APPENDIX

APPENDIX

A - 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-11818-E

MELTON JACKSON,

Petitioner-Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA,

Respondents-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

ORDER:

Melton Jackson, a Florida prisoner, is serving a life sentence after a jury convicted him of first-degree murder with a firearm and armed robbery. He seeks a certificate of appealability ("COA") to challenge the District Court's denial of his 28 U.S.C. § 2254 habeas corpus petition.

Mr. Jackson was indicted for the murder and armed robbery of Justin Hayes, a known drug dealer for the Blue Seal gang. At trial in 1998, the principal witness against him was Joshla Williams. Ms. Williams lived next door to a Blue Seal "trap house," where Mr. Hayes sold marijuana. Ms. Williams testified that, on August 18, 1997, she saw Mr. Jackson ride up to Mr. Hayes on a bicycle and ask him for "a bag." Ms. Williams stated that Mr. Jackson pulled out a gun and fired at Mr. Hayes between two and four times, killing him.

Ms. Williams testified that she first spoke to police on the day of the shooting and identified someone named "Kent" as the shooter. Ms. Williams said she eventually identified Mr. Jackson as the shooter and explained that she initially gave the name "Kent" because she was scared of retaliation by Mr. Jackson. Another witness, Flossie Pierre, testified that she saw Mr. Jackson riding away from the crime scene on a bicycle seconds after the shots were fired. In addition, Derrick Patteson testified that Mr. Jackson acquired a nine-millimeter pistol from him shortly before the shooting. A nine-millimeter bullet was found near Mr. Hayes's body. The jury found Mr. Jackson guilty.

Mr. Jackson appealed, arguing that there was insufficient evidence to prove premeditation and armed robbery, and that the trial court erred by (1) refusing to instruct the jury on self-defense, and (2) admitting a prior consistent statement by Ms. Williams. Florida's Third District Court of Appeal affirmed Mr. Jackson's convictions and sentences without a written opinion in July 1999.

In April 2000, Mr. Jackson filed a motion for post-conviction relief, pursuant to Florida Rule of Criminal Procedure 3.850, claiming ineffective assistance of counsel because his attorney (1) advised him to reject a plea offer; and (2) failed to object to the sentencing court's scoring of his sentencing guideline range. The state court denied Mr. Jackson's Rule 3.850 motion. The post-conviction court found that Mr. Jackson's attorney properly advised him regarding the potential plea agreement, and Mr. Jackson unilaterally rejected it. That court also found that the sentencing court properly scored Mr. Jackson's guideline range, so there was no basis for counsel to object to the sentencing scoring. Mr. Jackson appealed, and the state appellate court affirmed.

In August 2002, Jackson filed a second Rule 3.850 motion, asserting that: (1) Ms. Williams had been found psychologically incompetent to stand trial in her own pending criminal case, thus discrediting her previous testimony; and (2) the jury panel was not sworn prior to voir dire. Mr. Jackson argued that these issues involved newly discovered evidence, justifying his second Rule 3.850 motion. In March 2004, the state court denied Jackson's second Rule 3.850 motion, finding that his claim about Ms. Williams was untimely, and that his jury panel claim could have been previously raised. This decision was affirmed on appeal, and mandate was issued on April 13, 2004.

In December 2008, Mr. Jackson filed a third Rule 3.850 motion, claiming that Ms. Williams had recanted her testimony. In support of this claim, he submitted August 30, 2002 correspondence from his trial counsel. Mr. Jackson's attorney forwarded him an undated, unsigned letter he had received, purportedly typed by someone on Ms. Williams's behalf. In that letter, she said that Armard Timmons, also known as "Kent," was the real shooter, and that she had given Mr. Jackson's name to police because Mr. Timmons had threatened her and her children's lives. Ms. Williams explained that she recently learned Mr. Timmons had killed himself, so she now felt safe coming forward.

Mr. Jackson also submitted a handwritten letter he said he received directly from Ms. Williams, recanting and apologizing to him. The envelope Mr. Jackson submitted with the handwritten letter bore a postmark of July 15, 2008, and appeared to have a return address for Ms. Williams. In the second letter, Ms. Williams said she was surprised to learn that he was still incarcerated, reiterated that she identified him as the shooter because Mr. Timmons had threatened her life, and said because Mr. Timmons had died, she no longer feared for her life.

In his third Rule 3.850 motion, Mr. Jackson also claimed that the prosecution had violated Brady v. Maryland, 373 U.S. 83, 90, 83 S. Ct. 1194, 1198 (1963), by failing to disclose Ms. Williams's psychological and mental difficulties, which affected her credibility as a witness. Additionally, he claimed to have newly discovered evidence in the form of testimony from Damien Labon, Ms. Williams's boyfriend at the time of the murder. Mr. Jackson submitted an affidavit in which Mr. Labon stated that he would have testified that Ms. Williams had serious mental issues at the time of the shooting and during Mr. Jackson's trial. In addition, Mr. Labon said he spoke with Ms. Williams immediately after the shooting, and she told him that someone named "Kent" had committed the murder. Mr. Jackson also claimed that his attorney was ineffective for failing to conduct an adequate pre-trial investigation into Ms. Williams's mental history. Finally, Mr. Jackson repeated his claim that Ms. Williams having been found mentally incompetent to stand trial in her own criminal case qualified as newly discovered evidence.

The state court denied Mr. Jackson's third Rule 3.850 motion. Mr. Jackson appealed, and while the appeal was pending, he filed a motion to relinquish jurisdiction. He sought to present additional evidence: a June 24, 2009, affidavit from Ms. Williams, recanting her trial testimony. In the affidavit, Ms. Williams reiterated her claim that Mr. Timmons (a.k.a. "Kent") was the real shooter, explained why she lied, and essentially mirrored the statements she made in her previous two letters. The state court denied Mr. Jackson's motion to relinquish jurisdiction. The state court's decision denying Mr. Jackson's third Rule 3.850 motion was affirmed on appeal, and the mandate was issued on August 24, 2009.

In December 2013, Mr. Jackson filed an original proceeding in the Third District seeking post-conviction relief, or, in the alternative, a writ of habeas corpus. Mr. Jackson invoked the court's jurisdiction to correct a manifest injustice, and asked that his convictions be discharged based on his right to due process and actual innocence. He also challenged the state court's denial of his second and third Rule 3.850 motions. The state court summarily denied this petition without explanation on January 8, 2014, and Mr. Jackson's motion for rehearing was denied on February 7, 2014. In May 2014, Mr. Jackson filed a second petition seeking post-conviction relief or, in the alternative, a writ of habeas corpus, which the Third District denied on May 28, 2014.

In July 2014, Mr. Jackson filed this 28 U.S.C. § 2254 petition, arguing that: (1) the prosecution committed a Brady violation; (2) he was actually innocent of the offenses, as demonstrated by Ms. Williams's recantation; and (3) counsel was ineffective for failing to investigate Ms. Williams's mental history, inform the jury that "Kent" was a real person, and locate and call Mr. Labon as a witness. Mr. Jackson also included a claim of cumulative error. He conceded that his § 2254 petition was time-barred, but argued he was entitled to have his claims heard on the merits because he was actually innocent. In support of his actual innocence claim, he submitted Ms. Williams's letters and affidavit as well as Mr. Labon's affidavit.

The Magistrate Judge appointed an attorney to represent Mr. Jackson and ordered an evidentiary hearing. In his evidentiary hearing brief, Mr. Jackson submitted an October 2015 affidavit from Ms. Williams, in which she attested that she authored the 2002 and 2008 letters submitted by Mr. Jackson in his state court motions and confirmed that the contents of the letters were true and correct. Mr.

Jackson also submitted evidence establishing that: (1) Mr. Timmons was a real person with a criminal history, including charges for possession of cocaine and marijuana, possession of a firearm on school grounds, and resisting an officer; (2) he and Mr. Timmons fit the same physical description; and (3) Mr. Timmons killed himself during the relevant time period.

The government appealed the Magistrate Judge's order setting the evidentiary hearing to the District Court, which affirmed. The government received permission from the court to depose Ms. Williams.

At her deposition, Ms. Williams testified that she told the truth when she testified in court against Mr. Jackson. She stated that after Mr. Jackson's trial, "people on the streets" pressured her to help get him out of jail, and she feared for her life. She stated that Mr. Jackson killed Mr. Hayes. Ms. Williams said that her testimony at trial was not influenced by law enforcement in any way, and, although she knew a person named "Kent," he was not involved in Mr. Hayes's murder. She testified that, immediately after she witnessed Mr. Jackson murder Mr. Hayes, he told her not to give his name to police. She stated that she initially told police that the shooter was "Kent" because she was scared for her life. Ms. Williams said people harassed her to change her testimony, but she did not know their names. She said:

> [I was] scared of them, you know, because they pressuring me to do this and do that . . . And 100 years later, and they still, you know

> what I'm saying, coming to me with this and that. ... And like everywhere I go, ... they're trying to pressure me because they want to get him out of jail ... Every time I go to the store, they're like, you gonna help [Mr. Jackson], you gonna help [Mr. Jackson]? And I'm like, leave me alone, leave me alone ... But like I said, I'm here to tell the truth.

Ms. Williams said that she was pressured into creating and signing the letter forwarded to Mr. Jackson by his attorney. She confirmed that her statements in that letter, specifically that "Kent" committed the murder and had threatened her life, were lies. She also said that the second letter she wrote and sent directly to Mr. Jackson was "made up." She reiterated that her in-court testimony was truthful, and she only recanted her testimony because of pressure from people in her neighborhood. As to her 2009 affidavit, she claimed that she did not type it, did not know the person who notarized it, and regularly did not read things that she was brought to sign. When shown a photo of Mr. Timmons, Ms. Williams denied that he was the shooter.

When asked why she was now admitting that her recantations were false, Ms. Williams stated:

> Because like I said, I raise my right hand again and tell the truth that, yes, he did—Melton Jackson did do that crime, you know. And I feel like today, as I come here now and just say what I need to say and the truth that, you. know, God will free me from this situation, like, mentally, you know, I don't want to have nothing to do with, something that I know I didn't have nothing to do with, you know. And everybody pressuring me on the street to do this and do that and do this and do that. . . . Even like now, I raise my right hand again and tell the truth, I know they're gonna say, you know, when they see

> that I did come and tell the truth, they're gonna be like, you know, saying this stuff. But they don't, like, threaten me where I'm gonna kill you, I'm gonna do this, I'm gonna do that, you know what I'm saying. It's not that, but still, you now, you never know what, you know.

If asked to testify at an evidentiary hearing, she said she was going to tell the judge that "people pressured [her] into [recanting her testimony] and I'm not gonna uphold it anymore."

On September 6, 2016, the government filed a motion for reconsideration of the Magistrate Judge's order granting an evidentiary hearing. The government argued that, in light of Ms. Williams's deposition testimony, Mr. Jackson was no longer able to present sufficient evidence of his actual innocence. The government argued that an evidentiary hearing was no longer warranted, and Mr. Jackson's § 2254 claims should be dismissed as time-barred.

The Magistrate Judge cancelled the evidentiary hearing and recommended denying Mr. Jackson's claims as time-barred because over one year had elapsed since his convictions became final, and his actual innocence claim was not sufficient to allow his claim to proceed despite the time-bar. The Magistrate Judge noted that Mr. Jackson's actual innocence claim relied on Ms. Williams's recantation, and, based on Ms. Williams's deposition testimony, Mr. Jackson no longer could establish that it was more likely than not that any reasonable juror would have reasonable doubt as to his guilt. The Magistrate Judge determined that, when considering the evidence as a whole, Mr. Jackson failed to present evidence that would undermine confidence in the outcome of his trial. Thus, he could not avoid the time-bar, and the Magistrate Judge recommended denying his § 2254 petition. The District Court adopted the Magistrate Judge's supplemental report, denied Mr. Jackson's § 2254 petition, and denied a COA. Mr. Jackson appealed.

To obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the District Court has denied a habeas motion on the merits, the prisoner must demonstrate that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604 (2000).

The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year statute of limitations for filing § 2254 petitions, which begins to run following the latest of four events, including the date on which the judgment of conviction becomes final, or the date on which the factual predicate of the claim could have been discovered through due diligence. 28 U.S.C. § 2244(d)(1)(A), (D). The limitations period, however, may be statutorily or equitably tolled under certain circumstances. San Martin v. McNeil, 633 F.3d 1257, 1267 (11th Cir. 2011). Statutory tolling allows state prisoners to toll the limitations period while properly filed state post-conviction actions are pending. 28 U.S.C. § 2244(d)(2). A court may also consider an untimely § 2254 petition if the petitioner can demonstrate that he is actually innocent of his crime of conviction. See McQuiggin v. Perkins, 569 U.S. ___, 133 S. Ct. 1924, 1935–36 (2013).

The Supreme Court has classified the use of an actual innocence claim to excuse default as "procedural, rather than substantive," characterizing the claim as "a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." Schlup v. Delo, 513 U.S. 298, 314–15, 115 S. Ct. 851, 860–61 (1995). In order to pass through the gateway, the petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." Id. at 316, 115 S. Ct. at 861. Specifically, the Schlup standard requires the petitioner to "demonstrate that more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt." House v. Bell, 547 U.S. 518, 538, 126 S. Ct. 2064, 2077 (2006).

To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." Schlup, 513 U.S. at 324, 115 S. Ct. at 865. Further, this Court has held that recantations of trial testimony "are viewed with extreme suspicion by the courts." See United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988).

As a preliminary matter, more than one year has elapsed from the date that Mr. Jackson's convictions became final, after the mandate was issued on his second Rule 3.850 motion on April 13, 2004. And from 2004 to 2008, and 2009 to 2013, there were no active state or federal post-conviction motions pending. Thus, the AEDPA time-bar was not statutorily tolled during this period. See 28 U.S.C. § 2244(d)(2). Mr. Jackson's § 2254 claims are therefore time-barred unless he is entitled to equitable tolling. See McNeil, 633 F.3d at 1267.

Mr. Jackson's sole argument for equitable tolling is that he is actually innocent. Mr. Jackson's claim of actual innocence, however, does not satisfy the Schlup standard, and therefore, his § 2254 claims are time-barred. To be credible, an actual innocence claim must be supported with new, reliable evidence that was not presented at trial. See Schlup, 513 U.S. at 324, 115 S. Ct. at 865. Although Mr. Jackson attempted to support his actual innocence claims with Ms. Williams's recantation, it was the second of her two contradictory sworn statements. See Santiago, 837 F.2d at 1550. Then, Ms. Williams's subsequent deposition testimony not only directly contradicts her recantation, it also demonstrates that Ms. Williams is an unreliable witness. Her testimony has changed multiple times over the years. See McQuiggin, 133 S. Ct. at 1935 (stating that courts may consider how "the likely credibility of a petitioner's affiants bear[s] on the probable reliability of evidence of actual innocence" (quotation omitted and alteration adopted)).

Additionally, other circumstantial evidence supported Mr. Jackson's guilt. Ms. Pierre testified that she saw Mr. Jackson riding away from the crime scene seconds after Mr. Hayes was murdered. And testimony was provided that Mr. Jackson got a nine-millimeter pistol prior to Mr. Hayes's murder, matching a nine-millimeter bullet found near Mr. Hayes's body after the shooting. When this evidence is considered together, Mr. Jackson fails to present sufficient evidence that would undermine confidence in the outcome of his trial. Therefore, he cannot meet the Schlup standard to avoid § 2254(d)'s time-bar. See McQuiggin, 133 S. Ct. at 1933.

Mr. Jackson has not demonstrated that reasonable jurists would debate the District Court's decision. His motion for a COA is DENIED. Slack, 529 U.S. at 484, 120 S. Ct. at 1603.

Beverly B. Martin
UNITED STATES CIRCUIT JUDGE

A - 2

NO. 17-11818-E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MELTON JACKSON,
Petitioner/Appellant,

v.

FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent/Appellee.

On Appeal from the United States District Court
for the Southern District of Florida

MOTION FOR CERTIFICATE OF APPEALABILITY BY PETITIONER/APPELLANT MELTON JACKSON

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Melton Jackson v. Secretary, Florida Dept. of Corrections
Case No. 17-11818-E

Appellant, Melton Jackson, files this Certificate of Interested Persons and Corporate Disclosure Statement, listing the parties and entities interested in this appeal, as required by 11th Cir. R. 26.1.

Adelstein, Stuart, Esq.

Bergmann, Janice L., Assistant Federal Public Defender

Bondi, Pamela Jo, Attorney General

Carney, Honorable Thomas M., Florida Circuit Court Judge

Chen, Vanessa, Assistant Federal Public Defender

Cooke, Honorable Marcia G., United States District Judge

Caruso, Michael, Federal Public Defender

Fernandez, Hon. Ivan F., Florida District Court Judge

Florida Department of Corrections, Respondent/Appellee

Goderich, Honorable Mario P., Florida District Court Judge

Hayes, Justin, Victim

Jackson, Melton, Petitioner/Appellant

Kramer, Jill Diane, Assistant Attorney General

Natale, Anthony J., Assistant Federal Public Defender

Rothenberg, Honorable Leslie B., Florida District Court Judge

Salter, Honorable Vance Edwin, Florida District Court Judge

Schwartz, Honorable Alan R., Florida District Court Judge

Shepherd, Honorable Frank A., Florida District Court Judge

Shevin, Honorable Robert L., Florida District Court Judge

Sorondo, Honorable Rodolfo, Florida District Court Judge

Andrew Teschner, Special Assistant Public Defender

Vogel, Katherine, Assistant State Attorney

White, Honorable Patrick A., United States Magistrate Judge

MOTION FOR CERTIFICATE OF APPEALABILITY

Comes now Petitioner/Appellant, Melton Jackson, by and through undersigned counsel, and respectfully requests that this Court grant him a certificate of appealability on the following question:

> Whether the district court erred in dismissing Mr. Jackson's 28 U.S.C. § 2254 habeas corpus petition as untimely without first holding an evidentiary hearing on his claim of actual innocence?

In support of his request, Mr. Jackson states as follows:

INTRODUCTION

Following a trial by jury in April 1998, Melton Jackson was convicted of the first-degree murder with a firearm and attempted armed robbery of Justin Hayes, and sentenced to life imprisonment. At the time Mr. Hayes was killed, he was selling marijuana from a drug hole in one side of a duplex in Miami. The only eyewitness to the killing, and the State's star witness at trial, was Joshla Williams, who also sold drugs and lived next door. Joshla, who has a long history of drug abuse and mental health issues, initially told police that it was a man with the street name "Kent" who shot Mr. Hayes, but later identified Mr. Jackson as the shooter.

During the nearly 20 years since the trial, however, Ms. Williams has reached out several times to Mr. Jackson and his family, telling them that she testified as she did because she and her children had been threatened by the actual shooter – "Kent" – but had reached out because she had learned that "Kent" had killed himself and so she was no longer afraid. Specifically, in 2002 and 2008, Joshla sent letters to Mr. Jackson in which she recanted her trial testimony and named "Kent" – whom she identified in her letters as Ahmad Timmons – as the actual shooter. In 2009 she signed affidavits attesting to this fact, and in 2016, she verified that the affidavits were true.

In 2014, Mr. Jackson filed a pro se 28 U.S.C. § 2254 habeas corpus petition in the district court alleging that his counsel was ineffective in failing to investigate "Kent," as well as Joshla's mental illness, and that the State failed to turn over information in its possession about Joshla's mental illness to the defense in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Although the petition was filed well-outside the one-year limitations period for filing such petitions, Mr. Jackson asserted that Joshla's recantations and identification of "Kent" as the actual perpetrator demonstrated his actual innocence, thereby lifting the timeliness bar.

Mr. Jackson later, through counsel, supported his claim of actual innocence by providing supporting documentation indicating that "Kent" was Ahmad Timmons, and documenting that Mr. Timmons lived just a few blocks from where the murder occurred, and had a propensity for violence, as well as a familiarity with guns and drugs.

The magistrate judge initially ordered an evidentiary hearing on Mr. Jackson's claim of actual innocence and his underlying substantive claims, but as the hearing date approached, the State had an Assistant State Attorney and law enforcement official contact Joshla, and following that contact, she attended a deposition wherein she recanted her earlier recantations. Rather than hold the evidentiary hearing to assess Joshla's credibility, the magistrate judge instead cancelled the hearing, and recommended that the petition be dismissed as untimely. The district court affirmed and adopted the magistrate judge's report, and denied a certificate of appealability.

Mr. Jackson has now appealed the district court's dismissal of his petition as untimely, and seeks a certificate of appealability on whether the district court erred in dismissing his petition as untimely without first holding the already-scheduled evidentiary hearing on Mr. Jackson's claim of actual innocence. Reasonable jurists could differ regarding the answer to that question. Accordingly, this Court should grant a certificate of appealability, so that the Court can fully consider the issue on appeal.

PROCEDURAL HISTORY

I. State Proceedings.

A. State trial proceedings.

Justin Hayes, also known as "Jap," was killed on August 18, 1997. DE 11-1:1. The only eyewitness to the shooting was Joshla Williams. DE 21, T.340-420. Joshla lived in a duplex at 10225 S.W. 176th Street, Miami; Hayes lived on the other side of the duplex at number 10227. *Id.*, T.391. Hayes's side of the duplex was a "drug hole" for the "Blue Seal" gang, from where Hayes sold marijuana. *Id.*, T.220-22, 272-73. Joshla was a competitor who sold both marijuana and crack from her side of the duplex. *Id.*, T.241-42.

The police interviewed Joshla the day of the shooting, and she told them that it was "Kent" who shot Hayes, and gave a description that resembled Petitioner, but did not mention Petitioner's name. *Id.*, T.426, 428, 433. After that initial interview, the police kept "coming back and following us in the streets and everywhere we go and kept coming by and sitting in the yard and asking questions and questions," and she eventually identified Petitioner as the shooter. *Id.*, T.388; *see id.*, T.436-38.

At trial, Joshla testified that she was sitting in a chair in the backyard of the duplex talking with Hayes near a large dog cage. *Id.*, T.352-54. Her three small children – aged seven, six, and two – were in the backyard playing nearby. *Id.* T.349, 352-53, 378. As Joshla and Hayes continued to talk, she saw Petitioner ride up on a bicycle and ask Hayes for a bag of marijuana. *Id.*, T.252-54, 359-60, 362, 364-67. She testified further that Petitioner then laid his bicycle down, pulled out a gun, and fired at Hayes between two and four times, took drugs from Hayes's waistband, and left. *Id.*, T.372-73.

No physical evidence linked Petitioner to the crime. Rather, the State presented the testimony of Derrick Patterson, who sold marijuana with Hayes at the duplex. *Id.*, T.220-21. Patterson testified that approximately ten days before the shooting, Petitioner obtained a nine millimeter pistol from him. *Id.*, T.224-225, 227-229. The State also presented evidence that Hayes's body had two entrance wounds from gunshots on the left and lower chest area, and two exit wounds on the lower right side of the abdomen in the back. *Id.*, T. 183, 319-20. In addition, a nine millimeter bullet was found about a foot south of Hayes's body, by a large tree. *Id.*, T.158, 176-78, 188-89, 215-18, & 250-51.

Flossie Lee Pierre, a homeless crack addict, was cleaning Williams's kitchen at the duplex in exchange for some crack money when she heard gunshots fired. *Id.*, T.267-271-72, 274. She testified at trial that she could not see outside because the window was boarded up, but when she ran to the back door of the duplex, she saw Petitioner riding away on a bicycle. *Id.*, T.275-76. She did not, however, see the actual shooting. *Id.*, T.309, 434. Nor did she see a gun in Petitioner's hand or on his body. *Id.*, T.278, 291, 343. When Pierre was first interviewed by the police immediately after the shooting, however, she told them she hadn't seen a thing. *Id.*, T.298.

In closing, the State implied that Joshla had simply made up the name "Kent" when she first spoke to the police, and that "Kent" was Petitioner. DE 21, T.494 (arguing Joshla told police "everything that happened except she – ... [s]he called [defendant] Kent.").

B. State direct appeal.

Petitioner appealed his convictions and sentence to the Third District Court of Appeal, represented by Special Assistant Public Defender Andrew Teschner. DE 11-1 at 16. The Third District affirmed in a *per curiam* opinion. *Jackson v. State*, 733 So.2d 1138 (Fla. 3d Dist. Ct. App. 1999); DE 11-1 at 91. The mandate issued on July 30, 1999. DE 11-100.

C. State postconviction proceedings.

On April 25, 2000, Petitioner filed his first motion for postconviction relief pursuant to Florida Rule of Criminal Procedure 3.850, claiming ineffective assistance of trial counsel on matters not pertinent here. DE 11-1 at 101. The trial court held a hearing on the motion, *see* DE 11-1 at 123-143, and denied it on the merits, *id.* at 152. Petitioner appealed the denial, but the Third District affirmed without explanation in a *per curiam* decision, DE 11-2 at 82, and denied rehearing on March 1, 2002, DE 11-2 at 83.

While Petitioner's appeal was pending, on August 28, 2000, a trial judge sitting in the Eleventh Judicial Circuit in and for Miami-Dade County found Joshla Williams incompetent to stand trial in case numbers F97-35653 and F99-9895. DE 18:85; DE 11-3:20. Petitioner's appellate attorney, Andrew Teschner, heard that Joshla had been found incompetent, and sent a letter so stating to Petitioner, but did not provide any supporting documentation with the letter. DE 18:88. Although Joshla was involuntarily committed in August 2000, after receiving medication she was eventually restored to competency, pled guilty in both cases, and was sentenced to a 10-year term of imprisonment on February 12, 2002. *See* DE 33-2:5-6. On March 7, 2002, Joshla entered the custody of the Florida Department of Corrections; she remained imprisoned until February 8, 2008. See

DE 33-3.

About a month after Joshla entered state prison, on April 1, 2002, appellate counsel Teschner sent a letter regarding Petitioner to Beth Weitzner at the state Public Defender's Office. DE 18 at 60. In the letter, Teschner stated he was forwarding "letters" he received together in one envelope, and noted that "[i]f authentic, they indicate a recantation by the state's main witness, Joshla Williams." *Id.* Specifically, Teschner noted that according to the evidence at trial, Joshla initially told police that the shooter was "Kent," and the letter identifies the shooter "Kent" as someone other than Petitioner. *Id.*

Teschner's letter states, in pertinent part:

> I was the Baker SAPD in the direct appeal of this old case. Today I received the enclosed letters in one envelope. If authentic, they indicate a recantation by the state's main witness, Joshla Williams. Because the retyped letter is unsigned, some investigation may be necessary to develop this issue. Therefore, I am sending them to you rather than to Mr. Jackson directly, in the hopes that there is something you can do.
>
> According to the evidence at trial, Joshla Williams did initially tell police that "Kent" was the shooter. This letter purports to identify "Kent." My understanding is that Williams is or was recently found incompetent to stand trial in her own local felony case.

DE 18:60.

On August 19, 2002, APD Weitzner forwarded the letters she received from Teschner to Petitioner's trial counsel, Stuart Adelstein. DE 18:62. On August 30, 2002, Adelstein forwarded the letters to Petitioner. DE 18:64.

The first of the letters forwarded to Petitioner was an undated, unsigned letter addressed to Teschner. DE 18:66. It purported to be from a friend of Joshla who typed a letter for Joshla addressed to Petitioner while they were in county jail together. *Id.* The letter from Joshla's friend indicates that Joshla told her that the real shooter – "Kent" – was someone named "Armand Timmons," not Petitioner. The letter states, in its entirety:

> Dear Mr. Andrew M. Teschner,
>
> You don't know who I am, nor will I reveal my identity because it's not needed. You represented Melton Jackson in case number F97-27689, DCA No: 98-1485, a murder case that he should've won in my opinion.
>
> Now, one of the witnesses, Joshla Williams and I were pretty good friends, still are to a degree, but I won't get into that right now. Any how, as you know, she testified at Melton's trial that he was the person that shot and killed

> Justin Hayes. Right now, as you may also be familiar with the fact, Joshla is going through, let's call it, a "crazy stage" in her own criminal case.
>
> But prior to this Joshla told me over the phone that "Kent" (Armard Timmons) was the real shooter and that she had to lie because "Kent" would've had her and her kids killed if she turned him in.
>
> While in jail, Joshla had me type a letter to Melton explaining this, however, I never sent it to him. I really didn't want to get involve at all with this whole thing. However, I've recently became saved through the blood of Jesus Christ and to know that an innocent man is being held in prison for the rest of his natural life when I know I have some information that could prove who the real killer was, is not right.
>
> Although I won't give you my identity or address, I will give you the truth about what happened August 18, 1997. I've enclosed the letter that Joshla had me type, hopefully you can help him in some way. May god bless you!

DE 18:68.

The second letter Adelstein forwarded to Petitioner was a typed but unsigned, undated letter from Joshla Williams. DE 18:68-69. This letter also states that "Kent" was not Petitioner, but Armand Timmons, and that Williams only told police that Petitioner was the shooter after Timmons put a nine millimeter gun to her young son's head, and threatened the lives of her and her children. *Id.* However, the letter indicates that Joshla had since learned that Timmons was dead, and therefore felt safe to come forward and recant her trial testimony identifying Petitioner as the shooter. *Id.*

The undated, unsigned letter states, in its entirety:

> Dear Melton,
>
> I hope this letter reaches you. I know I'm the last person you probably would like to here from considering that you are in prison with a life sentence because I lied on you but after reading this letter maybe you can understand my point of view. First, you know, as well as I know, you didn't kill Justin. I don't know if you see what exactly happen but I think that you just rode up at the wrong time.
>
> On August 18, 1997, I remember it like it was yesterday. I was sitting outside watching Lloyd try an fix the back window. He didn't have the right type of nails so, he told Justin that he would be back. About a couple minutes later, Armard Timmons (A.K.A. Kent), rode up and asked Justin about some money Justin owed him. They started arguing and the next thing I noticed Kent shot Justin about four times.
>
> Kent took Justin dope and his gun and got in his car and drove off. As he was driving off, that's when you rode up. As you came up an looked at me and seen me screaming you looked over at Justin and said "oh shit" and rode off. When you looked back Flossie had came out and saw you leaving. She didn't see what happen she only saw you ridding off and minutes later Justin laying on the ground bleeding to death.

When the police came I told them Kent was the one who did it. I didn't remember Kent real name so, I just said Kent did it and Flossie went along with it. The next say, that silly ass nigga Kent, came to my house as soon as Duck, (my boy friend) left, and put his gun to my little boy head and told me that if I put "them crackers" on him, he would kill all my kids and then kill me. I started crying because I knew I told the Detective that he had done it.

Kent then asked me "who the fuck was that nigga on the bicycle". I told him that you was probably coming to buy some weed. He asked me did you see what happened and I told him I didn't know. He then told me that I better tell them crackers that you did it. So, when the Detective came back over to my house I told him it was you, because I was afraid Kent would come back and kill me and my kids.

But check this out. About a couple months ago my cousin them told me that Kent has shot himself sometime earlier last year. So, after thinking about what I had done to you, I felt guilty. You never did nothing to me nor my kids. All you ever did was buy weed from Justin and try and fuck all my friends. Smile! I don't know if I can help you, or whether it's too late, but whatever I can do, please let me know.

