No. 24-6180

ORIGINAL

SUPREME COURT OF THE UNITED STATES

Carl HUBBARD, Petitioner,

V.

Jeff TANNER, Warden-Respondent.

CAPITAL CASE

On Petition for Writ of Certiorari to the 6th Circuit court of Appeals.

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DID THE MAJORITY BELOW ERROR IN NOT APPLYING THIS COURT'S DECISION IN SCHULP V. DELO, TO HOLD THAT PETITIONER COMPELLING NEW EVIDENCE, THAT PRESENTS A COLORABLE CLAIM OF ACTUAL INNOCENCE, CREATE TWO CONFLICTS OF LAW, BY THE PANEL'S IMPOSSIBLE "ACTUAL INNOCENCE" STANDARD?

2. DID THE SIX CIRCUIT COURT OF APPEALS ERROR WHEN THEY DID NOT PROVIDE A HEARING EN BANC, WHEN A PANEL OF TWO OF THREE JUDGES RULED CONTRARY TO UNITED STATES SUPREME COURT LAW, ESTABLISHING NEW LAW, DENYING MR. HUBBARD'S ACTUAL INNOCENCE GATEWAY CLAIM?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carl Hubbard respectfully petitions this Court for a writ of certiorari to review the judgment of the Sixth Circuit court of Appeals in this case.

OPINION AND ORDER BELOW

On August 12, 2024, Petitioner's hearing en banc in the 6th Cir. Ct. of Appeals, was denied. (Appx. A) Earlier on April 16, 2024, the 6th Cir. Ct. panel denied. Petitioner's Certificate of Appealability by affirming the United States District court (Appx. A) The US District Court of Michigan had denied Petitioner's Habeas Corpus. (Appx. B)

JURSIDICTION

The 6th Circuit Court of Appeals rejected petitioner's Petition for hearing En banc on August 12, 2024, case no. 21 2968, by affirming petitioner's habeas petition in an earlier panel's majority judgment from April 16, 2024. The jurisdiction of this Court is invoked under 28 USCS 1254. (1) by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

United States Constitution Art I, § IX clause [2] states, in relevant part "Nor shall any State deprive any person of life, liberty, of property without due process of law...."

28 USC 2254, State custody; remedied in Federal Court (a) The Supreme Court, a Justice thereof for a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground tnat he is in custody in violation of the constitution or law or treaties of the United States;

(b)(1) An application for a writ of habeas corps on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -(A) the applicant has exhausted the remedies available in the State, or (B) (1) th-

ere is an absence of available State corrective process ineffective to protect jurisdiction of the applicant.

STATEMENT OF THE CASE

Introduction

In 1992, Petitioner Carl Hubbard, was convicted for the murder of Rondell Penn. He has consistently maintained his innocence. The prosecution presented no murder weapon of forensic evidence connecting Mr. Hubbard to the crime. Instead, the prosecution relied on implausible identification testimony from nineteen year old Curtis Collins.

When the prosecutor called Collins to the stand on the first day of trial, he testified that he had not seen Mr. Hubbard anywhere near the crime scene. Curtis Collins was arrested outside the courtroom, detained, and threatened with perjury charges. On the third day of trial, the People recalled Collins to the stand. Collins changed his story, saying he spotted a person fleeing the scene while he stood outside a party store located about three hundred and seventy-five feet away. Curtis Collins claimed he could not see the person s face, but identified him as Mr Hubbard because Collins saw--at night, in the dark, more than a football field away--a three - and-a-half-inch scar on the back of the person's head.

The prosecution's own expert examined photographs from the same vantage point, and even he could not make out details that small. Nevertheless, citing Collins's eleventh hour identification, the trial court convicted Mr. Hubbard. (05/02/1992, T. T. p. 185, Appx H).

Years later, Mr. Hubbard obtained new evidence showing that Collins's identification was bogus. In 2017, Collins himself recanted, explaining that he had been coerced, to implicate Mr. Hubbard by an officer who had committed similar misconduct for years. Collins swore under oath that he never saw Mr. Hubbard flee the scene-even

passing a polygraph test-and offered to testify to the same.

