No. 21-2968

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARL HUBBARD,

Petitioner-Appellant,

v.

RANDEE REWERTS,

Respondent-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan, No. 2:13-cv-14540,
Hon. David M. Lawson, U.S. District Judge

PETITIONER-APPELLANT CARL HUBBARD'S OPENING BRIEF

Alexander Kazam
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
akazam@kslaw.com

Counsel for Petitioner-Appellant Carl Hubbard

December 19, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, counsel for Petitioner-Appellant Carl Hubbard certifies that Hubbard is an individual and no party to this appeal is a subsidiary or affiliate of a publicly owned corporation and no publicly owned corporation that is not a party to this appeal has a financial interest in the outcome.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes & Rules

Other Authorities

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Pursuant to Federal Rule of Appellate Procedure 34(a) and Sixth Circuit Rule 34(a), Hubbard hereby respectfully requests oral argument. This appeal arises from a habeas proceeding with a complex evidentiary record and, as the district court concluded in granting a certificate of appealability, raises a substantial claim of actual innocence.

INTRODUCTION

Rodnell Penn was shot and killed on a street in a high-crime neighborhood in Detroit, Michigan on a winter night in 1992. The State charged Carl Hubbard with the murder, but Hubbard has always maintained his innocence. The State presented no eyewitnesses, and never recovered any physical evidence connecting Hubbard to the crime—no murder weapon, no forensic evidence, and no stolen property. Its case was entirely circumstantial. Meanwhile, Hubbard denied even being at the scene at the time of the murder. He presented an alibi through the testimony of two friends who confirmed that he was at their home that night. Nevertheless, Hubbard was convicted of first-degree murder and sentenced to life in prison.

The State's key witness at trial was Curtis Collins, a man who has been in and out of prison on various charges most of his life. Collins initially provided a statement to police, and testified at a preliminary examination, that he was leaving a party store in the area that night when he heard gunshots, turned around, and spotted Hubbard fleeing the scene. But Collins' story never made much sense; he claimed to have identified Hubbard from a distance of several hundred feet away, by a

scar on the back of his head, on a dark night in an area with minimal street lighting. And his own friends contradicted his account, testifying that he was out gambling with them that night. Collins recanted on the first day of trial, and switched his testimony again only after the State threatened to charge him with perjury. He has since unequivocally recanted, confirming in an affidavit and under a polygraph that he was not at the scene and only made the story up to placate the police.

Over the years, the case against Hubbard has been further undermined by several additional pieces of new evidence. The owners of the party store have submitted affidavits stating that they never saw Collins on the night of the murder and even had a policy against allowing him in the store. An eyewitness to the shooting has submitted an affidavit stating that he saw a different man, Mark Goings, argue with Penn and then shoot him in the back. Several other affidavits corroborate that version of events and cast further doubt on Collins' account. Hubbard has also received information in response to a FOIA request indicating that the State subpoenaed, but apparently never found, cab company records that would have provided much-needed corroboration for Collins' story.

In this appeal, Hubbard seeks to overcome the untimely filing of his federal habeas petition by presenting a colorable claim of actual innocence. The district court denied the petition as time-barred under AEDPA's limitations period, 28 U.S.C. § 2244(d), without holding an evidentiary hearing. But the court found that reasonable jurists could debate whether Hubbard is entitled to equitable tolling based on actual innocence, and it therefore granted a certificate of appealability on that question. This Court should reverse or, at the very least, remand for the district court to conduct an evidentiary hearing.

JURISDICTIONAL STATEMENT

The district court had jurisdiction of this habeas case under 28 U.S.C. § 2254. On August 31, 2021, the district court entered judgment denying Hubbard's petition for a writ of habeas corpus and granted a certificate of appealability on his claim for equitable tolling based on actual innocence. Hubbard timely filed a notice of appeal on September 10, 2021. This Court has jurisdiction under 28 U.S.C. § 2241.