I started to tell my lawyer about this or the State Attorney but, right now I'm going through my own bullshit so, the last thing the State probably want to hear from me is that I had lied on you and gotten you life in prison. I know they wouldn't understand the pressure I was under seeing my son with a 9 mm to his head and the hammer cocked back. Melton please understand my situation and what I was going through.

A friend of mine looked you up on the internet and said you were probably working on your case so I should send this letter to the law library of the institution. Hopefully, you will get this letter and get in contact with your lawyer or the State attorney or whoever. Whatever it takes to help you I will.

P.S. I'm sorry for what damage I've caused your life, please forgive me.

Sincerely,
Joshla Williams

DE 18:68-69.

On August 29, 2002, before he received these letters from Adelstein, Petitioner had filed *pro se* a second Rule 3.850 motion. DE 11-2:86-101. The motion was based on newly discovered evidence that Williams had been found incompetent to stand trial, and also that the jury panel was not properly sworn prior to voir dire. *Id.* The State responded arguing that the motion was premised on "a mere unsupported statement of hearsay" regarding Williams's incompetence that had been shared with Petitioner. *Id.* at 126. The trial court denied the motion as untimely and successive. *Id.* at 178. That decision was affirmed on appeal by the Third District in case number 3D04-222, DE 18:17, 24.

Petitioner sought further documentation of Joshla's incompetence by filing a *pro se* public records act request with the State Attorney's Office seeking records from the State Attorney regarding Joshla's competency hearing. *See* DE 18:90, 93, 95. When he failed to obtain the records, on June 21, 2004, he filed a petition for writ of mandamus in the trial court. DE 11-3:4-20. The State responded by asserting that it had no transcripts of the competency hearing, and the trial court denied the motion. DE 11-3:21, 25. Petitioner appealed *pro se*, but the Third District affirmed the denial of mandamus, DE 11-3:26, 105.

Undaunted, Petitioner eventually obtained some records relating to Joshla's competency proceedings from the trial court clerk in April 2007, including the trial court's order declaring Williams incompetent. *See* DE 11-3:43-44; DE 18:45, 107, 109. Petitioner also, in June 2008, obtained a notarized affidavit from Damien Labon, Joshla's boyfriend at the time of Petitioner's trial. DE 18 at 120. In his affidavit, Labon described Joshla's erratic behavior and psychological problems – including hearing voices and night terrors – during their relationship, which began in October 1996 and ended in March 1998. *See id.*

On July 15, 2008, five months after she was released from the Department of Corrections, Joshla Williams sent a handwritten letter to Petitioner at his correctional institution. DE 17-5:29; DE 17-2:42-44. In the handwritten letter, she describes the circumstances resulting in her friend sending her earlier unsigned, typed letter to Petitioner's counsel. DE 17-2:42. She also reiterates that "Kent" was the shooter, and that she only told police Petitioner committed the shooting because "Kent" had threatened her, and it wasn't until she learned that "Kent" was dead that she felt safe to come forward and recant her trial testimony. *See id.* at 42-44.

The handwritten letter states, in its entirety:

> Dear Melt
>
> I pray this letter finds you in the best of health. I know I am the last person you'd expect to hear from due to the fact that I'm the reason you're in the situation that you're in because of me and Flossie Pierre. I got you address from your sister when I seen her at Bell's Store. She as surprised to here and see me cause she didn't know I had recently got out of prison. I asked your sister if you got the letter a cell mate friend sent to your lawyer and she said that she didn't know anything about the letter. I asked her to give me your address so I could write you. Melt I don't know if you received that letter or not, but I was going to send it to you but my cell mate friend said it would probably be best to sent

it to your lawyer it was so long at but I do remember it was in May 2002 almost a month after I got to prison. I waited thinking someone would contact me regarding the letter so I could undo the wrong me and Flossie Pierre cause you but time passed and no one respond or called me regarding the letter. I know you probably hate us but please try and find in your heart to forgive me and Flossie for what we did to you. I never intentionally tried to do that to you. I was under so much stress and pressure that I was falling apart ready to breakdown barely holding on with the detectives following me around and sitting in my yard when I nor Flossie had nothing to do with that what happen nor you. Jap Bossman came by my house threatening me and Flossie saying word he gone get us if we don't tell him something, and he even sent some guy to kill us but the guy heard kids in the house and he himself walked away thank God because we didn't have anything to do with whatever went on next door daily. Melt you was in the wrong place at the wrong time you know we told the police Kent did it. But he also came by the house days after killing Jap a pointed a gun and said if he found out we told anyone what he did he was going to come back for us and anybody else in his way then u was passing by he ask who u was riding by I said Melt he some ken to my child father he said tell the police he did it or else. Melt I was devastated cause I had already told the police that Kent did it so I had to say it was u sence yal look alike. I couldn't let anything happen to me or my family for something I didn't have anything to do with. I nor Flossie never be around wild me that cause trouble and people was robbing them next door left and right I was scared to even come out side next door. So Flossie and me make up that stor[y] saying you did it. When I got locked up the judge sent me to a metal treatment and I'm thankful cause since the doctors killed my child while giving birth I've never trusted doctors since then but that treatment was a determining point in my life for so many reasons and after

> getting it I was able to deal with things better and the reality of what me and Flossie did to you went weighing heavily trying to undo what we cause on you and now Flossie did end up dieding. She was sick and also now that took a part of me my friend for a long time. I'm still heartbroken holding on again to faith. She never got to tell you she sorry. But I know she is please forgive her to[o] Melt. She was the main one who said you did it. But if there is anything I can do to help you let me no cause in 1999 Kent killed his self playing with the gun. I no longer have to be scared of him harming me or my family for something I didn't have nothing to do with praise God.
>
> Sincerely yours,
> Joshla Williams

DE 17-2 at 42-44.

As Joshla mentioned in her letter, Flossie Pierre died while Joshla was in prison, on April 10, 2007. *See* DE 33-4.

On December 10, 2008, Petitioner filed *pro se* a third Rule 3.850 motion in the state trial court, in which he claimed newly discovered evidence based on Joshla's recantation. DE 18:26-56. In support of the motion, Petitioner included: the August 30, 2002 letter from trial counsel Adelstein, which forwarded to Petitioner the typed, but undated and unsigned letter purportedly typed by another inmate for Joshla; and the handwritten letter that he receive directly from Joshla in July 2008.

DE 18:60, 62, 64, 66, 68-69, 72-74.

The *pro se* motion also alleged that the State violated *Brady v. Maryland,* 373 U.S. 83, 83 S. Ct. 1194 (1963), by failing to disclose Joshla's psychological and mental difficulties that bore on her credibility as a witness, DE 18:36-38; newly discovered evidence that Joshla had been found to be incompetent to stand trial, *id* at 42-45; newly discovered evidence of Damien Labon, Joshla's boyfriend who related in his affidavit the information regarding Joshla's mental state at the time of Petitioner's trial, *id.* at 46-47; that trial counsel was ineffective for failing to adequately investigated Joshla's mental history pretrial, *id.* at 49-50; that trial counsel was ineffective for failing to locate and present Labon's testimony, *id.* at 51; and a claim of cumulative error, *id.* at 54. The motion specifically requested an evidentiary hearing. *Id.* at 56.

In support of his third Rule 3.850 motion, Petitioner also filed a motion for appointment of counsel, DE 17-1:1, and a motion for postconviction discovery, DE 11-3:27-28. The trial court denied the motion on the merits without an evidentiary hearing. DE 22:5 (citing DE 11, Exh. FF-II).

Petitioner appealed the denial of his third Rule 3.850 motion *pro se* on May 1, 2009. DE 11-3:42. While his appeal was pending, Joshla signed a notarized affidavit dated June 24, 2009, in which she again recanted her trial testimony. DE 18:125-126. The affidavit was primarily typed, with a handwritten addition at the end. *See id.* It states in full as follows:

<u>**GENERAL AFFIDAVIT**</u>

> **I, Joshla Williams under penalty of perjury do hereby swear, that the following statement is true and correct, and made on my own free will, and based on my personal knowledge:**
>
> I'm writing this sworn affidavit on behalf of Melton Jackson to correct a wrong that I've caused years ago. I'm recanting my trial testimony because at the time I was under the threat of death from the actual killer in this case Armard Timmons (A.K.A. Kent). I initially told police that Kent did the shooting, but after being threatened by Kent I changed my Statement and said that Melton Jackson did the shooting.
>
> On or about August 18, 1997 I can remember it as if it was yesterday. I was sitting outside watching Lloyd try and fix the back window for Jap. After awhile Lloyd took a break and went inside the house. Me and Jap was talking and all of a sudden Kent comes from around the north side of Jap's apartment saying what's up now nigga and started shooting. I don't know if Jap went for his gun because he was armed with some type of machine gun and he was behind me.

I guess my motherly instinct kicked in because the only thing on my mind was protecting my kids who were playing in the yard at the time. When I looked back Kent was bent over behind the cage and that when Melton rode up on the bicycle, seen I was panicking, gathering my kids so he turned around and left. I never saw which direction Kent fled because he and my kids ran around the front. Flossie said she ran out the back door screaming and see Melton riding off.

When the police questioned me about the shooting I told them that Kent was the killer and that I didn't know his real name. The next day Roger (Jap's, boss man) pulled up in a gray Jeep Cherokee and said word on the street I had something to do with what happened and if he find out it's true he's going to kill me. Later than night I heard people creeping around my house, I believe maybe Roger sent them. 2 or 3 days later Kent shows up at my house and threatened to kill me and my family, he even put a gun to my child's head and said if he finds out I put them crackers on him he'll kill all of us. I was so terrified I couldn't phantom the thought of loosing another child cause I had already told the police Kent killed Jap. He also asked me who Melton was that rode up on the bicycle and he said if the police start sweating me to say it was Melton who killed Jap.

Since, I had already told police Kent had done the shooting I began to panic thinking of Kent holding a gun to my child's head, so Flossie made the story up that Melton did it cause word was already circulating on the street that Melton did it cause he and Jap's friend Bobbie had problems days earlier. We contacted the detective who left his card and meet him at Big Daddy's and told him Melton Jackson did it.

I learned that in 1999 Kent killed himself. At the time I found out I was dealing with my legal and mental issues. After receiving mental treatment I was able to function better and that's when the guilt of what I did to Melton went to weighing heavily on my heart and mind. When I got to prison I was so alone and having a hard time coping. I met another female who was in prison from Miami and began sharing our faults. When I shared my situations she offered to help me. I was going to send the letter to Melton but, she said it would probably be best to send it to his lawyer to ensure he get it and if need be they should contact me.

Well, I waited for someone to contact me, but no one ever contacted me so I assumed everything turned out fine until I seen Melton Jackson sister at Bell's store in the neighborhood she was surprised to see me. I asked her what was up with her brother, she responded he's still in prison. I asked her if Melton received the letter I sent his lawyer when I first got to prison through a friend, she say she didn't know anything about a letter. So I asked for the address so that I could help him because I know he is innocent and I wanted to right the wrong I did the previous time. Come forward and tell the truth, so on my own volition I recant all my trial testimony and information I provided the police were all wrong about Melton Jackson killing Justin Hayes.

Continueing I Joshla Williams also did not have anything to do with this shooting that happen next door to where I lived and this is the God heaven truth.[1]

HAVE READ THE FOREGOING, AND DECLARE UNDER PENALTY OF PERJURY THAT IT IS TRY AND CORRECT PURSUANT TO FLORIDA STATUTE 92.525(2) IN LIEU OF A NOTARY THIS 24 DAY OF JUNE 2009.

1 This sentence is the only portion of the affidavit that is handwritten.

/s/ Joshla Williams

DE 18:125-126. The affidavit contained a notary stamp and signature. DE18:126.

A week after Williams signed the affidavit, the Third District affirmed the denial of Petitioner's third Rule 3.850 motion in case number 3D09-1188. DE 11-3:35. Before the mandate issued, however, Petitioner filed a *pro se* motion to relinquish jurisdiction in the Third District. DE 17-1:25. The basis for the motion was that Petitioner had obtained Joshla's notarized affidavit recanting her testimony, and although not required under state law to have been filed with his Rule 3.850 motion, Petitioner wanted the trial court to consider it. DE 17-1:25-28. The Third District denied the motion to relinquish jurisdiction, DE 17-1:40, and issued its mandate on August 24, 2009. DE 11-3:37.

On December 4, 2013, Petitioner filed a *pro se* original proceeding, case number 3D13-3076, in the Third District seeking postconviction relief or, in the alternative, a petition for writ of habeas corpus. DE 11-3:38-53. Petitioner asked the court to "correct manifest injustice" because, in light of Joshla's recantation, he had been wrongfully convicted and imprisoned. *See id.* He also challenged the trial court's denial of his second Rule 3.850 motion on the basis of untimeliness and of his third Rule 3.850 motion without an evidentiary hearing. *See id.* The Third District denied the petition on January 8, 2014, stating that "Following review of the petition for writ of habeas corpus, it is ordered that said petition is hereby denied." DE 17-1:41.

On May 20, 2014, Petitioner filed in the Third District a second *pro se* petition seeking post-conviction relief, or, in the alternative, a writ of habeas corpus. DE 11-3:63. This second petition was a slightly modified resubmission of the first, and the Third District denied it using language identical to that it had used to deny the first on May 28, 2014. DE 11-3:80.

II. Federal Proceedings

A. The district court orders an evidentiary hearing on Petitioner's claim of actual innocence.

On July 2, 2014, Petitioner filed in the district court a *pro se* 28 U.S.C. § 2254 petition for writ of habeas corpus. DE 1. The petition acknowledged that it was filed well-beyond the one-year limitations period. *Id.* at 20. However, Petitioner argued that the court below should nonetheless consider his claims on the merits because his is actually innocent. *See id.* In support of his argument, Petitioner cited *McQuiggin v. Perkins*, ___ S. Ct. ___, 133 S. Ct. 1924, 1934 (2013) (finding actual innocence exception to statute of limitations applicable to § 2254 petitions), and *Schlup v. Delo*, 513 U.S. 298, 327, 115 S. Ct. 851 (1995). *See id.*

The case was referred to a magistrate judge who, on June 26, 2015, recommended dismissal of the petition as untimely. DE 22. The Report determined that "Petitioner's claim of actual innocence hinges upon the alleged recantation of eyewitness Joshla Williams," and noted that Petitioner relied on the letters "he allegedly received from Ms. Williams in 2002 and 2008, and a June 24, 2009 affidavit, purportedly executed by Ms. Williams." *Id.* at 9. The Report, however, concluded that "Petitioner's submission is inherently suspicious" because the 2002 and 2008 letters were unauthenticated and the June 2009 affidavit did "not comport with the requirements of § 117.05 of the Florida Statutes that the notary state that the signer personally appeared, and whether the affiant was personally known to the notary or produced identification." *Id.* Thus, the Report determined, "Petitioner offers nothing recent or seemingly reliable that Ms. Williams is even available and willing to recant." *Id.*

Ultimately, the Report concluded that "Petitioner fails to present anything that would undermine the confidence in the outcome of his trial. As such, he cannot meet the *Schlup* standard to avoid the time bar." *Id.* The Report therefore recommended that the petition be dismissed as untimely, and the denial of a certificate of appealability. *Id.* at 13.

On July 16, 2015, Petitioner timely objected *pro se* to the Report, objecting primarily that his petition had been dismissed as untimely without the Court first conducting an evidentiary hearing on his claim of actual innocence. DE 24. In addition, Petitioner filed a *pro se* "First Supplemental and Amended 2254 Petition," along with a motion seeking leave to supplement his petition with two additional claims. DE 25 & 27. The first supplemental claim alleges that trial counsel was constitutionally ineffective for failing to conduct an adequate pretrial investigation into Williams's mental health, and for failing to inform the jury, and provide evidence, that "Kent" was someone other than Petitioner. *Id.* at 2-3. The second supplemental claim alleged that the cumulative errors at his trial demonstrate his actual innocence of the shooting. *Id.* at 4-5.

