was only through further conversations with Mr. Williams and a thorough discussion of my case with him that I was able to get the second affidavit from Raymomd Wiliams.

I certify under the penalty of perjury that the foregoing is true and correct. Executed on October 22, 2013.

Carl Hubbard

Carl Hubbard

MICHIGAN RECORDERS COURT

DETROIT, MICHIGAN

UNITED STATES OF AMERICA
Respondent/Appellee,)

V.) Case#159160
LC NO:92-001856

CARL HUBBARD)
Petitioner/Appellant.)

PERSONAL AFFIDAVIT OF ELTON CARTER

Comes Now, the affiant, after being duly sworn on his oath, hereby depose the following:

(1) That he is willing to testify before this Honorable court pertaining to the testimony given to him by Curtis Collins in the murder trial dated September 2, 1992 under the aforementioned case number indicated above against one Carl Hubbard.

(2) That Mr. Collins has admitted to me that the testimony he gave was forced upon him by the 5th Precinct of the Detroit Police Department.

(3) That Mr. Collins stated that if he did not agree to give the testimony that he gave, that he would receive the charges in the case rather than Carl Hubbard.

(4) That Mr. Collins also stated to me that he was willing to sign an Affidavit ADMITTING HIS PERJURY BUT WAS AFRAID THAT DETROIT POLICE DEPARTMENT WOULD FOLLOW THROUGH WITH THEIR THREATS.

(5) That Mr. Collins admitted to me that he was not at the scene of the crime during the time that the murder occured.

(6) That Mr. Collins was threatened and pressured into giving a false testimony by the Detroit Police Department.

(7) That only after Mr. Hubbard was found guilty of the murder did Mr. Collins came to him with this information.

(8) That in regards to the statements made to me by Curtis Collins, that I am willing to appear before this Honorable court to testify to it, in the open court.

Further, the Affiant Sayeth Naught.

Respectfully Submitted,

Elton Carter #07458-032

Elton, Carter# 07458-032

I certify that Elton Carter appeared before me on this 28 day of January, 2004 and affixed his signature on this two pages document in my presence.

1/28/04

Myron Blair, Case Manager
"Authorized by the Act of July 7, 1955 to administer oaths (18 U.S.C 4004)"

Signature of B.O.P Official

Printed Name of B.O.P. Official

Dated this 28 day of January, 2004.

Elton Carter #07458-032

Notarized this 2ND day of Jan 2008

Penni L. Kotter, Notary Public
Sullivan County, Indiana
Commission Expires August 31, 2009.

Penni L. Kotter

SWORN AFFIDAVIT OF EMANUEL RANDALL

State of Michigan)
ss
County of chippewa

I, Emanuel Randall, being duly sworn deposeth and sayeth as follows:

1. The statement made in this affidavit are, to the best of my knowledge, true and if called upon as a witness, I can testify competently as to the truth of the statement made in this affidavit.

2. I know for a fact that Curtis Collins was not on Gray street on the night of January 17, 1992 at the time of the murder.

3. Because we both was on the run for escape and living over (Big Ron) or/ Roney Fluton house 12882 Dickson & Corbet street, the same house that Curtis cut his telther off his leg, and we both stayed there while we was on escape.

4. We where both at the house getting high when Murphy or/ Raymond William came over and we all started a dice game myself Curtis & Big Ron that night when well got a call from Heavey that someone got killed on Gray we all got into the car together to go over there to see who it was Heavey was at the store on Gray and Mack when he call us, and told us about the murder.

5. A couple days later we was walking on Mack & near Gray when the police rode up on us with two pictures and asks did we know them? we said no ! but Curtis said I do and they took his name and address & phone number and gave him a card, and said that they will call him, and that night they came and arrested Curtis.

6. The word on the street was that Mark Going kill the guy found in front of Uncle Pete house on Gray, because he believed the guy kill his brother Dearl Going on the same street about a few weeks ago.

7. The whole neighbordhood knew and was talking about this, because who ever killed Dearl Going was trying to rob him but ending up killing him.

8. Everybody couldnt understand why Curtis baby or/ Curtis Collins lied on Ghost or Mr. Hubbard, he never would say, all he would say was that the police had something over his head and he had too.

9. I Emanuel Randall, state that I have not been promised anything , nor threatened to come forth with this information, that all the above statements and facts within this affidavit are true, and that if I am called upon to testify to the same in a court of law I will do so under oath, subject to the penalties of perjury.