STATEMENT OF THE ISSUES

The district court granted a certificate of appealability on one issue: whether Hubbard has a colorable claim of actual innocence that excuses the untimeliness of his habeas petition.

STATEMENT OF THE CASE

A. Arrest and Indictment

On the night of Friday, January 17, 1992, at around 9:30 p.m., police responded to a reported shooting in front of a house at 3960 Gray Street in Detroit, Michigan. R.56-12 (Trial Tr.), PageID#3540. The first officer to arrive at the scene saw the victim, later identified as 21-year-old Rodnell Penn, lying on his side in the street at the mouth of the driveway. *Id.*, PageID#3540–41. The victim had multiple gunshot wounds to the back and head and appeared to be dead. *Id.*, PageID#3541; R.21-2 (Prelim. Exam Tr.), PageID#248. The body was down the street from the "Special K Party Store," which was located at the corner of Gray Street and Mack Street. R.56-12 (Trial Tr.), PageID#3541; R.56-13 (Trial Tr.), PageID#3602. The officer estimated that the party store was about "two hundred yards" away. R.56-12 (Trial Tr.), PageID#3547. People from the neighborhood began to gather outside of 3960 Gray. R.56-10 (Witness Stmt.), PageID#3206.

Officer Craig Turner went to the scene as backup. R.56-12 (Trial Tr.), PageID#3549–50. After Penn's body was loaded into an ambulance, Officer Turner saw 27-year-old Carl Hubbard walking by. *Id.*, PageID#3551. Hubbard asked him what happened, and Officer Turner

told him there had been a homicide. *Id.* According to Officer Turner, Hubbard left for several minutes, came back, and asked a couple of additional questions, including whether the victim was dead. *Id.*, PageID#3552–53. When Officer Turner said yes, Hubbard replied that the area around Gray and Mack was "out cold," which Officer Turner took to mean that the illegal drug trade was especially prevalent and violent in that neighborhood. *Id.*, PageID#3553–55.

A few days later, on January 21, Hubbard was taken into custody and interrogated by Sergeant Joann Kinney. R.21-2 (Prelim. Exam Tr.), PageID#282–84. On January 23, Curtis Collins agreed to give a statement to the police, under the alias "Tony Smith," claiming that he saw Hubbard at the Special K Party Store on the night of the shooting. R.56-8 (Witness Statement), PageID#2628–29. According to the statement, Collins left the store before Hubbard, walked in the opposite direction until he reached "mid block," and then heard gunshots, at which point he turned around and saw Hubbard running through a vacant lot across from 3960 Gray. *Id.* The next day, the State filed a criminal complaint charging Hubbard with one count of first-degree murder and one count of possession of a firearm during the commission of a felony.

R.51 (Am. Petition), PageID#2399 (Compl.). A warrant for Hubbard's arrest was issued the same day. *Id.*, PageID#2400 (Warrant).

B. Preliminary Examination

The state trial court held a preliminary examination on February 4, 1992. R.21-2 (Prelim. Exam. Tr.), PageID#245. Apart from law-enforcement agents Officer Turner and Sergeant Kinney, the State called only a single witness: 19-year-old Curtis Collins. Collins claimed to have been inside the party store on Gray and Mack on the night of January 17th for "five or ten minutes" and encountered Hubbard in the store with the man later identified as Rodnell Penn. *Id.*, PageID#256. Collins testified that he left the store before Hubbard and had walked "three" or "five" feet away from the store when he heard gunshots, turned around, and spotted Hubbard running through a field or "vacant lot" across from 3960 Gray. *Id.*, PageID#257, 267. Collins did not explain how he could have left the store before Hubbard, yet managed to walk only three to five feet away from the store in the time it took Hubbard to walk several hundred feet down Gray Street. Collins testified that after the shooting, he "ran back down there across Mack," saw the victim's body lying in the driveway, and then "jumped in a cab and went home." *Id.*, PageID#257.