On the same day, Petitioner filed a *pro se* motion for evidentiary hearing, noting that no evidentiary hearing was held by the state courts on his innocence claim, and argued that, in light of the new evidence, "'it is more likely than not that no reasonable juror would have found him guilty beyond a reasonable doubt.'" DE 26:3 (quoting *Schlup*, 115 S. Ct.

at 867).

In an endorsed Order, the district judge re-referred Petitioner's case to the magistrate judge. DE 28. Thereafter, the magistrate judge vacated the prior Report, appointed the Federal Public Defender to represent Petitioner, and issued an order requiring further briefing. DE 29.

On October 9, 2015, Williams signed affidavits verifying as her own the undated, unsigned typed letter sent to Petitioner in 2002, and verifying that the undated, handwritten letter sent to Petitioner in 2008 was also hers. *See* DE 33-5. Those affidavits were properly notarized. *See id.* Williams also verified that the contents of those documents are true and correct, and personally initialed each page of the earlier documents. *See id.*

Following additional briefing by the parties, the magistrate judge set an evidentiary hearing on Petitioner's gateway claim of actual innocence and his underlying claims alleging ineffective assistance of counsel and a violation of *Brady v. Maryland*, 373 U.S. 83 (1963). DE 46. Petitioner listed Joshla as a witness, as well as Damian Labon, and Chantel McInnis, who would have testified that she was friends with Ahmad Timmons, and that he was called "Kent" in the neighborhood. DE 123 at 11.

B. The district court cancels the evidentiary hearing and dismisses the petition as untimely.

Prior to the evidentiary hearing, the district court granted the State's motion to depose Joshla. DE 86, 87. At her deposition, Joshla recanted her recantation, stating that she had been pressured into all of her previous recantations by people "on the street" and relatives of Mr. Jackson, and that she was now going to "tell the truth." DE 123 at 14-16.

The State thereafter moved the district court to reconsider its order granting an evidentiary hearing in light of Joshla's deposition testimony. DE 119. Mr. Jackson opposed the motion, arguing that an evidentiary hearing was still warranted to assess Joshla's credibility, and to hear the testimony of other witnesses who could shed light on Joshla's change of heart. DE 121. On September 7, 2016, the magistrate judge cancelled the evidentiary hearing in a paperless order, and on September 12, 2016, issued a Supplemental Report recommending that Mr. Jackson's petition be dismissed as timebarred. DE 123.

The Supplemental Report noted the "dearth of authority regarding the standard a habeas petitioner should meet in order to justify a federal court exercising its discretion to set an evidentiary hearing on a gateway claim of actual innocence." DE 123:18. The Supplemental Report articulated possible two tests: (1) that "an evidentiary hearing on a gateway claim of actual innocence is warranted when there is substantial support for Petitioner's evidence;" or (2) "that a *prima facie* showing of actual innocence must first be made before the evidentiary hearing may be granted," with the understanding that "*prima facie*" means "minimal." *Id.* at 19-20. The Supplemental Report concluded, however, that it need not decide the relevant test because, "even assuming the lower *prima facie* standard . . . does apply, even that showing has been totally eviscerated by [Joshla] Williams' recent deposition testimony." *Id.* at 21.

Moreover, the Supplemental Report found support for its grant of the State's motion to reconsider the grant of an evidentiary hearing because it deemed its original grant of a hearing "a clear error or manifest injustice" given Joshla's deposition testimony recanting her earlier recantations. *Id.* at 22. It noted that Mr. Jackson's actual innocence claim hinged on Joshla's earlier recantations of her trial testimony, in which she indicated that the real shooter had not been Mr. Jackson, but Ahmad Timmons. *Id.* at 24. The Supplemental Report found, however, that "at this point Joshla Williams has demonstrated that she is totally unreliable, and the Court cannot conceive of any measure of rehabilitation that could ever make her testimony sufficiently reliable to support a gateway claim of actual innocence." *Id.* at 25.

The Supplemental Report noted the evidence corroborating Joshla's original recantations of her trial testimony, such as the fact that immediately after the shooting, she told both police and her boyfriend at the time, Damian Labon, that "Kent" was the shooter. *Id.* at 28-29. But it nonetheless chose to accept as true Joshla's deposition testimony that she named "Kent" as the shooter because she was scared and did not want to get involved. *Id.* at 29. Finally, the Supplemental Report relied on the "proffered testimony" of Mr. Jackson's trial attorneys, who the State asserted would testify that Mr. Jackson confessed to them. *Id.* at 30. The Supplemental Report determined that no cross-examination of these witnesses would have undermined their testimony. *Id.* at 30-31. Finally, the Supplemental Report concluded that Mr. Jackson's failure to testify on his own behalf was the final nail in the evidentiary hearing's coffin. *Id.* at 31. For all these reasons, it recommended that Mr. Jackson's petition be dismissed as timebarred, and a certificate of appealability denied.

On March 21, 2017, the district court summarily adopted the Supplemental Report *in toto*, denied the petition, and denied a certificate of appealability. DE 139. Mr. Jackson timely appealed, and now seeks a certificate of appealability from this Court so that he may proceed with his appeal.

MEMORANDUM OF LAW

A certificate of appealability (COA) is required to appeal the denial of a 28 U.S.C. § 2254 petition for writ of habeas corpus. A COA may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To obtain a COA under this standard, the applicant must "sho[w] 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." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603 (2000) (internal quotation marks omitted). *See also Henry v. Dep't of Corrections*, 197 F.3d 1361, 1364 (11th Cir. 1999).

A petitioner need not establish that he will win on the merits in order make the "substantial showing" required to obtain a COA; he need only demonstrate that the questions he raises are debatable among reasonable jurists. The Supreme Court has emphasized that a court "should not decline the application for a COA merely because it believes that the applicant will not demonstrate entitlement to relief." *Miller-El* *v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1039 (2003). Noting that a COA is necessarily sought in the context in which the petitioner has lost on the merits, the Supreme Court explained, "We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.*, 537 U.S. at 338, 123 S. Ct at 1040.

Under this "debatable among reasonable jurists" standard, a question of first impression likely warrants issuance of a COA. *See United States v. Espinoza-Saenz*, 235 F.3d 501, 502 (10th Cir. 2000). The fact that there is a split in the courts of appeal on the question also satisfies the standard for obtaining a COA. *See Lambright v. Stewart*, 220 F.3d 1022, 1028-29 (9th Cir. 2000).

Any doubt about whether to grant a COA is resolved in favor of the petitioner, and the severity of the penalty may be considered in making this determination. *See Barefoot*, 463 U.S. at 893; *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003); *Mayfield v. Woodford*, 270 F.3d 915, 922 (9th Cir. 2001).

I. Reasonable jurists could differ as to whether the district court erred in dismissing Petitioner's 28 U.S.C. § 2254 petition as untimely without first conducting an evidentiary hearing.

"[A]ctual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar, . . . or, as in this case, expiration of the statute of limitations." *McQuiggin v. Perkins*, ___ U.S. ___, 133 S. Ct. 1924, 1928 (2013). The district court found a "dearth of authority regarding the standard a habeas petitioner should meet in order to justify a federal court exercising its discretion to set an evidentiary hearing on a gateway claim of actual innocence," DE 123:18. Reasonable jurists could therefore debate not only what the appropriate standard is, but also whether the district court's denial of an evidentiary hearing, when evaluated against that standard, was in error. A certificate of appealability is therefore warranted under *Slack.*

Any discussion of the standard governing the district court's denial of an evidentiary hearing on a claim of actual innocence must begin with *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995). There, the

Supreme Court stated that "under the gateway standard we describe today, the newly presented evidence [of innocence] may indeed call into question the credibility of the witnesses presented at trial. In such a case, the habeas court may have to make some credibility assessments." *Id.* at 330, 115 S. Ct. at 868. In evaluating new sworn statements made in support of *Schulp*'s innocence claim, the Court noted that "[t]hose new statements may, of course, be unreliable. But if they are true – . . . it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict." *Id.* at 331, 115 S. Ct. at 869.

Even Justice Rehnquist, who dissented in *Schlup* with respect to the appropriate standard for demonstrating "actual innocence," agreed with the majority that

> in the highly unusual case where the district court believes on the basis of written submissions that the necessary showing of "actual innocence" may be made out, it should conduct a limited evidentiary hearing at which the affiants whose testimony the court believes to be crucial to the showing of actual innocence are present and may be cross-examined as to veracity, reliability, and all of the other elements that affect the weight to be given the testimony of a witness. After such a hearing, the district court would be in

> as good a position as possible to make the required determination as to the showing of actual innocence.

Schulp, 513 U.S. at 341-42, 115 S. Ct. at 874 (Rehnquist, J., dissenting).

These standards reflect the general standard for when a habeas petitioner is entitled to an evidentiary hearing. A district court *must* hold an evidentiary hearing in a habeas proceeding (1) if the prisoner alleges facts that, if true, would entitle her to relief; and (2) the relevant facts have not yet been reliably found after a full and fair hearing. *Townsend v. Sain*, 372 U.S. 293, 312-313, 83 S. Ct. 745 757 (1963).2 Actual proof of those facts alleged in the motion is not required in order to demonstrate entitlement to a hearing. "The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege* – not prove – reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasis in original). *See Meeks v. Singletary*, 963 F.2d 316, 319 (11th Cir. 1992) ("[I]t is well-established that a habeas petitioner is entitled to an evidentiary hearing if he or she

2 This Court has held that the provisions of 28 U.S.C. § 2254(e) for obtaining an evidentiary hearing are not applicable where the petitioner is seeking a hearing based on a gateway claim of actual innocence. *See Arthur v. Allen*, 459 F.3d 1310, 1310 n.1 (11th Cir. 2006).

alleges facts that, if proved at the hearing, would entitle petitioner to relief.")

Here, the district court initially granted an evidentiary hearing on Mr. Jackson's claim of actual innocence because it concluded that he had alleged facts that, if proved, met the standard for actual innocence. It thereafter cancelled the hearing, however, after determining the credibility of Joshla Williams and the other witnesses based only on the paper record. Reasonable jurists could debate whether the district court erred in so doing.

The credibility of witnesses – and the weight their testimony should be assigned – cannot be assessed in a vacuum based on a paper record as was done by the district court here. Rather, the proper credibility determination is a fact-intensive and holistic inquiry that is guided by the same factors that traditionally have been found to be determinative of the credibility of witnesses in the eyes of a jury, including the demeanor and apparent candor of the witness, any personal interest or other reason to fabricate testimony, and any conflicts between the testimony and the totality of the evidence, including the testimony of any conflicting witnesses and non-testimonial evidence. *See, e.g., Gallego v. United States*, 174 F.3d 1196, 1198 (11th Cir. 1999) (remanding for district court to assess "internal consistency of the defendant's testimony, or his candor or demeanor on the stand" in assessing competing credibility of witnesses).

These indicia of credibility cannot be captured by and within the four corners of affidavits, transcripts, or counsel's characterization of testimony, credibility, and the weight to be assigned to each. *See Amlong & Amlong, P.A. v. Denny's, Inc.*, 500 F.3d 1230, 1248-50 (11th Cir. 2006) (to the extent findings turn on evaluations of credibility or "demeanor-intensive fact finding," those findings should not be rejected or overruled lightly as "the raw transcript of the hearing" does not capture the "nuances" of the testimony or the demeanor of the witnesses."); *Pigrenet v. Boland Mfg. Co.*, 631 F.2d 1190, 1191-92 (5th Cir. 1980) ("Normally, a proper credibility evaluation requires that the fact finder hear and observe the witness[as c]redibility is not readily discernable by one who merely reads a cold record.").[3] Consequently,

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed

this recognition of the fact-intensive nature of credibility determinations has led both the Supreme Court and the Eleventh Circuit to view ones made on a cold record skeptically.[4]

Here, the district court cancelled the scheduled evidentiary hearing despite the fact that the credibility of the State's star witness Joshla Williams was at issue. In so doing, it relied upon its reading of the "cold" transcript of her deposition and the State's characterization of her demeanor and motive in testifying — and the dispositive weight it

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down by the former Fifth Circuit before October 1, 1981.

4 *United States v. Raddatz*, 447 U.S. 667, 681 n.7 (1979) ("We assume it is unlikely" that a reviewing court would make "dispositive" "findings on credibility" "without seeing and hearing the witness or witnesses whose credibility is in question" as that could "well give rise to serious questions which we do not reach."); *United States v. Ramirez-Chilel*, 289 F.3d 744, 749 (11th Cir. 2002) (advocating deference to fact-finder's evaluations of credibility and demeanor because the fact-finder has the unique and critical opportunity to "personally observe[] the testimony[, which puts it] . . . in a better position than a reviewing court to assess the credibility of witnesses."); *Manning ex rel. Manning v. Sch. Bd. Of Hillsborough Cty., Fla.*, 244 F.3d 927, 946-47 (11th Cir. 2001) (reviewing courts that "do[ ] not personally observe the witnesses in making a subjective determination of fact" should be viewed "with skepticism"—especially if they are contrary to factfinders who have had the benefit of observing the witnesses themselves); *United States v. Marshall*, 609 F.2d 152, 155 (5th Cir. 1980) ("it would be a rare case" in which "credibility choices" could be resolved without "having had an opportunity to see and hear the witnesses testify").

accorded to it — "without seeing and hearing the witness and witnesses whose credibility is in question," *Raddatz*, 447 U.S. at 681 n.7. The lack of "personal[ ] observ[ation of] the testimony," *Ramirez-Chilel*, 289 F.3d at 749, when "making a subjective determination of fact" should be viewed "with skepticism," *Manning*, 244 F.3d at 946-47, as this is not the "rare case" in which "credibility choices" can be resolved without "having had an opportunity to see and hear the witnesses testify." *Marshall*, 609 F.2d at 155.

Moreover, credibility determinations require the crucible of cross-examination. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis. v. Alaska*, 415 U.S. 308 (1974).[5] It not only "test[s] the

5 *Accord Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) ("To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination. The Clause thus reflects a judgment, not only about the desirability of reliable evidence (a point on which there could be little dissent), but about how reliability can best be determined."). *Cf.* 3 Blackstone, Commentaries, at 373 ("This open examination of witnesses . . . is much more conducive to the clearing up of the truth"); M. Hale, History and Analysis of the Common Law of England 258 (1713) (adversarial testing "beats and bolts out the Truth much better").

witness'[s] perceptions and memory" but also provides a basis to discredit the witness by "revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand." *Id.* at 316.

In *Davis*, the Supreme Court held that because"[t]he accuracy and truthfulness of Green's testimony were key elements in the State's case against petitioner," defense counsel should have been permitted to "show the existence of possible bias and prejudice of Green, causing him to make a faulty initial identification of petitioner, which in turn could have affected his later in-court identification of petitioner." 415 U.S. at 317-18. The Supreme Court reasoned that "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place on Green's testimony which provided a crucial link in the proof . . . of petitioner's act." *Id.* (internal quotation marks and citation omitted). This was because doing so may have "afford[ed] a basis for an inference of undue pressure [from the State] because of Green's vulnerable status as a probationer, *cf. Alford v. United States*, 282 U.S. 687 (1931), as well as of

Green's possible concerns that he might be a suspect in the investigation." *Id.*

In light of these considerations, reasonable jurists could debate whether the district court erred in rejecting Mr. Jackson's allegations of actual innocence without first requiring the State's evidence in opposition to those allegations to undergo the crucible of cross-examination at an evidentiary hearing. Joshla Williams's change of heart in her deposition testimony cannot be understood without the district court viewing her demeanor and personally assessing her credibility in light of the entirety of the events in this matter. It also cannot be assessed without also hearing Mr. Jackson's cross-examination of the law enforcement officers who interviewed her thrice over a five-week-period prior to her deposition. Cross-examination may have revealed that, like the witness in *Davis*, her change in testimony may "afford a basis for an inference of undue pressure [from the State] because of [her] vulnerable status." *Davis*, 415 U.S. at 317-18.