Bell 547 US 518, 554 (2006) (relying on evidence that "called into question" the state's case) By refusing to follow Keith the panel created a conflict with binding precedent.

Second, the panel split with at least eight other circuits that like Kieth, recognize that actual innocence can be established by cast[ing] serious doubt" on the prosecution's case. **Gable V. Williams** 49 F.4th 1315 1323 (9th Cir. 2022). These circuits agree, contrary to the pannel, that "there is no requirement that the petitioner present affirmative proof of innocence " Maj. Op. 14 (quoting a habeas treatise)

Petitioner Hubbard's compelling new evidence of actual innocence was denied when the 6th Circuit court of Appeals affirmed. The new evidence satisfies the equitable tolling gateway for untimely constitutional claims established by **Schulp V. Delo** 513 US 298 (1995). In the majority's view, evidence "undermining the State's case" is not enough: A petitioner must affirmatively prove that he "factually did not commit the crime." Majority Opinion, at 9. In a split decision, the panel rejected Mr. Hubbard's evidence by insisting that Schulp requires not just actual innocence, but "factual innocence. Maj. Op. at 12. This requires evidence that is exonerative in nature," like a "credible confession" from the "true perpetrator." Maj. Op. at 14. Because Mr. Hubbard could not clear this impossible bar, the panel denied him the opportunity to have his underlying claims considered on the merits (6th Cir. ct. Maj. Op. at 19-20 Appx. A).

At no stage during Petitioner Hubbard's, post conviction proceedings was he provided with an evidentiary hearing to test the reliability of the new evidence. A new hearing en banc was denied, as no judge voted for the full hearing. By imposing an impossibly high "factual innocence" requirement, the panel closed off Schulp's equitable gateway allowance, even for the rare case like Petitioner Hubbard's, in which compelling new evidence of actual innocence necessitates allowing his underlying claims to be heard. This Court should grant the writ of certiorari.

State court proceedings: The crime and investigations. On the night of January 17 ,1992, Rodnell Penn was shot in Detroit. (Felony Information, Appx. J). The investigation (led by Sgt. Joann Kinney) revealed no murder weapon, "no eyewitness to the killing", and no inculpatory forensic evidence. Instead, Sgt. Kinney found nineteen-year-old Curtis Collins, who claimed to have been at a nearby party store during the shooting.

On 02-04-1992 during the preliminary examination ([PE] p. 12, Appx. I), Collins claimed he was inside the store, "talking to the owner," when he saw Mr. Hubbard enter with Penn (09/02/1992 Trial Transcript [T.T.] pgs. 3, 38, 44, 52, Appx. H). Collins left and heard gunshots. (09/02/1992 T.T. p. 44-46, Appx. H). He claimed he turned and saw a person down the street, running through a vacant lot near the crime scene. Collins stated he could not see the person's face or what he was wearing. Nevertheles, Collins claimed he identified the person as Mr. Hubbard "by the scar on the back of his head." (09/02/1992 T.T. p. 64-65 Appx. H). The only scar on Mr. Hubbard's head is three and a half inc es long, and Collins cla med to have spot it at night, in the dark, about three hundred and seven five feet away

State Court Proceedings: The Trial

This was the prosecution's expert that visited the crime scene and had his partner take a photograph of him from Collin s vantage point at the party store. Reviewing the photo, the expert admitted that, even in broad daylight, all he could see was the outline of his body--not individual features like a three-and-a-half-inch

scar. (08/31/1992 T.T. p. 93, Appx. F).

When the prosecution called Collins to testify on the first day of trial, he abandoned his story completely. Collins denied even being at the party store, much less seeing Mr. Hubbard flee the scene. (08/31/1992 T.T. p. 18-19, Appx. F). Collins explained that officers coerced him to falsely implicate Mr. Hubbard at the prelimi-

nary examination hearing.

* 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 Sgt. 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.