On cross-examination, Collins acknowledged that there were no street lights on the vacant lot or in front of 3960 Gray. *Id.*, PageID#267–68. He also testified that he did not see Hubbard's face, because Hubbard was running "[a]way from [him]"; instead, Collins supposedly "noticed him by the scar on the back of his head." *Id.*, PageID#271–72. Collins did not explain how he could see Hubbard from so far away in the dark, let alone identify him by a scar on his head.

C. Trial

Hubbard agreed to waive his right to a jury trial, so the case was presented to a single judge. R.56-12 (Trial Tr.), PageID#3459. Trial began on August 31, 1992, and lasted three days. The State again relied primarily on Collins, devoting the majority of its opening statement to a description of Collins' anticipated testimony. *Id.*, PageID#3460–64.

On the first day of trial, however, Collins fully recanted his preliminary examination testimony and the police statement he had signed on January 23. He testified that he was never at the party store on the night of January 17, or even in the area of Gray and Mack, and that he did not see Hubbard that night. *Id.*, PageID#3472–73. He explained that he had agreed to fabricate the story to avoid getting into

trouble with the police. *Id.*, PageID#3493. After this recantation, Collins was arrested for perjury and held in a jail cell. R.56-11 (Trial Tr.), PageID#3234–37.

After Collins testified, the State called to the stand John Trammel. Trammel merely testified that he saw Hubbard "among the spectators" on Gray Street *after* the shooting had already happened and the ambulance had arrived. R.56-12 (Trial Tr.), PageID#3516–18. Trammel recalled that Hubbard was wearing a black jacket. *Id.*, PageID#3519.

Leon Penn, Rodnell's older brother, also testified. He claimed that the night before January 17, Rodnell stayed with him at his apartment on "Charlevoix and Springer." *Id.*, PageID#3526. According to Penn, Rodnell "spent the night" there and did not leave until the next morning. *Id.*, PageID#3526, 3532. Penn also claimed that he and Rodnell saw Hubbard in the area that night and that Hubbard told Rodnell, who was selling drugs for him, that he would see him the next day. *Id.*, PageID#3527–28. Rodnell had been selling crack for a couple of years. *Id.* On cross-examination, Leon admitted that he himself was using drugs around the time of January 1992 and was smoking crack once or twice a month. *Id.*, PageID#3536–37.

On the second day of trial, Officer Randy Richardson, the police department's evidence technician, testified. He recounted that he had gone to the scene at 3960 Gray after the shooting, and described the area where Penn was shot as "fairly dark." R.56-13 (Trial Tr.), PageID#3587. He estimated that the distance from the front of the store to the location of the body was about 375 feet. *Id.*, PageID#3588. On cross-examination, Richardson acknowledged that there was no street lighting in front of 3960 Gray, where Penn was shot, the porch light at 3960 Gray was not turned on, and he did not recall whether any street lights were operational that evening. *Id.*, PageID#3591, 3595, 3596–600. The State admitted into evidence Officer Richardson's diagram of the crime scene, *id.*, PageID#3586. As the diagram illustrates, the Special K Party Store is more than a football field away from 3960 Gray and is separated from that residential block by Mack Street, which is seven lanes wide.[1]

The State also called to the stand 20-year-old Andrew Smith. R.56-13 (Trial Tr.), PageID#3602. Smith testified that he was on the way to

[1] Hubbard included this diagram as an exhibit to his habeas petition. R.51 (Am. Petition), PageID#2341. Hubbard labeled the diagram with letters for ease of reference; "A" is where Collins testified he saw Hubbard running, "B" is where Collins was supposedly standing, and "C" is Rodnell Penn's body.

the Special K Party Store on the night of January 17 when he saw Hubbard with "two other guys" walking in the area. *Id.*, PageID#3604. Smith did not recall what Hubbard or any of the other guys were wearing, *id.*, PageID#3608, and he "couldn't tell" if the individual he later saw lying on the ground outside 3960 Gray was "one of the same" guys he had seen earlier, *id.*, PageID#3610. Nor could Smith remember how much time elapsed between the time he supposedly saw Hubbard and the time he heard gunshots from inside the party store. *Id.*, PageID#3612. Smith testified that after he heard the gunshots, he waited in the store "three or four minutes," and by the time he came out, the police had already arrived. *Id.*, PageID#3609. On cross-examination, Smith testified that he knew Curtis Collins and did not see Collins in the store or anywhere in the area that night. *Id.*, PageID#3613.