It is an open secret that Joshla's letters and affidavits recanting her trial testimony left her open to perjury charges in state court. Indeed, the State explained to the district court that it wanted to depose Joshla Williams because:

> [C]ounsel would like to verify that Williams actually wrote the unsigned typed letter and handwritten letter that Petitioner has submitted in support of his claims. Counsel would also like to explore what details that Williams actually remembers from the day of the shooting and the events that followed that prompted her ***purportedly perjured*** sworn statement, deposition, and trial testimony.

DE 86:4 (emphasis added).

Yet the district court considered none of this, instead accepting the cold record of her deposition as the end of the matter. Reasonable jurists could debate whether the district court erred in denying an evidentiary hearing where Mr. Jackson's allegations, if true, established his claim of actual innocence, and Joshla's credibility was a key component of those allegations.

Reasonable jurists could also debate whether the district court erred in relying on the State's proffered testimony of Mr. Jackson's state court trial counsel to deny an evidentiary hearing. The State offered no affidavit or other sworn statement from counsel, yet the district court found that there was no possible cross-examination at a hearing that could in any way undermine the credibility of their testimony that Mr. Jackson "confessed" to them. DE 123:30-31 (stating "The Court has no reason to believe that Petitioner's former lawyers, as officers of the Court, would not testify consistent with what they apparently have told counsel for Responded their testimony would be."). That cannot be correct. Trial counsels' competence was called into question by Mr. Jackson's allegations of ineffective assistance, and they had reason oppose his claim of actual innocence in order to protect their own reputational interests. Moreover, trial counsel may have had other reasons to curry favor with the State that the district court's denial of an evidentiary hearing precluded Mr. Jackson from exploring. Simply put, the State's proffer cannot substitute for a court hearing where counsels' testimony is taken, their demeanor viewed, and their credibility assessed under the rigors of cross-examination.

Indeed, this Court has previously rejected the conclusion that "an interested attorney (accused of providing ineffective assistance) is automatically considered to be more credible than an interested defendant (seeking vacatur of his sentence)." *Gallego*, 174 F.3d at 1198. Moreover, this Court has held that credibility determinations cannot be based solely of the "status" of a witness as a government witness or upon the professions they perform in the case of law enforcement officials or attorneys. *Id.* Reasonable jurists could therefore debate whether the district court's erred in relying on the State's proffered testimony of Mr. Jackson's trial counsel to deny an evidentiary hearing.

Indeed, the Seventh Circuit, presented with similar facts, reached the opposite conclusion to the Court below. *See Coleman v. Hardy*, 628 F.3d 314 (7th Cir. 2011). There, petitioner was convicted after a jury trial of murder and armed robbery. *Id.* at 317. "The sole evidence in the trial against [petitioner] was the eyewitness testimony of [the victim]'s brother and stepdaughter, who were present in the home on the day of the murder" as "no forensic evidence [was] introduced at trial that tied [petitioner] to the crime." *Id.* at 316. The eyewitnesses picked the petitioner out of a police lineup as one of the two men who committed the murder and armed robbery. *Id.* at 316.

Like Mr. Jackson, the petitioner in *Coleman* filed a § 2254 petition in which he alleged a gateway claim of actually innocence in order to overcome the AEDPA time-bar, as well as a substantive claim of ineffective assistance of counsel under § 2254. *Id.* at 319-20. Specifically, he proffered the newly discovered evidence that the main eyewitness to the crime had ulterior motives in identifying him and testifying against him. *Id.* He also provided affidavits of alibi witnesses, his girlfriend and her mother who stated that he was with them the night of the crimes. *Id.* He requested an evidentiary hearing. *Id.* The district court, however, denied a hearing "because it felt it had 'the ability to make credibility determinations and no new factual findings [we]re necessary to determine [petitioner]'s ineffective assistance of counsel claims.'" *Id.* at 319.

The Seventh Circuit reversed and remanded for a hearing on the claim of actual innocence. *Id.* at 319-20. It stated:

> Because we cannot meaningfully review [petitioner]'s habeas petition without more information regarding the content of

potential witnesses' testimony, we remand to the district court for an evidentiary hearing as to his claim of actual innocence. . . .

Here, development of the new evidence presented in [petitioner]'s case, reviewed in concert with the total information available, could support his claim of procedural actual innocence. An evidentiary hearing is warranted to allow the district court a chance to evaluate the totality of this evidence. . . .

An evidentiary hearing would allow the district court to evaluate the reliability of [the witness]'s statements together with the additional evidence developed at the hearing.

And an evidentiary hearing would also allow further consideration of [the main eyewitness to the shooting]'s account and possible ulterior explanations for the crime. . . .

An evidentiary hearing would also allow evaluation of [petitioner]'s alibi witnesses . . . .

Finally, an evidentiary hearing would allow [petitioner]'s attorney the opportunity to explain his strategy considerations in not calling [petitioner's alibi witnesses] or the Wilkinses, and in not verbalizing why his client needed a severance. These are all critical factors in evaluating [petitioner's procedural] claim of innocence and, if that threshold is met, his ineffective assistance claim. . . .

An evidentiary hearing is warranted to develop this evidence.

Id. at 315, 319-22.

Like the district court in *Coleman*, the district court here made credibility determinations not only with respect to Joshla and trial counsel, but also as to *all* of Petitioner's witnesses and rebuttal witnesses without ever observing *any* of them in person, without full knowledge of how they would testify, and without knowing how they would respond to cross-examination or impeachment. Reasonable jurists could conclude, as did the Seventh Circuit in Coleman, that an evidentiary hearing is required in such circumstances. Accordingly, reasonable jurists can debate whether the district court erred in failing to hold an evidentiary hearing in Mr. Jackson's case, and a certificate of appealability is warranted.

CONCLUSION

WHEREFORE, Petitioner/Appellant, Melton Jackson, respectfully requests that this Court grant a certificate of appealability on the following question:

> Whether the district court erred in dismissing Mr. Jackson's 28 U.S.C. § 2254 habeas corpus petition as untimely without first holding an evidentiary hearing on his claim of actual innocence?

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I CERTIFY that this brief complies with the type-volume limitation and typeface requirements of FED. R. APP. P. 32(a)(7)(B), because it contains 9,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief also complies with the requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point, Century Schoolbook.

s/Janice L. Bergmann
Janice L. Bergmann
Attorney for Appellant Jackson
Dated: May 17, 2017

CERTIFICATE OF SERVICE

I HEREBY certify that on this 17th day of May, 2017, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and sent seven copies to the Clerk of the Court via third party commercial carrier for delivery within three days. I also certify that the foregoing document is being served this day via CM/ECF on Jill Diane Kramer, Esquire, Attorney General's Office, 1 S.E. 3rd Avenue, Suite 900, Miami, Florida 33131 and mailed via U.S. Mail to Melton Jackson, DC No. 448430, Hardee Correctional Institute, 6901 SR 62, Bowling Green, Florida 33834-9505.

s/Janice L. Bergmann
Janice L. Bergmann

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A - 3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No: 14-Civ-22527-COOKE/WHITE

MELTON JACKSON,

Petitioner,

vs.

JULIE JONES,

Respondent.
_______________________/

ORDER ADOPTING MAGISTRATE JUDGE'S SUPPLEMENTAL REPORT AND RECOMMENDATION AND DISMISSING COMPLAINT

THIS MATTER was referred to the Honorable Patrick A. White, United States Magistrate Judge, pursuant to 28 U.S.C. § 636(b)(1)(B), Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts, and Administrative Order 2003-19, for a ruling on all pre-trial, non-dispositive matters and for a Report and Recommendation on any dispositive matters. On September 12, 2016, Judge White issued a Report of Magistrate Judge, ECF No. 123, recommending that: (i) the Mr. Jackson's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, ECF No. 1, be dismissed as time barred; and (ii) no certificate of appealability be issued. On September 26, 2016, Petitioner filed Objections to the Supplemental Report and Recommendation, ECF No. 126. On October 14, 2016, Respondent filed a Response to Objection to the Supplemental Report and Recommendation, ECF No. 134. I have considered Judge White's Report, the relevant legal authorities, and have made a *de novo* review of the record. I find Judge White's Report clear, cogent, and compelling.

It is **ORDERED and ADJUDGED** that Judge White's Report of Magistrate Judge (ECF No. 123) is **AFFIRMED and ADOPTED**. Accordingly, Mr. Jackson's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, ECF No. 1, is **DENIED**. The Clerk is directed to **CLOSE** this case.

It is **FURTHER ORDERED and ADJUDGED** that Petitioner has not demonstrated that "jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 326 (2003); *accord Lott v. Attorney Gen., Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010) (explaining that a "petitioner need not show he will ultimately succeed on appeal" in order to warrant a certificate of appealability). Accordingly, pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, this Court **DENIES** a Certificate of Appealability in this case.

DONE and ORDERED in chambers, at Miami, Florida, this 21st day of March 2017.

Marcia G. Cooke

MARCIA G. COOKE
United States District Judge

Copies furnished to:
Patrick A. White, U.S. Magistrate Judge
Counsel of record

A - 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 14-CIV-22527-COOKE
MAGISTRATE JUDGE P.A. WHITE

MELTON JACKSON, :

Petitioner, :

v. : SUPPLEMENTAL REPORT OF MAGISTRATE JUDGE

JULIE JONES, :

Respondent. :

Introduction

Melton Jackson, who is presently confined at the South Florida Reception Center in Miami, Florida, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, attacking his convictions and sentences in case number F97-27689, entered in the Eleventh Judicial Circuit Court of Miami-Dade County.

This cause has been referred to the undersigned for consideration and report pursuant to 28 U.S.C. § 636(b)(1)(B) and Rules 8 and 10 of the Rules Governing Section 2254 Cases in the United States District Courts.

The court has before it the petition for writ of habeas corpus (DE#1), Respondent's response to an order to show cause (DE#10), Respondent's appendix of exhibits (DE#11), Respondent's second appendix in reply to Petitioner's request for production (DE#17), Petitioner's reply (DE#15), Petitioner's motion for leave to supplement the record (DE#18),[1] the state court trial transcripts (DE#21), Petitioner's counseled Response to Order Requiring Further

[1]Pursuant to this court's previous order, the documents attached to Petitioner's motion for leave to supplement the record are being considered in support of the petition (DE#19).

Briefing with appendix of exhibits (DE#33), Respondent's Reply to Petitioner's Response to Order Requiring Further Briefing with appendix of exhibits (DE#40, 41), Respondent's Notice of Filing Transcripts (DE#42), Petitioner's counseled Sur-Reply Required by Court Order and appendix of exhibits (DE#44), Petitioner's counseled Notice of Filing Petitioner's Certification (DE#75), Petitioner's counseled Status Report (DE#76), Petitioner's counseled Pretrial Narrative Statement (DE#89), Respondent's Pretrial Narrative Statement (DE#97), Respondent's Motion for Reconsideration of Order Granting Evidentiary Hearing with the deposition of Joshla Williams (DE#119), and Petitioner's counseled Opposition to Respondent's Motion for Reconsideration of Order Granting Evidentiary Hearing and Amended Witness List (DE#121).

Claims[2]

Ground One:	The State committed a Brady violation.
Ground Two:	Free-standing claim of actual innocence based on the recantation of Joshla Williams.[3]
Ground Four:[4]	Ineffective assistance of counsel in failing to conduct an adequate and reasonable pretrial investigation into

[2]As the record reflects, at the time of filing his initial petition and his additional claims, Petitioner was proceeding pro se, and his claims were somewhat repetitive and unclear. (See DE#1, 25). Therefore, the Court construed them liberally to raise the strongest possible arguments they suggest, and re-stated them as such in its Order Setting Evidentiary Hearing and Briefing Schedule. (See DE#46). At no time did Petitioner object to the Court's restatement of his claims. Indeed, in compliance with order of this Court, thereafter Petitioner filed a status report, indicating that he did not intend to raise any claims other than those that were stated to be at issue by the Court. (See DE#76).

[3]As further set forth in the Court's Order Setting Evidentiary Hearing and Briefing Schedule and as has been undisputed since the inception of this case, Petitioner also raises a "gateway" claim of actual innocence in an attempt to avoid the statute of limitations.

[4]As further set forth in this Court's Order Setting Evidentiary Hearing and Briefing Schedule, Ground Three of Petitioner's original petition is duplicative and does not raise an independent ground for relief.

Ms. Williams' mental history, in failing to inform the jury that "Kent" was a real person, and in failing to locate and interview Ms. Williams' boyfriend, Damien Labon, and in failing to present Mr. Labon's testimony at trial.

Ground Five: Cumulative error.

Procedural and Factual Background

Petitioner was charged by information with first-degree murder with a firearm, and attempted armed robbery. The victim of the murder was Justin Hayes, who sold marijuana for the "Blue Seal" gang.

In April of 1998, the case proceeded to trial (DE#21). The principal witness against Petitioner at trial was Joshla Williams (See Id., pp.340-420). Ms. Williams lived next door to a Blue Seal "drug hole," from where Hayes sold marijuana. Williams testified that, on August 18, 1997, she witnessed Petitioner ride up on a bicycle and ask Hayes for a bag. Williams further testified that Petitioner then laid his bicycle down, pulled out a gun, and fired at Hayes between two and four times.

When Ms. Williams first spoke to police on the day of the incident, she said that someone named "Kent" was the shooter (Id. at 387-88, 426). The police then continued to make contact with Ms. Williams, in an attempt to get more information about the case (Id. at 388, 428-29). After a short time, Ms. Williams eventually gave police Petitioner's name (Id. at 388, 426, 428-30). At trial, Ms. Williams' explanation was that she gave the name "Kent" because she was scared, but that was not the truth (Id. at 388).

There were no other eyewitnesses to the shooting, and the remaining case against Petitioner was circumstantial. Flossie Lee Pierre testified that she saw Petitioner riding away on a bicycle seconds after the shots were fired (Id. at 276-278). Derrick

Patterson testified that Petitioner "got" a nine millimeter pistol from him shortly before the shooting (DE#21, p.227). Hayes' body had two entrance and exit wounds from gunshots (See Id. at pp.309-339), and a nine millimeter Luger bullet was found nearby on the ground (See Id. at pp.176-78, 188-89, 215-18 & 250-25).

Petitioner was convicted and sentenced to life for the murder, and 28 years for the armed robbery. He then pursued a direct appeal, wherein he argued that there was insufficient evidence to prove premeditation and armed robbery, and that the trial court erred by refusing to instruct the jury on self-defense and by admitting a prior consistent statement by Williams (DE#11, Exh.D). Florida's Third District Court of Appeal affirmed Petitioner's convictions and sentences and, on July 1999, Petitioner's motion for rehearing was denied (Id., Exh.H).

On April 25, 2000, Petitioner filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, claiming ineffective assistance of counsel in connection with Petitioner's decision to reject a plea offer, and based on counsel's failure to object to the State's scoring of his sentencing guidelines (Id., Exh.J).[5] That motion was denied on the merits after evidentiary hearing, and the denial was affirmed on appeal (Id., Exh.K-R). On March 15, 2002, the appellate court denied Petitioner's motion to recall the mandate (Id., Exh.R).

On August 29, 2002, Petitioner filed a second 3.850 motion, claiming newly-discovered evidence that Ms. Williams had been since found psychologically incompetent to stand trial in her own pending criminal case, and also that the jury panel was not sworn prior to *voir dire* (Id., Exh.S). This 3.850 motion was denied on the basis that Petitioner's claim of newly-discovered evidence regarding Ms.