Federal Habeas Corpus Proceedings

In 2013, Mr. Hubbard filed his initial federal habeas petition. He sought equitable tolling under Schulp and AEDPA s statute of limitations based on new evidence of actual innocence. The district court denied relief, but granted a certificate of appealability. (US District court No. 2:13-cv-14540 Appx. B).

Mr. Hubbard has "always maintained that he is innocent." In the years following the trial, he discovered new evidence establishing his innocence in two ways:

First, new evidence emerged dismantling Collins's testimony. For example in 2014 the owners of the party store, Raad and Samir Konja---whom the police had never contacted to verify Collins's story submitted affidavits refuting the foundation of Collins testimony; that he spotted Mr. Hubbard right after leaving the party store. Raad was working in the front of the store that night and, would have anyone who entered." Affidavit, Appx. K; (2012 affidavit of Raymond Williams corroborating store owners' Appx. K); (2009 affidavit of Emanuel Randall stating "Curtis Collins was not on Gray Street [that] night, Appx. K); (unanswered subpoena for records sought by prosecution to verify Collins's story that he "got in cab after seeing Mr. Hubbard 02/04/1992 Pre. Ex. T. p. 13, Appx. I); (2011 affidavit of Roy Buford stating neither Mr. Hubbard nor Collins was in the store, Appx K).

In 2017 Collins admitted in a sworn affidavit (Appx. K), that he was not present on or anywhere near" the party store on the night of the shooting, and he "did not witness Mr. Hubbard fleeing." He explained that he "testified truthfully on the first day" of trial but afterwards, he was detained and threatened by Homicide offi-

cers Sgt Kinney and Sgt Gale with being charges with the murder of Mr Penn if [he] didn't say that [he] saw Carl Hubbard at the murder seene." Collins decided to come forward after learning that the officers "were no longer on the police force." (Collins's Affidavit, Appx. K). Collins even passed a polygraph test to verify that he did not "see Carl Hubbard shoot anyone." (Polygraph, Appx. L); (2004 Affidavit of Elton Carter, stating "Collins admitted to me that the testimony he gave was forced upon him", Appx K); (2011 affidavit of Randall stating Collins "lied" because "the police had something over his head", Appx. K); (Affidavit of Burford stating Collins "lied" in part because "the police ha[d] something on him", Appx. K).

By the time Collins recanted, it had become public that the Detroit Police Department and Sgt. Kinney, in particular, had a "practice of arresting witnesses or suspects without warrants and holding them for days to induce cooperation." (US Justice Department Consent Decree, Appx. M). Kinney admitted to locking up a witness "for days without charges" and coer ing false statements.

Second, new evidence pointed to an overlooked suspect name Mark Goings. For example, in 2011, a resident name Askia Hill signed a sworn affidavit stating that he had been walking to the party store on the night of the murder and saw Goings shoot someone multiple times. Hill's affidavit explained that he did not come forward at the time beaause he "was afraid" of reprisal. Hill offered to testify to what he saw an emphasized that Mr. Hubbard is innocent. (Appx. K).; (An Affidavit by Burford stating "everyone was saying that Mark Goings was the one who killed Penn, Appx. K); (Randall's Affidavit stating the same. Appx. K).

The United States District Court of Michigan's Court Ruling

In 2013, he filed a petition for writ of habeas corpus under 28 USCS 2254 The petition was held in abeyance at Mr. Hubbard's request, so he could return to state court for more post-conviction litigation, which was unsuccessful. Mr. Hubbard, acknowledges that the petition was not filed within one year of most of the triggers in the habeas statutes of limitations, 28 USCS 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 district court dismissed the petition of Mr. Carl Hubbard who is serving a nonparolable life sentence for first-degree murder following a 1992 conviction by a judge sitt ng without a jury in the Wayne County, Michigan circuit court. His conviction was affirmed on direct appeal, and his motion for post-conviction relief all were rejected by the state courts. The United States District court granted a Certificate of Appealability. (US District court No. 2:13-cv-14540, Appx. B).