Lucinka Gross, a woman from the neighborhood who lived about a block north of 3960 Gray, also testified. *Id.*, PageID#3617. Gross was on her way to the party store the night of January 17 when she saw what she thought were "garbage bags on the street" outside 3960 Gray. *Id.*, PageID#3618, 3621. Only when she got close did she realize that it was a dead body. *Id.* When she reached the party store, she asked them to

call the police. *Id.*, PageID#3621. Even though Gross knew Andrew Smith, who had testified he waited in the store until the police arrived, Gross testified that she did not see him there. *Id.*, PageID#3625. Gross also did not see Curtis Collins anywhere. *Id.*, PageID#3624.

On the third day of trial, Rodnell Penn's cousin Christopher Harris took the stand. Harris testified that Rodnell spent the night before January 17 at Harris's home on "Rosemont" Street—contrary to Leon Penn's testimony that Rodnell spent the night with him at Charlevoix and Springer. R.56-13 (Trial Tr.), PageID#3651–52. Harris and a friend dropped Rodnell off at a bus stop around 5:00 p.m. on January 17. *Id.*, PageID#3652–55.

Rodnell Penn's girlfriend, Shannon Holcomb, testified that Rodnell called her around 9:20 p.m. or 9:25 p.m. on January 17 from what sounded like a public payphone outdoors. R.56-11 (Trial Tr.), PageID#3208, 3215. Rodnell sounded "very happy" but in a rush, and Holcomb thought she "heard someone rushing him off the phone." *Id.*, PageID#3208, 3210.

Facing potential perjury charges, Collins agreed to testify again and withdrew his recantation. *Id.*, PageID#3224–25. By way of

explanation for his testimony on the first day of trial, Collins alluded vaguely to threats he said he had received from unknown individuals on the street. *Id.*, PageID#3227, 3240. On cross-examination, Collins testified that he was walking south on Gray, behind the party store, when he supposedly heard the gunshots. In contrast to his police statement, which said he had reached "mid block," R.56-8 (Witness Statement), PageID#2628, and his preliminary examination testimony, which said he had reached "three" or "five" feet, R.21-2 (Prelim. Exam. Tr.), PageID#257, Collins now said he had gotten "approximately twenty-five, thirty feet" down the block behind the store. R.56-11 (Trial Tr.), PageID#3251. Collins testified that he had been walking three or four minutes in "the opposite direction" that Hubbard was going when Hubbard left the store after him, but Collins could not explain how he managed to walk only 25 to 30 feet in a few minutes. *Id.*, PageID#3272–73. Collins repeated his testimony that Hubbard was running "away from [him]" and that Collins identified him by "[t]he scar" on the backside of his head, since he couldn't see his face. *Id.*, PageID#3253. After Collins provided this testimony, the perjury charges against him were apparently dropped. *See* R.56-15 (Affidavit of R. Giles), PageID#3785.

By stipulation, the State admitted into evidence documents reflecting that a 1988 murder case against Hubbard was dismissed after certain witnesses, including Rodnell Penn, declined to appear at a trial scheduled for April of that year. R.56-11 (Trial Tr.), PageID#3280. Penn had previously testified at a preliminary examination in the same case. *Id.* Based on this history from four years before the shooting, the State argued to the court that Hubbard "had more of a motive to murder" Penn than anyone else—which the State called "[t]he most important circumstances that this Court should be aware of." R.56-12 (Trial Tr.), PageID#3460; *accord* R.56-11 (Trial Tr.), PageID#3343.