[5]The "prison mailbox rule," provides that a prisoner's documents are deemed filed at the moment the prisoner delivers them to prison authorities for forwarding to a court clerk. Houston v. Lack, 487 U.S. 266, 108 S.Ct. 2379, 101 L.Ed.2d 245 (1988).

Williams was untimely, and that his claim regarding the jury panel could have been raised previously (Id., Exh.U). That decision was also affirmed on appeal (Id., Exh.V-Y). The mandate issued on April 13, 2004 (Id., Exh.Y).

On June 21, 2004, Petitioner filed a petition for writ of mandamus, seeking records from the state attorney concerning a competency hearing of eyewitness Joshla Williams (Id., Exh.Z). That petition was denied, and the denial was affirmed on appeal (Id., Exh.AA-CC). The mandate issued on January 20, 2006 (Id., Exh.CC).

On or about December 10, 2008, Petitioner filed a third 3.850 motion (DE#18, Exh.C).[6] In that motion, Petitioner claimed that Ms. Williams had recanted her testimony (Id.). In support of this claim, Petitioner submitted an August 30, 2002 letter from his former trial counsel, Stuart Adelstein, forwarding to Petitioner an undated, unsigned letter he had received, purportedly typed by another inmate for Ms. Williams while she herself was in prison (See DE#18, Exh.C, Exhs.C-E thereto). In that letter, Ms. Williams purportedly explains that an individual named Armard Timmons, also known as "Kent," was the real shooter, and that Ms. Williams had to give the police Petitioner's name because Timmons was threatening her and her children's lives (DE#18, Exh.C, Exh.E thereto). Ms. Williams further explains that she recently learned that Timmons had shot himself sometime earlier in the previous year, and so she now felt safe coming forward (Id.).

Petitioner also submitted a hand-written letter he claimed to have received directly from Ms. Williams, recanting and apologizing to him, in support of his third 3.850 motion (DE#18, Exh.C, Exh.F

[6]Respondent purports to have filed Petitioner's third motion for post-conviction relief as Exh.DD to its appendix of exhibits. However, Exhibit DD to Respondent's response is a Motion for Postconviction Discovery that Petitioner apparently also filed. Petitioner has nevertheless filed a copy of his third motion for post-conviction relief, together with its exhibits (DE#18, Exh.C).

thereto). The envelope Petitioner submitted with the hand-written letter bore a postmark of July 15, 2008, and purported to have a return address for Ms. Williams (Id.). That letter stated that Ms. Williams was surprised to have learned upon her own release from prison that Petitioner was still incarcerated, reiterates that she identified Petitioner as the shooter because Timmons was threatening her life, and states that in 1999 Timmons killed himself playing with a gun and so she no longer feared him (Id.).

Petitioner's third 3.850 motion also claimed that the State had committed a Brady violation in failing to disclose that Ms. Williams had psychological and mental difficulties that bore on her credibility as a witness (DE#18, Exh.C). It also raised a new claim of newly-discovered evidence of witness Damien Labon, allegedly Ms. William's boyfriend who resided with her during the relevant time (Id.). In support of this claim, Petitioner submitted an affidavit, purportedly from Mr. Labon, attesting that he would have testified that Ms. Williams had serious mental issues at the time of the incident and during Petitioner's trial, and that he spoke to Ms. Williams immediately after the incident and Ms. Williams told him someone named "Kent" had done the shooting (DE#18, Exh.C, Exh.T thereto). Petitioner's motion also claimed that counsel was ineffective in failing to conduct an adequate pre-trial investigation into Ms. Williams' mental history, and in failing to locate and present to the jury the testimony of Mr. Labon (DE#18, Exh.C). Finally, Petitioner's third 3.850 motion again raised his claim of newly-discovered evidence that Ms. Williams had been found mentally incompetent to stand trial in her own criminal case (Id.).

Petitioner's third 3.850 motion was denied without an evidentiary hearing on the basis that "the allegations contained therein do not constitute legal grounds for granting the New Trial or release of the prisoner, and the motion being insufficient in substance to support the relief prayed" (DE#11, Exh.FF). Petitioner appealed and, while the appeal was pending, Petitioner filed a motion to relinquish jurisdiction (DE#17, Exh.12). The basis for that motion was that Petitioner had obtained a June 24, 2009 affidavit from Ms. Williams recanting her testimony and that, although not required under state law to have been filed with his 3.850 motion, Petitioner wanted the trial court to consider it (Id.). In the affidavit, Ms. Williams reiterates her claim that Armard Timmons (A.K.A. "Kent") was the real shooter and explains again why she he lied, and essentially mirrors the statements contained in the previous letters she allegedly sent to Petitioner (See DE#17, Exh.12, Exh.A thereto). Petitioner's motion to relinquish jurisdiction was denied (Id., Exh. 13), and the trial court's decision denying Petitioner's third 3.850 motion was affirmed on appeal (DE#11, Exh.GG-II). The mandate issued on August 24, 2009 (Id., Exh.II).

On December 4, 2013, Petitioner filed an original proceeding in Florida's Third District Court of Appeal seeking post-conviction relief or, in the alternative, a writ of habeas corpus (Id., Exh.JJ). That petition invoked the court's jurisdiction to correct a manifest injustice and to discharge Petitioner based on his right to due process, and claimed actual innocence (Id.). Petitioner also challenged the state trial court's denial of his second 3.850 motion on the basis of untimeliness, and of his third 3.850 motion without an evidentiary hearing (Id.). The petition was denied on January 8, 2014, and Petitioner's motion for rehearing was denied on February 7, 2014 (Id., Exh.KK).

On May 20, 2014, Petitioner filed a second petition seeking post-conviction relief or, in the alternative, a writ of habeas corpus, in the state court of appeal (Id., Exh.LL). That petition was essentially a modified re-submission of the first, and was denied on May 28, 2014 (Id., Exh.MM-NN).

On July 2, 2014, Petitioner then filed the instant federal petition for writ of habeas corpus (DE#1). Petitioner conceded that his federal petition was time barred, but argued that he was entitled to have his claims heard on the merits because he was actually innocent. In support of this claim, Petitioner relied again on the letters he allegedly received from Ms. Williams, as well on Ms. Williams 2009 affidavit and the affidavit of Mr. Labon (See DE#1, Grounds Two and Three).

On June 26, 2015, the undersigned issued a report recommending that the instant federal petitioner be dismissed as time barred (DE#22). Petitioner then filed a motion for evidentiary hearing and a motion to amend to supplement his claims (DE#23, 25, 26), and the case was re-referred to the undersigned for consideration of those motions (DE#28). The undersigned then vacated the original report and recommendation, appointed the Federal Public Defender to represent Petitioner, and ordered the parties to brief the pertinent issues (See, generally, DE#29, 37, 39, 43). The court also conditionally granted Petitioner's motion for leave to amend, subject to the statute of limitations, and alternatively denied Petitioner's motion for evidentiary hearing, noting that it would *sua sponte* set the matter if upon further review of the record it determined that an evidentiary hearing was warranted (DE#38, 45).

In response to the court's orders and in the course of the briefings, counsel for Petitioner proffered a variety of additional evidence. Significantly, counsel proffered October 2015 affidavits from Ms. Williams, wherein she attests that she authored the 2002 and 2008 letters submitted by Petitioner in support of his claims, and that the contents of those letters are true (DE#33, Exh.5). Counsel also submitted documents tending to establish that Armad Timmons was a real person with a criminal history including charges for possession of cocaine and marijuana and possession of a firearm on school grounds and resisting an officer (See DE#44, Exhs.2, 3), that Petitioner fit the same physical description as Timmons (See Id. at Exhs.4, 6), and that Timmons did in fact kill himself during the relevant time (See Id. at Exh.1).

Based on this showing, the undersigned issued an Order Setting Evidentiary Hearing and Briefing Schedule (DE#46). The Court reasoned that district courts have discretion to order an evidentiary hearing to assist in the development of evidence of actual innocence sufficient to meet the Schulp threshold,[7] and that nothing in Pinholster precludes an evidentiary hearing on the procedural issue of whether a habeas petitioner has established a credible claim of actual innocence. (Id., p.6).[8] However, due to the overlapping nature of the evidence on Petitioner's gateway claim of actual innocence, the Court concluded that the interests of justice warranted a consolidated evidentiary hearing on Petitioner's gateway claim and his underlying claims under the unusual facts and circumstances of this case. (See, generally, Id.). As the Court explained, the Court would only consider additional evidence that was not before the State court on Petitioner's gateway claim since, as set forth above, nothing in Pinholster bars consideration of such evidence on gateway claims of

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[7]In Schlup v. Delo, the Supreme Court classified this use of an actual innocence claim as "procedural, rather than substantive," characterizing the claim as "a *gateway* through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 513 U.S. 298, 314-15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995). As set forth in the undersigned's original report recommending that the instant petition be dismissed as time-barred and as set forth again *infra*, this well-settled standard requires the petitioner to "demonstrate that more likely than not, in light of the new evidence, ... any reasonable juror would have reasonable doubt [of petitioner's guilt]." House v. Bell, 547 U.S. 518, 538 555, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).

[8]Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011) limits the evidence that the district court may consider in determining whether the state court acted unreasonably in the first instance. In Pinholster, the Supreme Court held that, even in a case in which a habeas petitioner can satisfy the requirements of 28 U.S.C. § 2254(e)(2) with respect to obtaining an evidentiary hearing in federal court, the § 2254(d)(1) review by the federal court nevertheless must be based on the state court record. See 131 S.Ct. at 1400; see also Landers v. Warden, 776 F.3d 1288, 1295 (11th Cir.2015).

actual innocence. With regard to Petitioner's underlying substantive claims, the Court explained that it would consider evidence that was not before the State court if and only if the Court concluded that Petitioner met the Schlup standard on his gateway claim of actual innocence to avoid the limitations period, and if and only if the Court further concluded based solely on the evidence that was before the State court that the State court's resolution of Petitioner's underlying substantive claims was unreasonable under 28 U.S.C. § 2254(d).[9]

Respondent appealed to the District Court, which affirmed this Court's order setting the evidentiary hearing, and denied Respondent's motion for reconsideration. (See DE#51, 56, 60, 73). Thereafter, the parties continued their investigations. In the course of those proceedings, Respondent sought leave of court to depose Ms. Williams, which was granted. (DE#86, 87). And as the record reflects, after much difficulty, the deposition was finally scheduled for August 26, 2016, at 1:30 p.m. (See DE#108).

On August 15, 2016, in accordance with the Court's most recent scheduling order, counsel for Petitioner filed Petitioner's Pretrial Narrative Statement. (DE#89). Petitioner's list of exhibits includes for the most part exhibits that counsel for Petitioner has previously made part of the record. (Id.). With regard to witnesses, counsel for Petitioner lists Ms. Williams, and states that Ms. Williams would testify consistent with the letters and affidavit that she misidentified Petitioner as the perpetrator at trial because the real shooter, Ahmad Timmons (a/k/a "Kent), had

[9]As also set forth in this Court's Order Setting Evidentiary Hearing and Briefing Schedule, a prisoner in state custody may not be granted a writ of habeas corpus for any claim that was adjudicated on the merits in state court unless the state court's decision was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented" to the State court. 28 U.S.C. § 2254(d)(1).

threatened her and her family. (Id.). It also lists Mr. Labon,[10] and individual named Chantel McInnis, who apparently would testify that she was friends with Ahmad Timmons, who was called "Kent" by her and by many in her neighborhood, and that she was at his house when he shot himself. (Id.). Finally, Petitioner lists an investigator from the Federal Public Defender's office, as well as one of Petitioner's former attorneys, regarding their respective investigative efforts. (Id.).

On August 22, 2016, also in accordance with the Court's most recent scheduling order, counsel for Respondent then filed its pretrial narrative statement. (DE#97). Respondent's witness list in its pretrial narrative statement includes two law-enforcement officers who would testify that, when they asked Ms. Williams why she changed her story, she stated that Petitioner was the murderer but that Petitioner's family kept coming to her home to pressure her to say that Petitioner was innocent. (Id.). It also lists two of Petitioner's former attorneys, who would testify that Petitioner told them he was guilty of the murder but was certain that Ms. Williams would never testify against him and that, therefore, he did not want to accept a 13-year plea bargain and instead wanted an immediate trial. (Id.).

Shortly thereafter counsel for Petitioner filed a Motion to Continue the Deposition of Joshla Williams and to Continue Evidentiary Hearing or, in the Alternative, to Strike Witnesses 4

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[10]Mr. Labon apparently would testify that: 1) he had a romantic relationship with Ms. Williams during the relevant time, and that she displayed erratic behavior and psychological problems - including hearing voices and night terrors; 2) he spoke with Ms. Williams immediately after the shooting, and she told him that someone named "Kent" had done the shooting. Mr. Labon knew "Kent" from the neighborhood, and "Kent" was not Petitioner; 3) he was interviewed by police immediately after the shooting, but was never contacted again after that by law enforcement, Petitioner's trial counsel, or anyone working on behalf of Petitioner's trial counsel.

and 5 (DE#100),[11] as well as an Emergency Motion to Continue Deposition and Evidentiary Hearing (DE#112). The motions were predicated upon having recently learned about Ms. Williams' alleged statements recanting her recantation to the two law-enforcement officers, as well as the existence of a videotape of those encounters. (Id.). The Court denied Petitioner's motions to continue Ms. Williams' deposition, but did grant Petitioner a continuance of the evidentiary hearing, which was accordingly set to be held during the weeks of September 12 and 19, 2016. (DE#108, 115, 116). Ms. Williams' deposition thus proceeded on August 26, 2016. (See DE#119-1).

Ms. Williams' deposition testimony can be summarized as follows:

Ms. Williams first testified that she told the truth when she testified in court against Petitioner. (Id. at 7). She then testified that, after the trial, "a lot of people came and talked to me, saying that I need to help him get out of jail . . . But everybody's, like, on the street pressuring me to do this and that . . I was doing it because I was afraid . . ." (Id. at 8). Ms. Williams then became very emotional, and so counsel for Respondent allowed her to take a break. (Id. at 8-9).

When the deposition resumed, counsel for Respondent proceeded with some "really pointed questions." (Id. at 9). Counsel for Respondent first asked Ms. Williams who killed the victim, and she unequivocally stated "Melton." (Id.). Ms. Williams also testified that Detective Stroze was nice to her, and never told her what say. (Id. a 10-11). She also said that she knew an individual with the street name of "Kent," but that he did not do this murder. (Id. at 12). She also testified that, immediately after witnessing

[11]Witnesses 4 and 5 are the two officers who would testify that Ms. Williams told them that Petitioner was the murderer, but that she changed her story because Petitioner's family had pressured her.

Petitioner do the shooting, he turned around while riding off on his bike and told her not to call out his name. (Id. at 13). Ms. Williams also testified that she initially told police that the shooter was "Kent" (as opposed to "Melt") because she was scared. (Id.).

With regard to who asked her to change her testimony, Ms. Williams said that she didn't really know their names, but that she would be at the store buying things and different people would be saying things to her:

> . . . making me scared of them . . . because they pressuring me to do this and do that . . . And 100 years later, and they still . . . coming to me with this and that . . . And like everywhere I go, . . . they're trying to pressure me because . . . they want to get him out of jail . . . Every time I go to the store, they're, like, you gonna help Mel, you gonna help Mel. And I'm like, leave me alone, leave me alone . . . But like I said, I'm here to tell the truth, even though I was pressured to do things, you know.

(Id. at 16-21).

Counsel for Respondent then asked Ms. Williams about some of the things that she was asked to prepare or sign. (Id. at 21). With regard to the first type-written letter that was forwarded to counsel for Petitioner, Ms. Williams testified that she "was so pressured into this, even in jail, even through prison, you know. There's people sending me letters and letters and stuff like this, so I was kind of really afraid . . . But today, I'm not gonna be pressured into that . . ." (Id. at 27). Ms. William further testified that her statement therein, that "Kent" had come to her house and told her to pin the murder on Petitioner, was a lie. (Id. at 28).