Emanuel Randall

Emanuel Randall 512941
Kinross Corr. Facility
16770 S Watertower Drive
Kincheloe Michigan 49788

Subscribed and Sworn to me this
25th Day of June 2009

Notary Public

William H. Bonnee

William Herman Bonnee
Notary Public, State of Michigan, County of Chippewa
My Commission Expires on 3-24-2012
Acting In The County of Chippewa

SWORN AFFIDAVIT OF ROY A. BURFORD

STATE OF MICHIGAN)

SS)

COUNTY OF MONTCALM)

AFFIDAVIT OF FACT

I ROY A. BURFORD #248543, being duly sworn deposeth and sayeth as followed:

1. The statements made in this affidavit are, to the best of my knowledge, true and if called upon as a witness, I can testify competently as to the truth of the statements made in this affidavit.

2. I was in the "SPECIAL K" party store on January 17, 1992 around 8:00 p.m. until closing, when I heard some shooting outside the store on Gray Street and Mack Avenue on Detroit's eastside.

3. I stepped outside for a moment and seen a car light down the street by "UNCLE PETER'S" house. Then I went back in the store and I finished talking to "SAM" and older guy works in the "Special K" party store which is owned by "STEVE" and "SAMIR".

4. Then this older black lady came in the store to cash a check told the store owner "STEVE" to call the police because there looks like a body is laying in the driveway of "UNCLE PETER'S" house.

5. Then "STEVE", the owner of the store, cashed the woman's check then called the police. The woman waited for a little while then she left the store. After she left the store I stepped outside and saw nothing but people standing around along with the police and an ambulance. The street was blocked off by the police car and other people.

6. I can testify that I know "CURTIS COLLINS" a.k.a. "CURTIS BABY" and that I never seem him on Gray and Mack Avenue the night of January 17, 1992 before the shooting occurred or after the shooting occurred. Plus I know "CURITS COLLINS" personally and he was never on Gray and Mack Avenue or in the "SPECIAL K" party store on the night of January 17, 1992.

7. I personally do NOT know "CARL HUBBARD" a.k.a. "GHOST", but I am willing to testify truthfully that I never seen him on Gray and Mack Avenue on January 17, 1992 or in the "SPECIAL K" party store the night of the shooting. This is because I

know him when I see him and he was NOT any of the people in the store that night. Further he lives in the neighborhood and I stay on Springle Street around the corner from "Special K" party store on Gray and Mack Avenue.

8. I am also willing to testify that I lived on Springle Street around the time of the shooting at "SPECIAL K" party store. I know "CURTIS COLLINS" personally and he told me he lied on "CARL HUBBARD" a.k.a. "GHOST" because Mr. Hubbard supposedly robbed him around 1986 and the police has something on him as well.

9. I remember that night because it was a snow storm and there were no buses running and everybody outside on Gray Street were walking around, plus I hustle up there all the time.

10. After "CARL HUBBARD" got convicted for the murder in front of "UNCLE PETER'S" house, everyone was saying that "MARK GOINGS" was the one who really killed the guy. This was due to "MARK GOINGS" believing that the victim had something to do with his brother "DARRYL GOINGS" murder on Gray Street. It was said these are the same people who was trying to rob and kill "DARRYL GOINGS" as well.

11. I ROY A. BUFORD #248543, state that I have NOT been promised anything, nor threatened to come forth with this information, and that all of the above statements and facts within this affidavit are true, and that if I am called upon to testify to the same in a Court of law, I will do so under oath and under the penalties of perjury.

Roy Buford 248543

Roy A. Buford #243543
Carson City correctional Facility
P.O. Box 5000
Carson City, MI 48811-5000

LAURA NEVINS, Notary Public
State of Michigan
County of Montcalm
My Commission Expires December 13, 2012
Acting in the County of montcalm

Subscribed and sworn to me.
this 8th day September 2011

NOTARY PUBLIC Laura Nevins

AFFIDAVIT OF RAYMOND WILLIAMS

COUNTY OF WAYNE)
) ss
STATE OF MICHIGAN)

Raymond Williams, being duly sworn, deposes and says:

1. That on October 2, 2011, I was discussing Mr. Hubbard's case with Steve Konja, the owner of the Special K party store.