Defense counsel then called several witnesses. Raymond Williams, who described himself as Collins' "best friend[]" for the past seven or eight years, directly contradicted Collins' testimony. R.56-11 (Trial Tr.), PageID#3289. Williams testified that on the night of January 17, between 8:00 p.m. and 10:00 p.m., he was with Collins at the home of Roney Fulton on Dickerson and Corbett, gambling. *Id.*, PageID#3290–91. Williams remembered January 17 well because it was opening night for the movie *Juice*. *Id.*, PageID#3292. He left Fulton's house around 10:00 p.m. to go see it and was running late. *Id.*

Roney Fulton corroborated this account. He testified that he was friends with Williams and Collins, and that Collins spent "all day" and evening at Fulton's house on January 17. *Id.*, PageID#3299, 3302. Neither Fulton nor Williams knew Hubbard well, and Fulton had "never had a conversation" with him. *Id.*, PageID#3309–10, 3293.

Thomas Spells, Hubbard's friend, testified that Hubbard spent the evening of January 17 at his house. *Id.*, PageID#3317–19. He and Hubbard did not leave the house until around 9:00 p.m. or 10:00 p.m., when they went to pick up the Spells' baby from the home of Hubbard's mother. *Id.*, PageID#3317. While walking over, they saw an ambulance on Gray Street. *Id.*, PageID#3318. One of the detectives talked to Hubbard, and eventually Hubbard and Spells left the area to go to Hubbard's mother's house. Thomas Spells' wife, Vanessa, corroborated this testimony. She testified that she came home from work around 8:15 p.m. and Hubbard and her husband left the house around 10:00 p.m. *Id.*, PageID#3335–36. They came back with the baby around a half hour later. *Id.*, PageID#3340–41.

After closing arguments, the court briefly summarized the evidence and issued its ruling. The court agreed with defense counsel that

"Collins' testimony at times was very conflicting and downright lying." R.56-11 (Trial Tr.), PageID#3363. Nevertheless, the court concluded in a single sentence that "after looking at all of the elements and listening to all the facts in this case . . . all of the elements of Murder in the First Degree have been satisfied." *Id.*, PageID#3372. The court convicted Hubbard of the first-degree murder charge and acquitted him of possessing a firearm during the commission of a felony. *Id.* On September 23, 1992, Hubbard was sentenced to life in prison without the possibility of parole. R.56-2 (Op.), PageID#2488; R.56-8 (Judgment), PageID#2786.

D. New Evidence

Over the years, new evidence emerged that cast further doubt on Hubbard's guilt. In 2001, *The Detroit News* published an article describing an investigation by the U.S. Department of Justice, at the request of the mayor of Detroit, into the Detroit police department's reported practice of "coerc[ing] false confessions or statements from people after illegally locking them up for days at a time." R.51 (Am. Petition), PageID#2329 (Article). The article highlighted a 1995 murder case in which Sergeant Joann Kinney admitted to locking up a witness

"for days without charges against her" and "threatening to take [her] children away if she did not cooperate." *Id.*, PageID#2332. The Wayne County circuit court judge called this misconduct "egregious," saying, "[i]f I have ever seen a case where the police have manufactured the facts, this is one." *Id.*

While in prison, Hubbard encountered several people from his neighborhood with information about his own case, including the coercion of Curtis Collins by Sergeant Kinney and her partners. *See* R.51 (Am. Petition), PageID#2321–22 (Affidavit), 2324–25 (Affidavit), 2334–35 (Affidavit). In 2011, prisoner Askia Hill also came forward with an affidavit identifying a different man as the murderer of Rodnell Penn. *Id.*, PageID#2237 (Affidavit). Hill stated that on the night of January 17, 1992, he had personally witnessed a man named Mark Goings argue with another man on Gray Street, shoot him, and then get into a car with other people and drive away. *Id.*, PageID#2237–39. This account was corroborated by affidavits submitted by Roy Burford and Emmanuel Randall confirming that it was widely believed in the community that Goings killed Penn as payback for Penn's involvement in the murder of his brother. *Id.*, PageID#2243, 2321–22 (Affidavits). Burford, who was

at the party store that night and stepped out after hearing gunshots, also saw a car's lights down on Gray Street at that time. *Id.*, PageID#2243.