United States Court of Appeals For The Sixth Circuit

On appeal, the Sixth Circuit panel divided over the standard for actual innocence. In the majority's view, "'actual innocence' means factual innocence," i.e., evidence "that he factually did not commit the crime." Maj. Op 9. Judge Cole dissented, explaining that Keith "explicitly denounce such a requirement in a published opinion. Dist. Op. 24. Under the proper standard, Judge Cole, found that Mr. Hubbard's new evidence established actual innocence. Collins's testimony in this crucial block to the State's case. Without it, the State loses. 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. (Dist. Op. 40, Appx. A).

...

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 his actual innocence inquiry, there is a remedy for that--a remedy Hubbard has requested an evidentiary hearing. (Dist. Op. 44, Appx. A).

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. (6th Cir ct. 04 1 -2024, Appx. A).

REASON FOR GRANTING THE WRIT

Mr Hubbard has demonstrated his innocence's at every stage of these post-conviction proceedings This case was based on all circumstantial evidence that was manufcatured from the beginning. From prison, Petitioner collected and presented to State and Federal Courts evidence that is permitted by this Court in Schulp V. Delo. It appears that the 6th Circuit court of Appeals, need some guidance from this United States Supreme Court, as two of a three judge panel's decision in Hubbard V. Rewerts No. 21-2968, 6th Cir. ct. April 16, 2024 (Appx. A), would effectively do away with the standard of actual innocence permitted by this Court. Be that this Court does not act, a lower court's ruling would take root as law of the land.

Mr Hubbard has demonstrated that the State of Michigan, did not have any evidence against him. So, Detroit Police Det. Sgt. Joann Kinney and Wayne County Assistant Prosecutor manufactured this case. They used Curtis Collins and Andrew Smith against him, both were suspects in the case at bar.

In 2011, Askia Hill gave an affidavit, that was not explored in any State or Federal evidentiary hearing. Even being that Mr. Hill was on his way to the store on Gray Street the night of the murder, and saw a Mark Goings shoot the victim multiple times. He did not come forth at that time as he "was afraid" of reprisal. He also

would testify to what he saw, attesting to Mr. Hubbard's innocence.

Mr. Hubbard has been in prison for over 32 years (going on 33) years now, and will remain here if justice does not prevail. It has been shown that Detroit Police officer Joann Kinney, coerces false confessions and testimony. She was the officer in charge in Petitioner Hubbard's case.

I. THE SIXTH CIRCUIT DECISION DENYING PETITIONERS PETITION OF HABEAS CORPUS SHOWING ACTUAL INNOCENCE THAT WAS BASED ON THIS COURT'S RULING IN SCHULP V. DELO, DIRECTLY CONTRAVENES UNITED STATES SUPREME COURT S LAW, AFTER A COMPELLING CASE ENTITLING POST CONVICTION RELIEF WAS PUT FORWARD BY MR HUBBARD.

A majority of the circuit judges who are in regular active service and who are not disqualified may order an appeal or other proceedings be head or reheard by the court of appeals en banc. An En Banc hearing or rehearing is not favored and ordinarily will not be ordered unless: en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or the proceeding involves a question of exceptional importance.

The panel decision conflicts with a decision of the United States Supreme Court in Schulp V. Delo 513 US at 327 (1995), and House V. Bell 547 US at 552-555 (1998), are the standard of review for a claim of Actual Innocence where by equitable tooling is to allow for constitutional procedural bars. In the United States District Court, Eastern District of Michigan, Southern Division, the Ho David M. Lawson's, Order Granting In Part a Certificate of Appealability, to Petitioner Hubbard. He wrote

in part the following:

.. The Court finds that reasonable jurists could not debate the Court's conclusion that all of the claims raised in original and amended petitions were untimely However, the court finds that reasonable jurists could debate whether evidence obtained by the petitioner after trial suggest that he did not commit the murder for which he was convicted could justify the application of equitable tooling to excuse the untimely filing of the petition. The Court therefore will grant a certificate of appealability on 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 excuse the late filing of his petition. (Dist. Ct. Op., p. 2, Case No. 13-14540, Filed 08/31/2021, Appx. B)....