2. He informed me that he was working on January 17, 1992, the night that Rodnell Penn was murdered. He told me that he knew Curtiss Collins but that he didn't see him in his store that night.

3. He informed me that, only if subpoenaed, would he testify to these facts.

Raymond Williams 1-9-2012

Subscribed and Sworn to this

9 day of JAN 2012

NOTARY PUBLIC

SAMIR A. KONJA
Notary Public, State of Michigan
County of Oakland
My Commission Expires Apr. 1, 2017
Acting in the County of Wayne

State of Michigan)
)
)
)
County of Michigan)

Affidavit of Raymond williams of fact.

I, Raymond Williams, being duly sworn deposes and sayeth as follows:

1) The statement made inthis affidavit is the best of my knowledge, true and if called upon as a witness I can testify competently as to the truth of the statement made in this affidavit.

2) I, Raymond Williams, while being held in police custody at the Detroit Police Headquaters on the 9th floor Homicide Section between 8-31-92 [redacted] until 9-2-92.

3) When I heard somebody crying in their cell, then I found out it was(Kurtis Baby) or Curtis Collins and I asked him what was wrong with him and he told me that the police officers Sgt. Joann Kenny and Sgt.Ronald Gale [redacted] making him lie on (Ghost AKA) or Mr. Carl Hubbard in his murder trial September 2, 1992.

4) I told him don't lie on him because you are playing with a man's life. Then I told him to tell the truth No matter what! and whatever you do tell the truth Curtis, and don't lie on nobody for the police, because me and you know you wasn't on Gray & Mack Curtis! Then he told me Sgt. Joann Kenny Sgt. Ronald Gale was making him lie on (Ghost) or Mr. Carl Hubbard in his murder trial and if he did'nt they would make sure he would be charged with the murder case rather than (Ghost) or Mr. Carl Hubbard.

5) Mr. Curtis Collins admitted this to me during the time me and him was locked up together on the 9th floor of Homicide Sec. just before I went to testify on behalf of Mr. Carl Hubbard in his Murder trial in September 2, 1992

6) I never told anybody about what Curtis Collins told me or what happened while we were locked up in 1300 Beaubien on the 9th floor between 8-31-92 and 9-2-92until recently when I got in contact with Mr. Carl Hubbard between

the time of the end of 2010and 2011. then I revealed to Mr. Carl Hubbard what Mr. Curtis Collins had told me, and I'm willing to come to open court and testify to what Mr. Curtis Collins told me while we were locked up together and I am willing to take a polygraph test as well

7) Because Curtis Collins admitted to me he lied on the witness stand when he testified against (Ghost) or Mr. Carl Hubbard in his murder trial 9-2-92, and the reason why he lied was because Sgt. Joann Kenny and Sgt. Ronald Gale was going to put the murder case on him and charge him with the murder case as well.

8) I Raymond Williams State that I have not been promised anything, nor threatened to come forth with this information. I state that all the above statement and facts within this affidavit are true, and if called upon to testify to the same in the court of law. I will do so under the oath, subject to the penlties of perjury.

respectfully Submitted,

Raymond Williams
19165 Packard
Detroit, Michigan 48234

Subscribed and sworn to this

23 rd. day of May, 2011

Notary Public

SAMIR A. KONJA
Notary Public, State of Michigan
County of Oakland
My Commission Expires Apr. 1, 201
Acting in the County of Wayne

STATE OF MICHIGAN)

)SS

COUNTY OF MOUNTCALM

AFFIDAVIT OF FACT

I Askia Hill Id ç331718, being duly sworn deposes and sayeth as followed:

1) The statement made in this affidavit is to the best of my said knowledge, true and If called upon as a "Witness". I can testify Competently, as to the truth of the statement made in this affidavit

2). I was on my way to the store on the corner of Gray & Mack on Janurary 17, 1992, when I was across the street in the vacant lot across the street from Uncle Peter's house. That is when I saw Mark Going arguing with somebody in the front of Uncle Peter's house. Then I saw the other guy turn his back and start to walk away from Mark Going.

3). Then I heard some gunshots fired and the guy arguing with Mark Going fell to the ground. Then Mark Going stepped over him and started shooting the guy again. Then he turned around and got in his car in front of Uncle Peter's house with some other guys sitting already in the car that was parked in front ofUncle Peter's house.

Affidavit Page II.