Meanwhile, the owners of the Special K Party Store, Raad and Samir Konja, came forward with affidavits further undermining Collins' testimony. The Konja brothers explained that Collins could not possibly have been in the store on the night of January 17 because he had been banned from the store for misbehavior. R.51 (Am. Petition), PageID#2246, 2248 (Affidavits). Raad Konja also stated that he was working the front of the store that night, where he would have seen Collins enter, and Collins never passed by. *Id.* The brothers also revealed that, despite the centrality of the party store in the State's theory of the case, they were never interviewed by the police in the aftermath of the shooting. *Id.*

In 2017, Collins signed an affidavit recanting his testimony on the third day of trial. Collins reaffirmed his initial testimony that he "was not present on, or anywhere near the corner of Gray and Mack" on January 17 and "did not witness Carl Hubbard fleeing from where Mr. Rodnell Penn was found dead." *Id.*, PageID#2253–54 (Affidavit). Collins explained that Sergeant Kinney and her partners "forced [him] to falsely

testify" by threatening him with criminal charges. *Id.* Now that Sergeant Kinney and the other officers had retired, Collins felt safer coming forward. *Id.* He also stated that he was willing to take a polygraph to prove he was now telling the truth. *Id.* Shortly thereafter, he took a polygraph and passed it. *Id.*, PageID#2306–07 (Polygraph Report).

Around the same time, Hubbard obtained government records in response to a FOIA request that corroborated Collins' recantation. The documents revealed that during the State's investigation of the shooting, the prosecutor had instructed Sergeant Kinney to subpoena records from the Checker Cab company in order to shore up Collins' account of his actions on the night of January 17, which supposedly culminated with him going home in a cab. R.51 (Am. Petition), PageID#2309–10 (Subpoena). Yet the State failed to produce any cab company records at trial.

E. Post-Conviction Proceedings

On direct appeal, the Michigan Court of Appeals affirmed Hubbard's conviction. R.56-8 (Op.), PageID#2560. The court acknowledged, however, that "[t]he evidence upon which [Hubbard] was

convicted was entirely circumstantial," that "[t]here were no eyewitnesses to the killing," and that "the prosecution's key witness" was "Curtis Collins." *Id.* The Michigan Supreme Court denied leave to appeal. R.66 (Op.), PageID#4173. Hubbard then pursued post-conviction litigation in state court. *See id.* After obtaining the affidavit of Askia Hill, Hubbard filed a post-conviction motion for relief under Michigan Court Rule 6.500. *Id.* The trial court denied the motion, and a divided court of appeals denied Hubbard leave to appeal. R.56-7 (Order), PageID#2558. Judge Stephens dissented, indicating that she would have granted the application for leave to appeal based on Michigan Court Rule 6.508(D), which permits such relief only if the defendant demonstrates a "significant possibility of actual innocence." *Id.*

On October 22, 2013, Hubbard filed a petition for writ of habeas corpus in federal district court under 28 U.S.C. § 2254. He asked the district court to hold the petition in abeyance while he returned to state court for additional post-conviction litigation, which was unsuccessful. Hubbard then moved to reinstate the habeas petition and file an amended habeas petition. R.66 (Op.), PageID#4174. After receiving the recanting affidavit of Curtis Collins and his polygraph report, Hubbard

again stayed the proceedings so that he could file a post-conviction motion for relief from judgment, which was likewise denied without leave to appeal. *Id.*, PageID#4174–75. Hubbard then returned to federal court to reopen the case and file an amended petition on July 15, 2020. *Id.*, PageID#4175.

