

Appendix A

No. 21-2968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

<p>FILED Aug 12, 2024 KELLY L. STEPHENS, Clerk</p>

CARL HUBBARD,

Petitioner-Appellant,

v.

RANDEE REWERTS, WARDEN,

Respondent-Appellee.

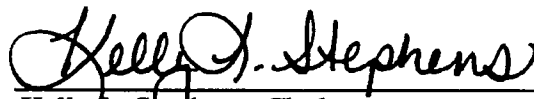
ORDER

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

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

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT



Kelly L. Stephens, Clerk

*Judges Larsen, and Davis recused themselves from participation in this ruling.

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 24a0088p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CARL HUBBARD,

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v.

RANDEE REWERTS, Warden,

Respondent-Appellee.

No. 21-2968

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 2:13-cv-14540—David M. Lawson, District Judge.

Argued: July 19, 2023

Decided and Filed: April 16, 2024

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

COUNSEL

ARGUED: Alexander Kazam, KING & SPALDING LLP, Washington, D.C., for Appellant. Marissa A. Wiesen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee. **ON BRIEF:** Alexander Kazam, KING & SPALDING LLP, Washington, D.C., for Appellant. Marissa A. Wiesen, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, for Appellee.

BATCHELDER, J., delivered the opinion of the court in which NALBANDIAN, J., joined. COLE, J. (pp. 21–44), delivered a separate dissenting opinion.

OPINION

ALICE M. BATCHELDER, Circuit Judge. Petitioner Carl Hubbard was convicted of first-degree murder in Michigan state court on September 2, 1992. Over two decades later (and

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long after 28 U.S.C. § 2244's one-year limitation period had expired), Hubbard filed a petition for a 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 U.S. 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.

I.

On the night of January 17, 1992, Rodnell Penn was shot in a crime-ridden neighborhood in Detroit. He was found lying near the curb of Gray Street, just north of the corner of Gray and Mack (colloquially, the "Gray and Mack" neighborhood), about two hundred yards away from a party store. Officer Craig Turner arrived at the scene as backup. As EMS loaded Penn's body into an ambulance, petitioner Carl Hubbard, who had been walking by the scene, walked up to Officer Turner and asked what happened. Officer Turner stated that a homicide had occurred: Hubbard left and came back about ten minutes later, asking if the victim was from the neighborhood and if he was dead. Officer Turner responded that the victim was not from the neighborhood and was indeed dead. Hubbard reacted with what Officer Turner later described as a fake expression of shock. Hubbard then stated, "You think Leonard [] and Charlevoix is out cold, Gray and Mack is." Officer Turner took this to mean that Hubbard believed that the Gray and Mack neighborhood had more drugs and violence than nearby locations. Because no one had indicated this was a drug-related killing and Hubbard's comment implied that it might be, Officer Turner asked if Hubbard would have a seat in the patrol car. Hubbard declined and was allowed to leave.

Four days later, on January 21, Sergeant Joann Kinney took Hubbard into custody and asked him about Penn's killing. Hubbard stated that he did not know anything about Penn's death until Sergeant Kinney mentioned it. He further stated that he had not seen Penn since the 1980s and was not on Gray Street on January 17. These statements were all false. Hubbard was

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on Gray, knew about Penn's death, and was seen discussing drug sales with Penn the day before his death.

On January 23, neighborhood resident Curtis Collins gave a statement to the police. In his statement, Collins, signing under the alias "Tony Smith," claimed that he was in the party store on Gray and Mack on January 17 when he saw Hubbard and another man arrive at the store. Collins stated that he left the store about two minutes later and that as he was leaving, he turned back and noticed Hubbard and the other man leaving the store together and trekking across Gray and Mack. Collins continued walking down the street, but, he said, when he heard gunshots he turned and saw Hubbard running through a vacant lot. Collins ran toward the scene and saw a body lying in the street in front of a house. After obtaining Collins's statement, the State charged Hubbard with first-degree murder and possession of a firearm during the commission of a felony.

The state trial court conducted a preliminary examination on February 4, 1992, before Hubbard's actual trial. Collins testified at this preliminary examination, largely repeating his statement to the police. He recounted that he had left the store and walked about 3–5 feet down the street when he heard gunshots and turned to see Hubbard running away (inexplicably having gotten more than 200 yards away from the store in the time Collins took to traverse 5 feet). During cross-examination, Collins recounted that the time all this occurred was around 8:15 p.m. (which, on January 17, meant it was dark). He then admitted there were no streetlights or lamps in the area where Hubbard allegedly shot Penn and that he could not see Hubbard's face. On redirect, Collins claimed that even though he could not see Hubbard's face, he identified him by the scar on the back of his head. After Collins's testimony, the trial court asked Hubbard to stand and turn around and noted that the scar in question was no more than three inches in length.

—The Trial

The first day of Hubbard's bench trial commenced on August 31, 1992.¹ The prosecutor's first witness was Curtis Collins. Right away, Collins recanted and denied he was in

¹Hubbard waived a jury trial.

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the vicinity of Gray and Mack on January 17. The prosecutor sought to impeach him with his February 4 testimony. Defense counsel then asked Collins why his story changed between February and August. Collins replied that when he gave his initial story to the police, he was mentally unstable because a friend (not Penn) had just died. He also stated he was afraid of getting into trouble because he had violated parole by taking his ankle monitor off. Lastly, he claimed that the police threatened to charge him for being “on escape” (presumably referring to his parole violation, not an actual jailbreak) and that they would pay him \$10,000 to remove him to Texas as part of a witness protection program if he testified.