The 6th Circuit Court of Appeal's Majority Opinion is written by, Judge Alice M Batchelder, in Hubbard V. Rewers, she wrote in pertinent part the following:

.... Hubbard filed a petition for writ of habeas corpus in The United States District court for the Eastern District of Michigan. The district court dismissed the petition as untimely. Hubbard now appeals, arguing that he is entitled to an equitable exception to the Antiterrorism and Effective Death Penalty Act of 1996's (AEDPA), time bar based on a credible showing of actual innocence. See McQuiggin V. Perkins, 569 US 383, 386 (2013). While Hubbard presents new evidence that impeaches the State's case against him, he fails to present evidence affirmatively demonstrating his actual innocence; he cannot prove that he did not, in fact, commit murder. Accordingly, AEDPA does not permit him to file an untimely habeas petition. We affirm. (Case No. 21-2968.

Filed: 6th Cir. 04/16/2024; Maj. Op., p. 2. Appx. A).

Further in the Opinion, Judge Batchelder, wrote the following:

... Fifth, and perhaps most importantly, "'actual innocence means factual innocence not mere legal insufficiency." Bousley V. United States 523 US 614, 623; 118 S. Ct. 1604; 140 L.Ed. 2d 828 (1998) (citing Sawyer V. Whitley 505 US 333, 339; 112 S. Ct. 2514; 120 L. Ed. 2d 269 (1992). This means that a petitioner may not pass through the "gateway" by simply undermining the state' 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 a 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. Schulp 513 US at 324; House 547

US at 552-53.

Start with Schulp. The equitable exception adopted by the Schulp Court rested not on the notion that all convictions m st be supported by constitutionally suffic - ient 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." Schulp 513 US 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 and 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 light of the new evidence." Id. at 322, 327. This probabilistic standard in Jackson V. Virginia 443 US 307 (1979) was not meant to serve as collateral sufficiency review. Schulp 513 US at 330 (explicitly distinguishing Jackson). Rather, this standard was simply meant to reflect degree of proof needed to make a successful actual-innocence claim. Proof of actual innocence was the end; the effect of the evidence on hypothetical fact finder 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. Schulp asks whether the petitioner actually committed the crime. Id. 330-31. (6th Cir. ct. 04-16-2024, Maj. Op. pgs. 9-10 Appx. A).

. .

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 US 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 statute 22 4(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 add 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. (6th Cir. ct. 04-16-2024). Maj. Op. p. 11 Appx. A).

Petitioner sees that the "Majority is now asserting Sawyer V. Whitley 505 US 333 (1992), where this Supreme Court held:

The present case requires s to further amplify the meaning of "actual innocence" in the setting of capital punishment. A prototypical example of actual innocence in a colloquial sense is the case where the State has convicted the wrong person of the crime. Such claims are of course regularly made on motions for a new trial after conviction in both state and federal courts, and quite regularly denied because the evidence adduced in support of them fails to meet the rigorous standard for granting such motions. But in rare instances it may turn out later, for example, that another person credibly confessed to the crime, and it is evident that the law has made a mistake. Sawyer, Id. at 340.

This Court should see the majority opinion in Hubbard V. Rewerts to be conflating the Schulp Standard, with the Swayer Standard, making the dissent of Judge Cole, and this request for Writ of Certiorari necessary. Petitioner Carl Hubbard, asserts Schulp V. Delo 513 US 298 (1995), is the Standard of Review for an equitable tolling miscarriage of justice claim, and not the more difficult Swayer V. Whitley 505 US 333 (1992). The 6th Circuit court has overlooked Souter V. Jones 395 F.3d 577, a standard of review that, originated in their own court. Souter, permits a gateway showing as

does Schulp N. Delo. The actual innocence claim is a gateway claim allowing courts, in the United States, to look at Constitutional Violations of the Bill of Rights that are otherwise procedurally barred, as defendants has a right to a fair trial that result are reliable.

Please consider Judge Cole's dissent in Hubbard V. Rewerts case no. 21-2968,

filed: 6th Cir. 04/16/2024, which reads in pertinent part as follows:

....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 minimum, remand for an evidentiary hearing on his new reliable evidence. For these reasons, I respectively dissent.