4) Then they drove the car down Gray Street, and this is when I turned around and ran back to my house. I live at Algonguin 4210, Detroit, Michigan ç 48215. I never told anybody what I seen that day is because I was afraid for my life and I didnt want any trouble with anybody in the neighborhood, because I have to live in that neighborhood.

5) So I kept silent about what I saw that night. I heard everybody saying that this guy name "Ghost" got charged with the murder/case shooting in front of uncle Peter's house on Gray street. I don't know Carl Hubbard (Ghost) personally, but I am willing to testify to what I saw that night , because I know he is "Innocent" of the crime of murder that he is in prison for now.

6). I Askia Hill state that I don't know Carl Hubbard Personally but I have seen him in the neighborhood and I can truly say that he was not the person that I seen shoot and kill this guy that night outside Uncle peter's house. It was "Mark Going", because I do remember the "Other guy" was "Tall" and was "wearing some kind of hood on his head because it was snowing outside. I know the difference between Mark Going and Carl Hubbard because I grew up with both of them in the neighborhood.

7). One thing for sure is that I can truly say and will never forget somebody got shot and killed that day and plus I remember everybody the next day was talking about the guy who got killed in front of uncle peter's house.

8). I Askia Hill ç 331718, state that I have not been promised anything, nor threaten to come forth with this information. I state that all above statements and facts within this affidavit are true, and If called upon to testify to the same in court of law. I will do so under oath, subject to the penalties of perjury.

Respectfully submitted:

A. Hill.

Askia Hill ç 331718
Carson City Correctional Facility: P.O. Box 5000
Carson City, MI 48811-5000.

Subscribed and Sworn to this day
1st day of February 2011
C. Schrauben:
Notary public

C. SCHRAUBEN
NOTARY PUBLIC, STATE OF MI
COUNTY OF IONIA
MY COMMISSION EXPIRES Jun 10, 2016
ACTING IN COUNTY OF

III.

Appendix L

Mike Anthony Forensic Polygraph and Consulting Services LLC.
P.O. Box 36641, Grosse Pointe Farms, Michigan 48236
TX: 313-400-2124
manthonypolygraph@att.net

POLYGRAPH REPORT

Client: Curtis Collins
13695 Hendricks
Warren, MI 48089

Date of exam: 02-01-2018

Nature of Offense: Witness to Homicide

Person Examined: Curtis Collins DOB: 08-15-1972

Purpose:

All information for this polygraph examination was provided by the examinee, Curtis Collins. No police reports or court testimony transcripts were available or provided to this examiner.

The examinee Curtis Collins stated that in 1992 he was forced to testify at the homicide trial of a person named Carl Hubbard. He stated that he was interviewed by Detroit Police Homicide detectives and was told that if he did not give a statement indicating that he was present and saw Carl Hubbard shoot a man, they were going to violate his parole for possession of drugs. Collins stated that a homicide detective wrote out a statement which indicated that he was present and saw a Carl Hubbard shoot a man on January 17, 1992. Collins stated that he signed the statement.

Collins stated that he testified at the trial and initially lied by identifying Hubbard as the shooter, then testified that he lied at the direction of the police. Collins stated that this Carl Hubbard was then convicted and is now in prison.

Curtis Collins denies being present and observing Carl Hubbard shoot anyone in January of 1992. This examination is to determine if Curtis Collins is being truthful regarding being a witness to a homicide committed by a person named Carl Hubbard.

Relevant Issue Test Questions:

1. Did you see Carl Hubbard shoot that man? Ans. No

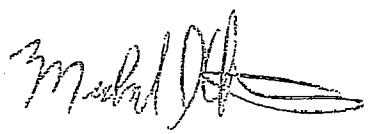
2. Did you see Carl Hubbard shoot anyone at Gray and Mack in January of 1992? Ans. No

3. Were you present when Carl Hubbard shot that man? Ans. No

Results:

Several polygraphs were completed using relevant questions. Following a thorough analysis of the polygrams, it is the opinion of this examiner that Curtis Collins did not show consistent, significant, physiological reactions to the above relevant questions, indicating TRUTHFULNESS.

It is the opinion of the undersigned examiner based upon the examination given that this subject is being truthful regarding this issue.



Michael Anthony
Licensed Polygraph Examiner
License # 6001000316

Appendix M

New Article (Consent Decree)

92-1856

Detroit police inquiry expands

Justice Department focuses on detainees' coerced confessions.