Counsel for Respondent then showed Ms. Williams her hand-written letter, and she immediately responded without even being questioned "All of this is made up." (Id. at 30). She then testified that she wrote it because people were pressuring her, and that she was scared, so she "just did it." (Id.). She further testified that she never saw Petitioner's sister in a store after she was released, as it stated in her letter. (Id. at 31). She then re-iterated that she had told the truth in court. (Id.). She then again stated that she initially told law enforcement that "Kent" did it because she was scared, and because "they was pressuring me on the streets . . . by, why you gonna tell on Mel, you gonna tel on Mel. But he did it. Why won't I say it. But I was pressured, different people kept coming by, knocking on the door and coming by and questioning me and Flossie . . ." (Id. at 32-33). Ms. Williams further testified that she signed the letter recanting her testimony because she was told to sign it. (Id. at 37).

With regard to her 2009 affidavit, Ms. Williams testified that she didn't type it, but that she did sign it. (Id. at 39). She further testified that she never showed her driver's license to anyone, and that she did not know the person who notarized it. (Id. at 39-40). She also testified that she would not read the things that she was brought to sign carefully; rather, she would just sign them. (Id. at 40-41).

When shown a photo of "Kent," Ms. Williams immediately denied that he was the shooter. (Id. at 42). With regard to the actions of Petitioner's family pressuring her, Ms. Williams testified that the "younger ones . . . in their late 30's or early 40's. You know like every time an investigation or somebody come out to my house try to talk to me . . . They see me going to the store or something, they will, like throw things at me . . . But they keep saying, 'the State is saying,' you know." (Id. at 44).

With regard to why Ms. Williams was now admitting that her recantations were false, significantly, Ms. Williams stated spontaneously:

> Because like I said, I raise my right hand again and tell the truth that, yes, he did -- Melton Jackson did do that crime, you know. And I feel like today, as I come here now and just say what I need to say and the truth that, you know, God will free me from this situation, like, mentally, you know, I don't want to have nothing to do with, something that I know I didn't have nothing to do with, you know.
>
> And everybody pressuring me on the street to do this and do that and do this and do that . . .
>
> Even like now, I raise my right hand again and tell the truth, I know they're gonna say, you know, when they see that I did come and tell the truth, they're gonna be, like, you know, saying this stuff. But they don't, like, threaten me where I'm gonna kill you, I'm gonna do this, I'm gonna do that, you know what I'm saying.
>
> It's not that, but still, you know, you never know what, you know. But they're the kind of family, like, I got a baby from, their cousin, like, they're not really mad at me, the old ones. It's the young ones, like, pressuring me, you know, but not threatening me.

(Id. at 46-47).

Counsel for Respondent also asked Ms. Williams about the October 2015 affidavits she recently executed, attesting that she authored the 2002 and 2008 letters submitted by Petitioner in support of his claims, and that the contents of those letters are true. In response, Ms. Williams testified that "Yeah, I signed them but I ain't really, like, read them. I was just hurrying up to let you know to let you know everybody leave me alone. But half of that, some of that, I don't even know who typed it up and who did this, and that's true." (Id. at 56).

At the conclusion of the deposition, when asked if there was anything else she would like to say, Ms. Williams responded:

> Nothing but I'm just here today to say that I raised my hand and I know I told the truth . . .
>
> So that's why, you know, I came to you and the public defender, not for the State, you know, to tell the

> truth and nothing but the truth, you know. And now I feel, like, relieved, you know, relieved.
>
> And I also told them, and I see them to the store, like, a couple of his cousins hang around the store, I told them, and I even told Andrew, who's my baby daddy, I'm not going to go up to the deposition and make up no stories. So I'm telling you now, leave me alone with the situation, you know, and they did, you know.

(Id. at 58-60).

Finally, when asked what she was going to say to the Judge at the evidentiary hearing, Ms. Williams responded "[t]hat all the people pressured me into doing it and I'm not gonna uphold it anymore. I can't." (Id. at 61).

On September 6, 2016, after Ms. Williams's deposition, Respondent filed a Motion for Reconsideration of this Court's Order Granting Evidentiary Hearing. (DE#119). The basis of the motion is that, because Ms. Williams' has now testified under oath that she told the truth at trial and that the letters and affidavit Petitioner has submitted are fabricated and that Petitioner's family has been pressuring her to get Petitioner out of prison, that Petitioner will not be able to present any credible evidence of actual innocence. (Id.). As such, Respondent argues, an evidentiary hearing is no longer warranted, and all of Petitioner's claims should be dismissed as time-barred. (Id.).

Petitioner, for his part, has filed a counseled Opposition to Respondent's Motion for Reconsideration, as well as an Amended Witness list. (DE#121). The basis of Petitioner's opposition is that an evidentiary hearing is still warranted to assess, among other things, Ms. Williams' credibility. (Id.). Petitioner's amended witness list lists another investigator with the Federal Public Defender's Office, the two law-enforcement officers to whom Ms. Williams recanted, several of Petitioner's family members, a former girlfriend of Petitioner, and another one of Petitioner's attorneys in the underlying case.[12]

Finally, on September 7, 2016, this Court entered a paperless order cancelling the evidentiary hearing in this matter scheduled for the weeks of September 12 and 19, 2016, and indicating that Respondent's Motion for Reconsideration of Order Granting Evidentiary Hearing would be resolved by separate order or report of this Court. (DE#122). This supplemental report now follows.

Discussion

Standard of Review and for Evidentiary Hearings on Actual Innocence Gateway Claims[13]

The Supreme Court has held that claims of actual innocence can enable a habeas petitioner to clear various procedural hurdles, including the statute of limitations. See e.g. McQuiggin v. Perkins, ___ U.S. __, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013). In Schlup v. Delo, the Court classified this use of an actual innocence claim as "procedural, rather than substantive," characterizing the claim as "a *gateway* through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 513 U.S. 298, 314-15, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995)(emphasis added)(internal quotations omitted).

District courts have discretion to order an evidentiary hearing to assist in the development of evidence of actual innocence sufficient to meet the Schulp threshold. See Id. at 331-

[12]The two attorneys listed in Respondent's Pretrial Narrative Statement are the same two listed in Petitioner's Pretrial Narrative Statement, and now Petitioner's Amended Witness list; that is, Mr. Adelstein and Mr. Matters, who are law partners.

[13]Because Respondent asks this Court to reconsider its prior order setting the evidentiary hearing, it is necessary to discuss the standard for setting one.

32 (noting that application of the actual innocence standard arose in the context of a request for an evidentiary hearing and remanding in light of the "fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses if it deems that course advisable"). Nothing in Pinholster supra, precludes an evidentiary hearing on the procedural issue of whether a habeas petitioner has established a credible gateway claim of actual innocence. See Pettus-Brown v. Warden, Corr. Reception Ctr., No. 1:14-CV-292, 2015 WL 422557, at *1 (S.D. Ohio Feb. 2, 2015)("A claim of actual innocence offered to excuse procedural default is not a substantive claim for habeas corpus relief, but a 'gateway' claim and therefore not subject to the Pinholster restrictions."); Washington v. Beard, Civ. No. 07-3462, 2012 WL 1033526 (E.D.Pa. Mar.28, 2012) (finding that Pinholster does not bar factual discovery on an actual innocence claim); Rivas v. Fischer, 687 F.3d 514, 530-31 (2d Cir.2012)(discussing with approval an evidentiary hearing on a petitioner's actual innocence claim).

There appears to be a dearth of authority regarding the standard that a habeas petitioner should meet in order to justify a federal court exercising its discretion to set an evidentiary hearing on a gateway claim of actual innocence. Federal courts routinely do so, but infrequently cite any controlling standard. See, e.g., Pettus-Brown v. Warden, Corr. Reception Ctr., No. 1:14-CV-292, 2015 WL 422557, at *1 (S.D. Ohio Feb. 2, 2015)(stating that "[t]his Court's practice has been to require a statement of the actual innocence claim in sufficient detail for the Court to understand it and the Respondent to defend"); Bowers v. Jones, No. 2:09-CV-01133-RDP, 2012 WL 1951968, at *5 (N.D. Ala. Apr. 27, 2012), report and recommendation adopted, No. 2:09-CV-01133-RDP, 2012 WL 1952443 (N.D. Ala. May 30, 2012) (stating that, because petitioner's claimed that the sole witness to the killing had recanted her testimony and presented corroborating evidence, "the court scheduled an evidentiary hearing to determine if petitioner indeed could make a threshold showing of actual innocence"). The Court twice ordered counsel for Petitioner to brief this issue, to no avail. (See DE#29, 29, 43, 44). Respondent, for its part, never briefed the issue at all. (See DE#10, 40). Rather, Respondent simply urged the Court to bypass the limitations issue altogether in the interests of judicial economy, and proceeded to respond on the merits. (Id., pp.6-7). The Court thus conducted its own research, and concluded that an evidentiary hearing on a gateway claim of actual innocence is warranted when there is substantial support for the Petitioner's evidence. (DE#46, p.7). Specifically, the Court found the reasoning of Lopez v. Miller, 906 F.Supp.2d 42, 54 (E.D.N.Y. 2012) persuasive, wherein the court had granted a consolidated evidentiary hearing where, among other things, the petitioner had submitted a recantation of the prosecution's key witness testimony and sworn statements from two alibi witnesses in support of his Schlup claim of actual innocence. The Court further concluded that, in this case, at that time, there was substantial support for Petitioner's gateway claim of actual innocence. In addition, the Court concluded that, at that time, an evidentiary hearing was necessary to determine the reliability of Ms. Williams' and Mr. Labon's statements and to assess their credibility to, among other things, resolve Petitioner's actual-innocence gateway claim.

Respondent appealed to the Court's order to the District Court, arguing for the first time an issue that it had never briefed; that is, the standard for an evidentiary hearing on a gateway claim of actual innocence. (See DE#51). Specifically, Respondent argued that this Court had concluded that an evidentiary hearing may be granted to establish a *prima facie* showing of actual innocence, while it was Respondent's position that the relevant authorities require that a *prima facie* showing must first be made before the evidentiary hearing may be granted.

Black's Law Dictionary, Rev. 6th Ed., defines *prima facie* as follows:

> At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

See also Howard v. BP Oil Co., Inc., 32 F.3d 520, 524 (11th Cir.1994) (characterizing the requirements of demonstrating a *prima facie* case as "minimal"). The term "substantial," on the other hand, is defined by Black's as:

> Of real worth and importance; of considerable value; valuable . . . Something worthwhile as distinguished from something without value or merely nominal . . . Synonymous with material.

See also Chai v. Dep't of State, 466 F.3d 125, 129 (D.C. Cir. 2006)(equating "substantial support" with the "substantial evidence" standard, which requires "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion")(internal quotations and citations omitted). As such, a substantial showing is by-definition a higher showing than a *prima facie* showing. Therefore, the Court need not decide whether an evidentiary hearing on a gateway claim of actual innocence is warranted only when there is substantial support for the Petitioner's evidence, or whether the lower *prima facie* standard that Respondent urges applies. That is because, as set forth in this Court's Order Setting Evidentiary Hearing and Briefing Schedule, the Court concluded that, at the time the Court set this matter for evidentiary hearing, there was substantial support for

Petitioner's claim of actual innocence.[14] Therefore, the Court by-definition also concluded that Petitioner had made a *prima facie* showing since, as illustrated above, that is a lower standard. Moreover, demonstrated *infra*, assuming the lower *prima facie* standard that Respondent urges does apply, even that showing has been totally eviscerated by Ms. Williams' recent deposition testimony.

Motion for Reconsideration

An interlocutory order entered by a trial court may be revisited at any time before the entry of final judgment adjudicating all claims. Fed. R. Civ. P. 54(b); Harper v. Lawrence County, Ala., 592 F.3d 1227, 1231-32 (11th Cir. 2010); see also Latin American Music Co. Inc. v. Media Power Group, Inc., 705 F.3d 34, 40 (1st Cir. 2013) (noting that the doctrine of law of the case does not apply to interlocutory orders which remain open to reconsideration by the court within its discretion); American Canoe Ass'n v. Murphy Farms, Inc., 326 F.3d 505, 514-15 (4th Cir. 2003) (same); City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper, 254 F.3d 882, 886-87 (9th Cir. 2001) (holding that a district court's power to rescind an interlocutory order is not only grounded in rules of procedure but also derived from the court's common law powers). The strict requirements of Fed. R. Civ. P. 60(b) do not apply to interlocutory orders and, in fact, the authority to reconsider an interlocutory order is entirely within the discretion of the trial court. Bon Air Hotel, Inc. v. Time,

[14]Respondent's suggestion that the Court concluded that an evidentiary hearing was warranted to allow Petitioner to establish a *prima facie* case of actual innocence is without merti. (See DE#46, p.7 (concluding that an evidentiary hearing on an actual innocence gateway claim "is warranted when there is substantial support for the Petitioner's evidence, [and that] in this case, there is substantial support for Petitioner's claim of actual innocence.")

Inc., 426 F.2d 858, 862 (5th Cir. 1970),[15] *abrogated on other grounds by* Little v. Liquid Air Corp., 37 F.3d 1069 (5th Cir. 1994); see also Zimzores v. Veterans Admin., 778 F.2d 264, 266-67 (5th Cir. 1985).

A motion for reconsideration seeks to invoke a district court's authority to modify or vacate its prior orders. Brogdon v. Nat'l Healthcare Corp., 103 F.Supp. 1322, 1338 (N.D.Ga.2000). "Courts have distilled three major grounds justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence; and (3) the need to correct clear error or manifest injustice." Instituto de Prevision Militar v. Lehman Bros., Inc., 485 F.Supp.2d 1340, 1343 (S.D.Fla.2007) (*quoting* Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294, 295 (M.D.Fla.1993)) (internal quotation marks omitted). Reconsideration is granted only in extraordinary circumstances and is "committed to the sound discretion of the district judge." Tristar Lodging, Inc. v. Arch Speciality Ins. Co., 434 F.Supp.2d 1286, 1301 (M.D.Fla.2006) (*quoting* Am. Home Assur. Co. v. Glenn Estess & Assocs., Inc., 763 F.2d 1237, 1238-39 (11th Cir.1985)) (internal quotation marks omitted).

Here, the Court concludes that the third circumstance justifying reconsideration exists; that is, the need to correct clear error or manifest injustice. More specifically, the Court concludes that reconsideration is necessary to correct manifest injustice, because the record as it stands now supports the strong inference that Petitioner has perpetrated a fraud upon this Court. Specifically, as set forth above, Ms. Williams has now, under oath, recanted her previous recantations. Moreover, as further set forth above, Ms. Williams has further testified under oath that, if she is called to testify in the evidentiary hearing in this matter, she

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[15] Cf. Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1207 (11th Cir. 1981).

will testify that Petitioner committed the murder at issue, and that Petitioner's family have been pressuring her to get Petitioner out of prison.

Gateway Claims of Actual Innocence[16]

The Supreme Court has repeatedly held that claims of actual innocence can enable a habeas petitioner to clear various procedural hurdles. See, e.g., McQuiggin v. Perkins, ___ U.S. __, 133 S.Ct. 1924, 185 L.Ed.2d 1019 (2013)(finding an actual innocence exception to the AEDPA's statute of limitations); McCleskey v. Zant, 499 U.S. 467, 495, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (finding an actual innocence exception to the bar against second petitions); Kuhlmann v. Wilson, 477 U.S. 436, 454, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986)(finding an actual innocence exception to the bar against successive petitions); Murray v. Carrier, 477 U.S. 478, 495-96, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) (finding an actual innocence exception to procedurally defaulted claims and petitions). In Murray, the Court stated "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default" to prevent a "fundamental miscarriage of justice." 477 U.S. at 495-96. In Schlup v. Delo, the Court classified this use of an actual innocence claim as "procedural, rather than substantive," characterizing the claim as "a *gateway* through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." 513 U.S. 298, 314-15, 115 S.Ct.