Before discussing the specifics of Hubbards 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 bonding precedent.

We review a district court's dismissal of a writ of habeas corpus as barred by the statute of limitation 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. Appx. 450, 459 (6th Cir. 2008)(citing House V. Bell 547 US 518, 539-40; 126 S. Ct. 2064; 165 L.Ed. 2d.1 (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)(Bug V. Mitchell 329 F.3d 496, 500 (6th Cir. 2003)).
The Antiterrorism and Death Penalty Act (AEDPA) established a one year limitation period during which a state prisoner can bring a federal habeas petition. 28 USCS 22 44(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 limitation period is not jurisdictional, and does not require courts to dismiss a claim as soon as the "clock has run dry," Day V. McDonough 54 US 198, 208; 126 S.Ct. 1675; 164 L.Ed. 2d 376 (2006). "[A] petitioner who misses a viable habeas action if the court decides that equitable tolling is appropriate." Allen V. Yukins 36 F.3d 396, 401 (6th Cir. 2004).

Since Souter, this court has embraced equitable tolling of the AEDPA's one year period, where a petitioner can present a credible claim of actual innocence. Cleveland V. Bradshaw 693 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 Schulp V. Delo 513 US 298, 315; 115 S. Ct. 851; 130 L. Ed.2d 808 (1995)). A petitioner is actually innocent when he (1) presents new reliable 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 convict him. Schulp 513 US at 325, 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 began 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. Schulp 513 us 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 the rules of admissibility that would govern at trial. House 547 US at 537 (cleaned up) (citing Schulp 51 US at 327-28). (Dist. Op. at 21-22, 6th Cir. ct. Appx A).

Petitioner hubbard asser's the Majority's opinion ignores the corroborating facts that makes this circumstantial case an extraordinary gateway claim. He presented new evidence that dismantle the State's cases against him and demonstrates that he actually is innocent under the gateway standard announced in Schulp V. Delo 513 US 298 (1995). At petitioner's trial in State court, defense counsel motion to dismiss. (09/02/1992 T.T. pgs. 97-99 Appx. H).

The denial shows that the Judge, sitting as the fact finder in a bench trial, gave much to Curtis Collins rebuttal testimony on the third day of trial. (09/02/1992 T.T. p 101 Appx. H).

In Hubbard V. Rewerts case no. 21-2968 (filed 6th Cir. 04/16/2024 Apx. A), the court affirmed the United States Eastern District Court's denial of his petition for a writ of habeas corpus. Petitioner filed for hearing En banc which the 6th Cir. ct. of appeals denied as no Circuit judge voted for the hearing En Banc. Consideration should had occurred in the Sixth Circuit to maintain uniformity of that court's prior decisions. A hearing en banc would have brought the 6th Circuit back in line with United States Supreme Court's Law as applied in Schulp.

2. THE SIXTH CIRCUIT COURT OF APPEALS ERRED WHEN THEY DID NOT PROVIDE A HEALING EN BANC, WHEN A PANEL OF TWO OF THREE JUDGES RULED CONTRARY TO UNITED STATES SUPREME COURT LAW, ESTABILSHING LAW DENYING MR. HUBBARD'S ACTUAL INNOCENCE GATEWAY CLAIM.

This determination by the Sixth Circuit court is reminiscent of what the United States Supreme Court has dealt with in 2005 with House V. Bell. Petitioner Hubbard is

seeking a Writ of Certiorari, as he has presented an extraordinary case under Schulp V. Delo, establishing a Geteway claim where a miscarriage of justice of a petitioner's constitutional rights could be addressed in the 6th Circuit court of appeals. The standard of review is House V. Bell, where this Court Held:

> In the usual case the presumed guilt of a prisoner convicted in state court counsels against federal review of default claims. let a petition supported by a convincing Schulp gateway showing "raise[s] sufficient doubt about [the petitioner's] guilt to undermine confidence in the result of the trial without the assurance that trial was untainted by constitutional error"; hence "a review of the merits of the constitutional error" hence. "a review of the merits of the constitutional claims" is justified. 513 US at 317; 115 S.Ct. 851; 130 L. Ed. 2d 808. House Id. at *537.