By Norman Sinclair
and Ronald J. Hansen
The Detroit News

DETROIT — Investigators from the U.S. Justice Department are looking into charges that Detroit police officers coerced false confessions or statements from people after illegally locking them up for days at a time.

A Detroit practice of arresting witnesses or suspects without warrants and holding them for days to induce cooperation has concerned local federal authorities even before Mayor Dennis Archer asked last September that the U.S. Justice Department investigate the Detroit Police Department.

FBI and Drug Enforcement Administration agents in Detroit threatened last year to stop working with Detroit police unless they were assured these practices would end. Their complaints prompted U.S. Attorney Saul Green to meet several times with Chief Benny Napoleon, Major Crimes Cmdr. Dennis Richardson and other Detroit police executives.

The Justice Department is examining some confessions as part of its larger probe of Detroit Police Department misconduct, according to federal law enforcement sources.

The News reported last summer that internal investigations into the questionable shooting deaths of nearly a dozen persons — including three by one officer — were sloppy and incomplete. In addition nearly twice as many persons died in police lockups, also under questionable circumstances.

Please see CONFESS, Page 4A

(1)

Received by MCOA 11/21/2019 at 3:08PM via Prisoner Efiling Program

CONFESS

Continued from Page 1A

Deputy Chief Michael Hall, in charge of the Headquarters Bureau, strongly denied that the department obtains confessions improperly.

"We have no confessions being taken under coercion," said Hall, who nevertheless acknowledged that federal authorities had expressed concerns about one drug case. "To paint a broad stroke and say because of one case (there is a problem), doesn't mean we are coercing confessions."

Police spokeswoman Paula Bridges acknowledged there were high-level meetings last March and September with Green, the chief federal prosecutor in Detroit, concerning the detention of prisoners without warrants.

She said the department had no way of knowing if allegations of coerced confessions are part of the current Justice Department scrutiny.

Green declined to comment.

There are, however, several cases that have raised questions about police practices involving confessions.

A case of coercion?

In a highly publicized case last fall, federal investigators still are trying to determine how detectives convinced Michael Gayles, a learning-disabled 15-year-old, to sign three separate false confessions that he killed J'nai Glasker, 12, last August.

Brian Kutinsky, a Southfield lawyer who has filed a $20-million lawsuit against the city on behalf of the family, said the family has been notified that federal investigators are examining the case.

In six recent lawsuits involving questionable confessions examined by The News, the city paid several hundred thousand dollars in damages, most in confidential agreements, to people who said their statements were coerced.

In testimony in one murder case, a veteran homicide detective said she believed there was no standard procedure for how long police could hold someone without charges, and she admitted to intimidating a witness by threatening to take her children away.

In the Gayles case, "the police manufactured the confessions," Kutinsky said. "With his learning disability, he couldn't have articulated those confessions. They had him sign a waiver giving up his constitutional rights that he couldn't understand."

(3) ↓

Scope of federal inquiry

■ In addition to examining how Detroit police get confessions and statements, federal investigators are looking at the department's policies, practices and use of deadly force by officers. The probe began in December and is expected to [illegible] about a year.

■ Detroit Mayor Archer asked for the investigation in September after a groundswell of public outrage at shootings by officers. The U.S. Justice Department chose to expand the probe beyond that issue.

Department under fire

■ Last May, the force was criticized over how it investigates shootings by its officers. The investigations are often inadequate and geared toward clearing them of wrongdoing, a study of court records by The Detroit News found. Investigators for the department focus on justifying the shootings rather than determining what happened, and their conclusions often vary little from the officers' accounts, say former police executives and attorneys.

■ Last month, the department was hit with several lawsuits charging that it conducts illegal dragnets to round up friends and witnesses in murder investigations in an effort to nab the killers.

■ Also last month, a team of about six federal investigators found wholesale problems with how Detroit police handle prisoners who have medical illnesses, drug addictions or are injured.

tioned the minors, as state law requires. The law says that if a parent or guardian cannot be located, police must contact the Juvenile Court immediately, a requirement Stevenson later admitted he did not know.

The next day, Stevenson had Pouncy and Bliss brought back to headquarters. This time, Bliss' 18-year-old brother accompanied him. Stevenson later testified that he called Bliss' mother, but she refused to come. She testified she was never called.