[16]As the record reflects, Petitioner has always conceded the instant federal petition is filed "well outside the one-year limitations period" (DE#1). Petitioner argues that the court should nevertheless consider his claims on the merits because he is actually innocent, and that the failure to consider his underlying claims will therefore result in a fundamental miscarriage of justice (DE#1, 15).

851, 130 L.Ed.2d 808 (1995)(emphasis added)(internal quotations omitted).

The standard for avoiding a procedural bar pursuant to Schlup is exceedingly high. In order to pass through the gateway, the petitioner must present "evidence of innocence so strong that a court cannot have confidence in the outcome of the trial." Schlup, 513 U.S. at 316. Specifically, the Schlup standard requires the petitioner to "demonstrate that more likely than not, in light of the new evidence, ... any reasonable juror would have reasonable doubt [of petitioner's guilt]." House v. Bell, 547 U.S. 518, 538 555, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006). To be credible, a claim of actual innocence requires the petitioner to "support his allegations of constitutional error with new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial." Schlup, 513 U.S. at 324.

Here, Petitioner's claim of actual innocence hinges upon the alleged recantation of eyewitness Joshla Williams. As set forth above, at the time that the Court set this matter for evidentiary hearing, there was evidence in the record that tended to corroborate Ms. Williams' claims. Specifically, at the time the Court set this matter for evidentiary hearing, Ms. Williams had signed affidavits affirming the contents of her previous letters, and there was evidence tending to establish that Armad Timmons was a real person with a criminal history, that Petitioner fit the same physical description as Timmons, and that Timmons did in fact kill himself during the relevant time. The evidence still tends to establish that there was an individual named Timmons with a criminal history, and that he apparently died from a gunshot wound during the relevant time. Moreover, Petitioner apparently has a witness that will testify that Timmons was also known as "Kent," and that he did in fact shoot himself during the relevant time.

The Court does not doubt that most of this is true.[17] The problem for Petitioner, however, is that even taking this as true, Petitioner will never be able to establish, based on the totality of the evidence proffered, that it is more likely than not that any reasonable juror would have reasonable doubt of Petitioner's guilt. See House, 547 U.S. at 538. Specifically, as set forth above, to be credible, a claim of actual innocence requires the petitioner to support his allegations with new reliable evidence that was not presented at trial. Schlup, 513 U.S. at 324. As further set forth above, Petitioner's claim of actual innocence hinges on Joshla Williams' recantation. But at this point Joshlua Williams has demonstrated that she is totally unreliable, and the Court cannot conceive of any measure of rehabilitation that could ever make her testimony sufficiently reliable to support a gateway claim of actual innocence.

As set forth in the Court's initial report, it is well-settled that "recantations are viewed with extreme suspicion by the courts." See United States v. Santiago, 837 F.2d 1545, 1550 (11th Cir. 1988)(*citing* Newman v. United States, 238 F.2d 861, 862 (5th Cir. 1956). This case illustrates why. Ms. Williams' recantations conveniently began after Mr. Timmons died. Moreover, Ms. Williams

[17] The Supreme Court in Schlup stated that, in assessing the adequacy of petitioner's showing, the district court is not bound by the rules of admissibility that would govern at trial. 513 U.S. at 327-328. Otherwise, the Rules of Evidence would have to be declared unconstitutional to the extent that they prevent a petitioner from establishing a claim of actual innocence, since "the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973); see also Liebman, Federal Habeas Corpus Practice and Procedure, § 19.5, at 532 (2d ed.1994) (stating that Rule 7 of the Habeas Rules contemplates a relaxed application of the hearsay, best evidence, authentication, and other evidentiary rules under the Federal Rules of Evidence). But regardless, the documents establishing the facts relating to Timmons for the most part fall within various firmly rooted exceptions to the hearsay rule. (See DE#110). As such, they have inherent indicia of reliability. See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980), *abrogated on other grounds by* Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

had a romantic relationship with Petitioner's cousin resulting in the birth of children, effectively making her to some extent a part of Petitioner's extended family. And as cannot be emphasized enough, Ms. Williams has now admitted under oath that all of the documents were fabricated, and that she was pressured by Petitioner's family to help get Petitioner out of prison. This, coupled with the suspect nature of recantations to begin with, undermines any possible reliability of Petitioner's claim of actual innocence. See McQuiggin, 133 S.Ct. at 1935-36 (courts may consider how the likely credibility of a petitioner's affiants bears on the probable reliability of evidence proffered to show actual innocence).

In addition, as also set forth in the undersigned's initial report, Ms. Williams' recantation attempts to impeach Flossie Pierre, who also testified against Petitioner at trial. Specifically, Williams' version of the events in the letters and 2009 affidavit, that she now denies authoring, claims that Ms. Pierre knew that Petitioner was not the real shooter, and that Ms. Pierre conspired with Ms. Williams to incriminate Petitioner. However, Ms. Pierre has since also conveniently died. See McQuiggin, 133 S. Ct. at 1936 (the State fears that a prisoner might "lie in wait and use stale evidence to collaterally attack his conviction ... when {a} witness has died and cannot appear at a hearing to rebut new evidence" . . . The timing of such a petition, however, should seriously undermine the credibility of the actual-innocence claim.").

Finally, as also set forth in the undersigned's initial report, there was circumstantial evidence linking Petitioner to the crime. Specifically, there was evidence that Petitioner had obtained a nine millimeter pistol shortly before the incident (DE#21, p.227), and that a nine millimeter Luger bullet was found on the ground near the victim's body (See Id. at pp.176-78, 188-89, 215-18 & 250-25).

In sum, when the foregoing factors are considered together, Petitioner fails to present anything that would undermine the confidence in the outcome of his trial. As such, he cannot meet the Schlup standard to avoid the time bar. See McQuiggin, 133 S.Ct. at 1933 ("The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows it is more likely than not that no reasonable juror would have convicted [the petitioner].")(*citing* Schlup, 513 U.S., at 329, 115 S.Ct. 851); Schlup, 513 U.S. at 316 (a habeas petitioner must present evidence of innocence so strong that a court cannot have confidence in the outcome of the trial in order to pass through the gateway and avoid a procedural bar).

Petitioner's Arguments

Petitioner first argues that Ms. Williams' recent deposition testimony recanting her recantation and attesting that she wrote the letters and signed the affidavit because Petitioner's family pressured her conflicts with her trial testimony, the letters and affidavits themselves, and "her statements to Petitioner's other witnesses from 1997-2016." (DE#121, p.1). Petitioner further urges that the Court needs an opportunity to observe Ms. Williams' demeanor to assess her credibility, as well as that of Petitioner's rebuttal witnesses. (Id. at 2).

Petitioner's argument that Ms. Williams' recent deposition testimony conflicts with so many of her previous statements cuts against Petitioner, not in his favor. Specifically, it further demonstrates that Ms. Williams is totally unreliable as a witness. Indeed, who knows what Ms. Williams might say next. What if Ms. Williams comes to the evidentiary hearing now testifies that what she testified to in her deposition was not true? At that point she would be testifying that she lied when she testified that she lied about lying at trial. But claims of actual innocence must be supported by "new ***reliable*** evidence . . . ." Schlup, 513 U.S. at 324 (emphasis added).

Petitioner is conspicuously vague about Ms. Williams' "statements to Petitioner's other witnesses from 1997-2016," and lists several family members whose proffered testimony is equally vague, indicating only that they will testify regarding their involvement with Petitioner's case and "any statements or interactions with Ms. Williams" regarding Petitioner's case. Presumably these witnesses will deny pressuring Ms. Williams to help get Petitioner out of prison. But even assuming this and also that Ms. Williams "statements to Petitioner's other witnesses from 1997-2016" were consistent with her recantations in the letters and affidavit, and further assuming that the Court finds these rebuttal witnesses credible, then what would this support? The conclusion that Ms. Williams is now lying about having lied in her recantations?[18] And then what? Deduce therefrom that what Ms. Williams said in the letters and affidavit that she now claims were fabricated by Petitioner's family is true? Simply stated, this is not the type of showing that claims of actual innocence are made of.

Petitioner also places great weight on the fact that Ms. Williams initially told law enforcement that "Kent" did it, and further emphasizes that Ms. Williams apparently also told Mr. Labon on the day of the shooting that "Kent" did it. However, the fact that Ms. Williams initially told this to law enforcement is nothing new. Rather, it is undisputed. And Ms. Williams' recent deposition testimony is consistent with her statements at the time

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[18]Indeed, Petitioner urges this Court to hold an evidentiary hearing to determine whether Ms. Williams' "most recent change in testimony is accurate and whether her impetus for doing so is reliable and credible." (DE#121, p.3).

of trial in this regard. Specifically, Ms. Williams recently testified, as she maintained at the time of trial, that she originally told law enforcement that "Kent" did it because she was afraid and did not want to get involved.

With regard to Ms. Williams' also having told Mr. Labon at the time of the shooting that "Kent" did it, there is no reason for the Court to hear from Mr. Labon in order to assess his credibility on this issue. Even accepting as true that Ms. Williams also told Mr. Labon at the time of the shooting that "Kent" did it, this no longer significantly advances Petitioner's claim of actual innocence. Specifically, at the time the Court set the evidentiary hearing, one of the factors the Court considered was that there was arguably no reason for Ms. Williams to have said this to Mr. Labon in the first instance. However, that was before the Court knew that Ms. Williams had children with Petitioner's cousin, and a relationship with his family. This, in turn, provides a plausible explanation regarding why Ms. Williams' initial reaction would have been to avoid implicating Petitioner.

Petitioner also states that an evidentiary hearing is necessary not only to assess his actual innocence claim, but also because factual findings regarding Ms. Williams' credibility are also necessary to "determine the impact and constitutional significance" of Petitioner's underlying claims. (DE#121, p.4). However, because the Court concludes that Petitioner cannot make the threshold showing of actual innocence to avoid that statute of limitations, there is no occasion to even consider Petitioner's underlying claims. As set forth above, at the time the Court set the consolidated evidentiary hearing, it was in the interests of justice and judicial economy because it appeared that Petitioner might be able to make the threshold showing of actual innocence. Any possibility of that, however, is now gone.

Petitioner also continues to emphasize that the remaining evidence against Petitioner was circumstantial. However, it is well-settled that "[f]ederal courts are not forums in which to relitigate state trials." Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391, 77 L.Ed.2d 1090 (1983). The guilt or innocence determination in state criminal trials is "a decisive and portentous event." Wainwright v. Sykes, 433 U.S. 72, 90, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). The Supreme Court's decision in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), comes as close to authorizing evidentiary review of a state-court conviction on federal habeas as any of its cases. There, the Court held that a federal habeas court may review a claim that the evidence adduced at a state trial was not sufficient to convict a criminal defendant beyond a reasonable doubt. But in so holding, the Court specifically noted that "the standard announced ... does not permit a court to make its own subjective determination of guilt or innocence." Id., at 320, n. 13, 99 S.Ct., at 2789, n. 13.

Moreover, Petitioner's response is conspicuously silent regarding the proffered testimony of Petitioner's two attorneys, who will testify that Petitioner told them he was guilty of the murder but was certain that Ms. Williams would never testify against him and that, therefore, he did not want to accept a 13-year plea bargain and instead wanted an immediate trial.[19] Petitioner indicates in his amended witness list that he intends to call one of these lawyers to testify "to any statements made by Mr. Jackson." (DE#121-1, p.3). Petitioner would presumably also argue that he should be allowed to cross-examine these former attorneys at the evidentiary hearing. But what is the most that testimony or

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[19]The Court has no reason to believe that Petitioner's former lawyers, as officers of the Court, would not testify consistent with what they apparently have told counsel for Respondent their testimony would be.

cross-examination regarding Petitioner's confessions to his lawyers could establish? Speculation and innuendo regarding why Petitioner might have falsely confessed to the crime? Again, this is simply not the type of showing that claims of actual innocence are made of.

Finally, it is noteworthy that Petitioner apparently does not even intend to testify in his own offense. This is not a criminal trial where the State has the burden of proof, and Petitioner has the right to remain silent. See Schlup, 513 U.S. at 324 & 327 (claim of actual innocence must supported with new, reliable evidence that was not presented at trial, and Petitioner must show "that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence."); While there is no requirement that Petitioner testify, one would think that Petitioner would be eager to profess his innocence to this Court, and to explain why he confessed to his own lawyers and told them Ms. Williams would never testify against him at trial. But even if he did, any such self-serving statements would obviously not be sufficient to make a threshold showing of actual innocence to overcome that statute of limitations. See House, 547 U.S. at 537-38 (claims of actual innocence generally require exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence and, in the vast majority of cases, will rarely be successful.

In sum, whatever showing Petitioner previously made to be entitled to an evidentiary hearing on a gateway claim of actual innocence, whether it was substantial or merely a *prima facie* one, has been totally eviscerated by Ms. Williams' recent deposition testimony. Moreover, for the reasons set forth above, no amount of rehabilitation or cross-examination could ever cure this deficiency. Therefore, because Petitioner cannot make the requisite showing of actual innocence to overcome the statute of limitations no evidentiary hearing is warranted, and his claims are thus time-barred.

Certificate of Appealability

Rule 11(a) of the Rules Governing Section 2254 Cases provides that "the district court must issue or deny a certificate of appealability when it enters a final order adverse to the 2applicant," and that if a certificate is issued, "the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. §2253(c)(2)." Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts (hereinafter "Habeas Rules"). Rule 11(a) further provides that "[b]efore entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue." Id. Regardless, a timely notice of appeal must still be filed, even if the court issues a certificate of appealability. Rule 11(b), Habeas Rules.

A certificate of appealability may issue only upon a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where a habeas petitioner's constitutional claims have been adjudicated and denied on the merits by the district court, the petitioner must demonstrate reasonable jurists could debate whether the issue should have been decided differently or show the issue is adequate to deserve encouragement to proceed further. Miller-El v. Cockrell, 537 U.S. 322, 336-38 (2003); Slack v. McDaniel, 529 U.S. 473, 483-84 (2000). Where a petitioner's constitutional claims are dismissed on procedural grounds, a certificate of appealability will not issue unless the petitioner can demonstrate both "(1) 'that jurists of reason would find it debatable whether the petition [or motion] states a valid claim of denial of a constitutional right' and (2) 'that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.'" Rose v. Lee, 252 F.3d 676, 684 (4th Cir.2001)(quoting Slack, 529 U.S. at 484). "Each component of the §2253(c) showing is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Slack, 529 U.S. at 484-85.

Having determined that Petitioner's claims are barred on procedural grounds, the court considers whether Petitioner is nonetheless entitled to a certificate of appealability with respect to one or more of the issues presented in the instant motion. After reviewing the issues presented in light of the applicable standard, the court concludes that reasonable jurists would not find debatable the correctness of the court's procedural rulings. Accordingly, a certificate of appealability is not warranted. See Slack, 529 U.S. at 484-85 (each component of the §2253(c) showing is part of a threshold inquiry); see also Rose, 252 F.3d at 684.

Conclusion

Based upon the foregoing, it is recommended that this petition for writ of habeas corpus be DISMISSED AS TIME BARRED, and that no certificate of appealbility be issued.[20]

Objections to this report may be filed with the District Judge within fourteen days of receipt of a copy of the report, including any objections to the recommendation that no certificate of appealability be issued.

SIGNED this 12th day of September, 2016.

UNITED STATES MAGISTRATE JUDGE

[20]Respondent's Motion for Reconsideration of Order Granting Evidentiary Hearing will be granted by separate order for the reasons set forth in this report.

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