A hearing en banc should have been granted to bring the Sixth Circuit full court in line with United States Supreme Court law, the petition in the 6th Circuit court Appeals had case authorities that should have been binding on that court i.e. Keith V. Hill Arnold V. Dittmann and Souter V. Jones that were based on United States Supreme Court Law.

The 6th Circuit court of Appeals has established new law in regards to equable tolling of defaulted (procedurally barred) Constitutional Claims. In Mr. Hubbard's case, he was denied a Writ of Habeas Corpus and was not allowed to pass through the gateway with his constitutional claims. The majority reasoned that he could not prove that someone else confessed to the crime in which he was found guilty, even when Trial Judge found him Not Guilty of the gun.

Majority of the panel of judges in the 6th Circuit found the following in Petitioner Hubbard's case:Fifth and perhaps most importantly actual innocence beats factual innocence, not merely legal insufficiency. Bousley V. United States 523 US 614, 623; 118 S. Ct 1604; 140 L.Ed.2d 828 (1998)(citing Sawyer V. Whitley 505 US 333, 339 112 S.Ct. 2514; 120 L.Ed.2d 269 (1992). This means that a petitioner may not pass the 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 filed by an exonerated explanation; but it is not sufficient in and of itself. This distinction between exonerating evidence and impeachment evidence undergrids both the Supreme Court's landmark equitable exception cases. Schulp 513 US at 324; House 547 US at 552 53 (6th Cir. Maj. Op. p. 9, 04-16-2024, Appx. A).

The Majority has shifted what the Schulp Court has established as a Gateway to Habeas Corpus relief Petitioner Hubbard is seeking to rectify a Miscarriage of Justice by an equitable tolling exception allowed. This change by the United States 6th Circuit court of Appeals is a misapplication of supreme Court Law.

After the 6th Circuit court of Appeals Majority's Opinion, Judge Coles the dissent wrote the following:

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 decision in your own [life] " A defendant who can clearly and convincingly dismantle the governments case against him could therefore overcome the procedural bar of sec. 2244(b)(B)(ii) -- by removing that "certitude" -- even if he cannot show that he is, in fact innocent. Keith V. Hill 78 F.4th 307 3-5 (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 direct 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 reject the use of the actual innocenc-- 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 acknowledge, the teachings of the precedent are not always clear as we might wish, [e]specially in a complicated area like habeas. Wright V. Spaulding 939 F.3d 693, 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 abrocated en banc or by the Supreme Court." Id. at 700, Here, that holding is Keith, a holding that is so clear: Under Supreme Court and Sixth 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. (6th Circuit Dist. Op. at 23-24, Appx. A).

Petitioner Hubbard should be permitted to pass through the gateway with his Credible Actual Innocence Claim. There are many cases that are being granted equitable inception that have more damning evidence against the petitioner than Mr. Hubbard. There was never any evidence that petitioner Hubbard committed this crime of Murder in the First Degree. The 6th Circuit court of Appeals rejected the evidence in the Case at Bar.

Petitioner Hubbard's case has been used to set a new standard in the 6th Circuit and maybe the Country, if allowed to stand. Please consider the following:

Out of respect for the finality of state- court judgments federal habeas courts, as a general rule, are closed to claims that state court would consider defaulted. In certain exceptional cases involving a compelling claim of actual innocence, however the state procedural default rule is not a bar to a federal habeas petition See Schulp V. Delo 513 US 298, 319 322; 115 S. Ct. 815; 130 L. Ed. 2d 808 (1995). Id. *522 .... This formulation, Schulp explains ensure that petitioner's case is truly 'extraordinary ' while still providing petitioner a meaningful avenue by which to avoid a manifest injustice." Ibid. (quoting McCleskey V. Zant 499 US 467, 494; 111 S. Ct. 1454; 103L. Ed. 2d 517 (1991)) Id. *537.

CONCLUSION

The petition for writ of certiorari should issue as to both questions.

Respectfully Submitted,

Carl Hubbard

Date: 11-8-2024.