Bliss was kept in a squad room most of the afternoon until Stevenson obtained a second question-and-answer statement written out by the detective and signed by Bliss.

This time, Bliss said he and Pouncy were approached by an intoxicated man who asked for cocaine. They took him to the abandoned house, where Pouncy pulled his pants down and ordered the man to perform a sex act. Bliss said the man refused. Then, Pouncy pulled out a pistol and shot the victim three times, Bliss said.

Pouncy, who was five feet tall and weighed just over 100 pounds, tied the man up and carried the corpse outside to the Dumpster, Bliss added.

Missing links

Stevenson obtained a murder warrant based on the statement, admitting in court that he did no further investigation.

Police could not link Pouncy to the victim or the gun, nor did police follow up on a neighbor's claim of hearing a woman talking loudly and people running from the house to a car just as the fire broke out. Moreover, the man was

"These cases are not just about money," Kutinsky said. "Hopefully, by bringing those lawsuits we can accomplish something worthwhile by getting the police to do the right thing."

Another settlement

In another murder case in which the city ultimately paid a five-figure settlement in 1995, a Wayne County Circuit Court judge harshly criticized Detroit police for locking up a mother of two children as a witness and illegally holding her until her 10-year-old daughter and 6-year-old son implicated her in the death.

Judge Kathleen M[...] was outraged that Theaucbelle Taylor w[...] "a scintilla of evidence[...]

"If I have ever see[...] police have manufact[...] is one," McDonald s[...] had facts as egregiou[...]

Taylor spent 130 [...] County Jail before th[...] the case.

Veteran Homicide[...] testified that she had [...] a witness for days [...] against her and said [...] dard procedure as to [...] es could be held with[...]

Kinney also adr[...] to take Taylor's ch[...] did not cooperate. [...] shocked Judge Mac[...]

Criminal lawyer [...] the Detroit Police [...] officers write out q[...] statements, as in th[...]

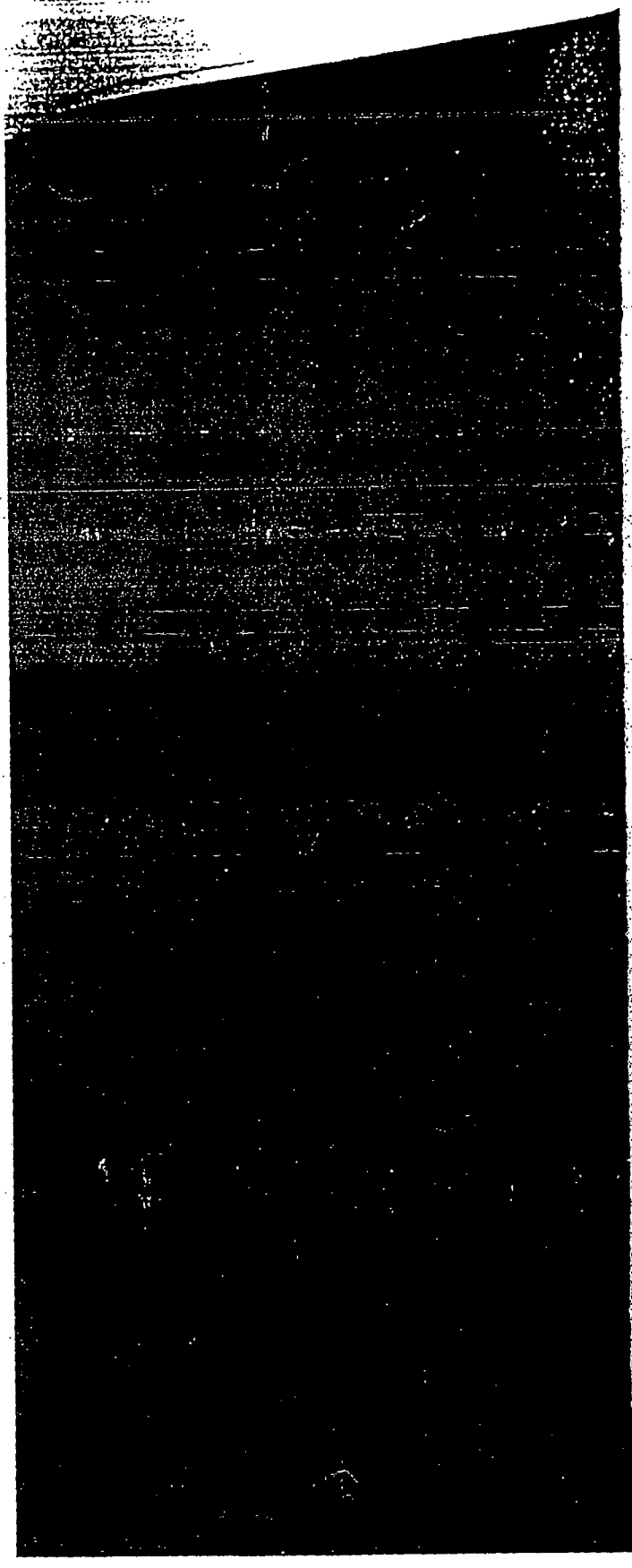
"Every modern [...] country records w[...] statements on vid[...] Kriger, a Detroit la[...] sense because it p[...] of the process on [...]