The State tried to save its disintegrating case. The prosecutor called another witness, John Trammel, who placed Hubbard among the spectators at the scene once the police and medical personnel arrived. The prosecutor next called Leon Penn, the victim Rodnell Penn’s brother, who testified that Hubbard and Rodnell were together on January 16, the day prior, and that Hubbard told Rodnell that he would see him the next day. According to Leon, Rodnell Penn was in the business of selling drugs for Hubbard. The prosecutor’s final witness that day was Officer Turner, who testified to his seeing Hubbard on the street that night as EMS tended to Rodnell’s body.

On the second day of trial, the prosecutor called Andrew Smith, another Gray and Mack neighborhood resident, who said he observed Hubbard on January 17, crossing the street from the party store to Gray Street with two other men at around 8–9 p.m. About 3–4 minutes later, while Smith was in the party store, he heard gunshots. He stayed in the store for a few minutes and then walked to the gunshot area, by which time the police had responded. Smith did not actually see who shot Penn or anyone fleeing from the scene.

On the third and final day of trial, the prosecutor recalled Curtis Collins. Collins withdrew his recantation and returned to his former story about identifying Hubbard by the scar on the back of his head. He stated that he had lied two days earlier because he heard rumors that his family was threatened. During cross-examination Collins admitted that he had been arrested and threatened with perjury charges following his initial recantation. After Collins’s testimony, the prosecutor and defense counsel stipulated to some indisputable facts—facts which the prosecutor argued established motive: specifically, that Hubbard had a prior murder charge from

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1988 and that Rodnell Penn was supposed to testify at that murder trial. Although Penn never testified at that trial, he did testify at the preliminary examination. After this stipulation, the State rested.

The defense called Raymond Williams, who testified that he was with Curtis Collins in another part of town from 8–10 p.m. on January 17th. Williams claimed they were gambling. He remembered the night well because that was when the movie *Juice* had come out in theaters and he had gone to see it that night, leaving the house around 10:00 p.m. Roney Fulton testified to the same fact—Curtis Collins was at his house with Williams.

The defense next called Thomas and Vanessa Spells, friends of Hubbard's. Thomas testified that Hubbard was with him at his (Spells's) house from 6–9 p.m. on January 17 and that his wife, Vanessa, arrived at their apartment at around 8:15, while he and Hubbard were still there. Vanessa also testified to this fact. Thomas and Hubbard then left the Spells's residence to go to Hubbard's mother's house, where she had been taking care of the Spells's child. The pair then saw the ambulance and police cruisers on Gray Street and Hubbard walked up to Officer Turner to ask what was going on.

The defense rested and the court recounted all the evidence presented at trial. The court found Hubbard not guilty of the firearm charge but guilty of the first-degree murder charge. While recounting the evidence, the trial court gave some insight into the basis for its verdict, noting that Collins's testimony provided little value because, Collins "did look quite nervous" and was "down right lying to the Court," and noting that Hubbard had lied to the police.

—*Subsequent Proceedings and New Evidence*

Hubbard's attempts to overturn his conviction on both direct appeal and collateral review proved unsuccessful. *People v. Hubbard*, 554 N.W.2d 910 (Mich. 1996) (unpublished table decision); *People v. Hubbard*, 843 N.W.2d 130 (Mich. 2013) (unpublished table decision). Furthermore, Hubbard waited over ten years after the conclusion of the direct appeal to file his state postconviction petition, well beyond the one-year time window during which federal habeas claims must be brought. *See* 28 U.S.C. § 2244(d).

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Notwithstanding AEDPA's time bar, Hubbard filed this federal habeas petition in 2013 and, after much delay, amended the petition in 2020. The district court dismissed the petition as untimely but certified Hubbard's actual-innocence claim for appeal.

On appeal, Hubbard argues that the equitable exception outlined in *Schlup v. Delo*, 513 U.S. 298 (1995), and applied to AEDPA's statute of limitations in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), entitles him to belatedly file his federal habeas petition. Under that exception, a petitioner may avoid AEDPA's time bar if he can demonstrate, in light of "new reliable evidence," that, more likely than not, "no reasonable juror would have convicted him." *Schlup*, 513 U.S. at 324, 327.

Hubbard now presents as "new evidence":

- A news article describing an investigation by the United States Department of Justice into the Detroit police department based on a reported practice of coercing false confessions or testimony. The article named Sergeant Joann Kinney, the officer who interviewed Hubbard and apparently threatened Collins.
- An affidavit by fellow prison inmate Askia Hill, who claimed that on January 17, 1992, he saw a man named Mark Goings argue with somebody on Gray Street, in front of "Uncle Peter's House" (a notorious residence in front of which Penn's body was found). He further claimed that he saw the man walk away from Mark Goings, and that Mark Goings shot him.
- Affidavits from Roy Burford and Emanuel Randall stating that the "word on the street" was that Mark Goings killed Penn.
- Affidavits from Raad Konja and Samir Konja, the brother co-owners of the party store, who claimed that they never saw Curtis Collins in their store on January 17, and that they would have noticed because they had previously banned him from the store.
- A 2017 affidavit from Curtis Collins, recanting yet again his accusation against Hubbard. He avers that he was coerced to testify against Hubbard because Sergeant Kinney, Sergeant Gale, and Assistant Prosecutor Gonzalez threatened to charge him with the murder of Penn if he did not testify against Hubbard. He claimed that he had been scared to come forward until 2015, when he learned that those individuals were no longer working in their government positions.
- A 2018 polygraph report, reporting Collins's truthfulness when he said that he was not "present when Carl Hubbard shot that man."
- A FOIA request to the Detroit Police Department that purportedly demonstrates a lack of corroborating evidence to Collins's story at trial. Collins had testified that