You can reach No[...] (313) 222-2034 or nsinclair@detnew[...]

You can reach R[...] (313) 222-2019 or rhansen@detnew[...]

(4)

(2)



Judge Kathleen McDonald said she was outraged that police charged Thoanchelle Taylor with murder without "a scintilla of evidence," as the judge put it.

"If I have ever seen a case where the police have manufactured the facts, this is one," McDonald said. "I have never had facts as egregious as this case."

Taylor spent 130 days in the Wayne County Jail before the judge threw out the case.

Veteran Homicide Sgt. Joann Kinney testified that she had Taylor locked up as a witness for days without charges against her and said there was no standard procedure as to how long witnesses could be held without being arrested.

Kinney also admitted threatening to take Taylor's children away if she did not cooperate, an admission that shocked Judge MacDonald.

Criminal lawyers also are critical of the Detroit Police practice of letting officers write out question-and-answer statements, as in the Pouncy case.

"Every modern department in the country records witness or suspects' statements on videotape," said Mark J. Kriger, a Detroit lawyer. "It only makes sense because it protects the integrity of the process on both sides."

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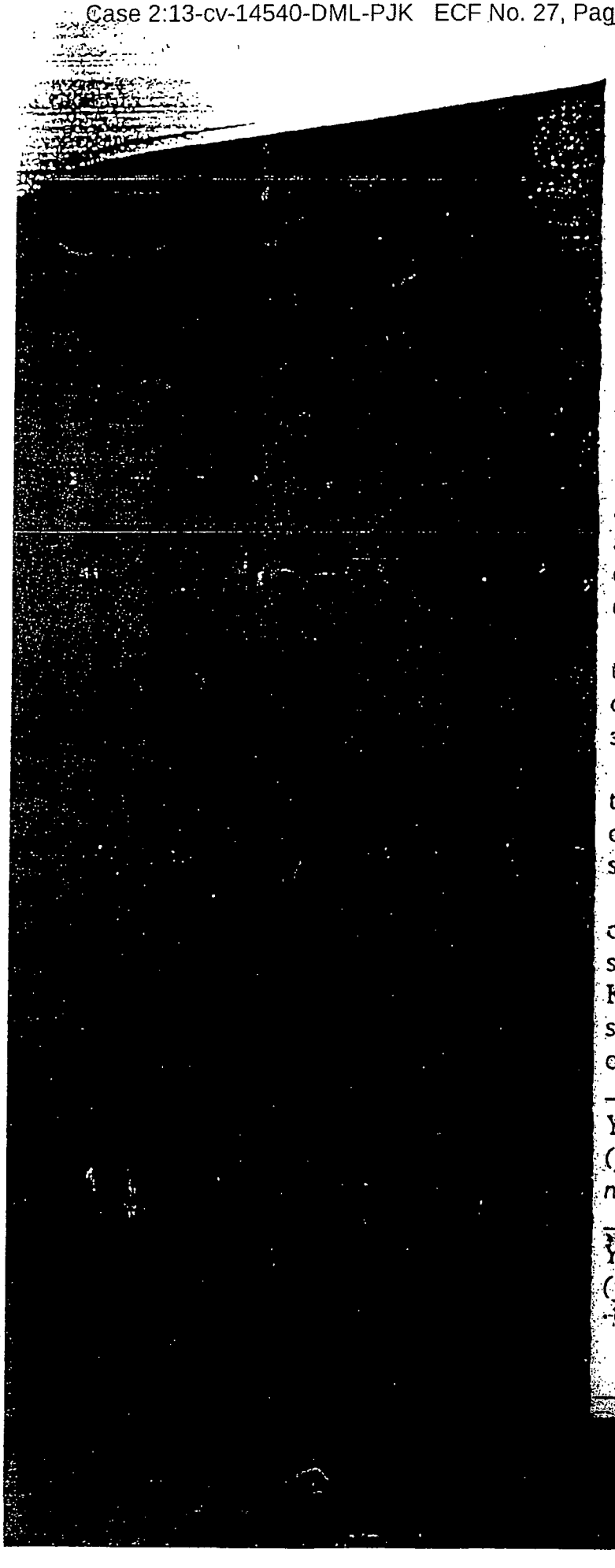
You can reach Ronald J. Hansen at (313) 222-2019 or rhansen@detnews.com.



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CONFESS

Continued from Page 1A

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Scope of federal inquiry

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■ Last May, the force was criticized over how it investigates shootings by its officers. The investigations are often inadequate and geared toward clearing them of wrongdoing, a study of court records by The Detroit News found. Investigators for the department focus on justifying the shootings rather than determining what happened, and their conclusions often vary little from the officers' accounts, say former police executives and attorneys.

■ Last month, the department was hit with several lawsuits charging that it conducts illegal dragnets to round up friends and witnesses in murder investigations in an effort to nab the killers.

■ Also last month, a team of about six federal investigators found wholesale problems with how Detroit police handle prisoners who have medical illnesses, drug addictions or are injured.

tioned the minors, as state law requires. The law says that if a parent or guardian cannot be located, police must contact the Juvenile Court immediately, a requirement Stevenson later admitted he did not know.

The next day, Stevenson had Pouncy and Bliss brought back to headquarters. This time, Bliss' 18-year-old brother accompanied him. Stevenson later testified that he called Bliss' mother, but she refused to come. She testified she was never called.

Bliss was kept in a squad room most of the afternoon until Stevenson obtained a second question-and-answer statement written out by the detective and signed by Bliss.

This time, Bliss said he and Pouncy were approached by an intoxicated man who asked for cocaine. They took him to the abandoned house, where Pouncy pulled his pants down and ordered the man to perform a sex act. Bliss said the man refused. Then, Pouncy pulled out a pistol and shot the victim three times, Bliss said.

Pouncy, who was five feet tall and weighed just over 100 pounds, tied the man up and carried the corpse outside to the Dumpster, Bliss added.

Missing links

Stevenson obtained a murder warrant based on the statement, admitting in court that he did no further investigation.

Police could not link Pouncy to the victim or the gun, nor did police follow up on a neighbor's claim of hearing a woman talking loudly and people running from the house to a car just as the fire broke out. Moreover, the man was

"These cases are not just about money," Kutinsky said. "Hopefully, by bringing those lawsuits we can accomplish something worthwhile by getting the police to do the right thing."

Another settlement

In another murder case in which the city ultimately paid a five-figure settlement in 1995, a Wayne County Circuit Court judge harshly criticized Detroit police for locking up a mother of two children as a witness and illegally holding her until her 10-year-old daughter and 6-year-old son implicated her in the death.

Judge Kathleen Mc[illegible] was outraged that [illegible] Theunchelle Taylor with[illegible] "a scintilla of evidence." [illegible]

"If I have ever seen [illegible] police have manufactur[illegible] is one," McDonald sa[illegible] had facts as egregious [illegible]

Taylor spent 130 da[illegible] County Jail before the [illegible] the case.

Veteran Homicide [illegible] testified that she had T[illegible] a witness for days [illegible] against her and said [illegible] dard procedure as to [illegible] es could be held with[illegible]

Kinney also adm[illegible] to take Taylor's chi[illegible] did not cooperate. [illegible] shocked Judge Mac[illegible]

Criminal lawyers [illegible] the Detroit Police [illegible] officers write out q[illegible] statements, as in th[illegible]

"Every modern [illegible] country records w[illegible] statements on vide[illegible] Kriger, a Detroit law[illegible] sense because it p[illegible] of the process on [illegible]

You can reach No[illegible] (313) 222-2034 or rsinclair@detnew[illegible]

You can reach Ro[illegible] (313) 222-2019 or rhansen@detnew[illegible]

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