In his original and amended petitions, Hubbard sought relief on several grounds, including due process claims arising from the prosecutor's coercion of Collins and withholding of evidence, and claims of ineffective assistance of trial and appellate counsel. *Id.*, PageID#4175–76. Hubbard also argued that AEDPA's statute of limitations was tolled because he had a colorable claim of actual innocence, and requested an evidentiary hearing. *Id.*, PageID#4175; R.51 (Am. Petition), PageID#2136, 2174. The district court did not address Hubbard's entitlement to an evidentiary hearing and denied his petition as untimely. R.66 (Op.), PageID#4192. The court found, however, that "reasonable jurists could debate whether evidence obtained by [Hubbard] after trial which suggests that he did not commit the murder for which he was convicted could justify the application of equitable tolling to excuse the untimely filing of the petition." Order, R.68, PageID#4195.

The court therefore granted a certificate of appealability on the actual innocence question. *Id.*

STANDARD OF REVIEW

A district court's dismissal of a writ of habeas corpus as barred by the statute of limitations is reviewed de novo. *Souter v. Jones*, 395 F.3d 577, 584 (6th Cir. 2005). "Because equitable tolling based upon a claim of actual innocence involves the interpretation of the evidence as a whole and its likely effect on reasonable jurors, it is primarily a question of law" on which this Court "do[es] not defer to the district court's judgment." *McSwain v. Davis*, 287 F. App'x 450, 459 (6th Cir. 2008) (citing *House v. Bell*, 547 U.S. 518, 539–40 (2006)). This Court "accordingly review[s] the district court's refusal to apply equitable tolling based on actual innocence under the *de novo* standard of review." *Id.* When a district court decides a habeas petition "without [an] evidentiary hearing," the district court's factual findings are likewise reviewed de novo. *Northrop v. Trippett*, 265 F.3d 372, 377 (6th Cir. 2001).

SUMMARY OF THE ARGUMENT

Hubbard is entitled to equitable tolling of the statute of limitations for his habeas petition because he has a colorable claim of actual innocence. He has presented an array of new evidence, including an

eyewitness account of the murder identifying a different perpetrator, the recantation of the prosecution's key witness (backed by a certified polygraph report), several other affidavits containing information not presented at trial, and documents obtained in response to a FOIA request. This evidence is reliable because it is mutually reinforcing, originates from government records or witnesses with no evident motive to lie, and is more consistent with logic and the established facts than Collins' original testimony, which is implausible on its face and thoroughly undermined by other evidence. The district court erred in treating recanting affidavits and inmate affidavits as virtually per se unreliable and ignored other important new evidence, including the affidavits of the party store owners and the State's attempt to subpoena cab company records to shore up Collins' account.

Considering the new evidence along with all of the other evidence in the record, any reasonable juror more likely than not would have reasonable doubt about Hubbard's guilt. The State's case against Hubbard has always been riddled with serious defects; the new evidence lays those defects bare, supports a more plausible alternative version of events, and makes clear that Hubbard deserves an opportunity to be

heard on the merits of his habeas petition. At a minimum, Hubbard is entitled to an evidentiary hearing to permit the many witnesses who have submitted sworn affidavits in support of his claim to testify in court.

ARGUMENT

Hubbard is entitled to tolling of the AEDPA statute of limitations because he has presented at least a colorable claim of actual innocence. Under 28 U.S.C. § 2244, a habeas petition is subject to a one-year statute of limitations that begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D). The statute of limitations is subject to equitable tolling, however, when a petitioner has a "colorable claim of actual innocence." *White v. Horton*, No. 20-1780, 2021 WL 3669363, at *2 (6th Cir. Apr. 14, 2021) (citing *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013)). A petitioner has a colorable claim of actual innocence if: (1) he presents "new reliable evidence" of innocence, *Schlup v. Delo*, 513 U.S. 298, 324 (1995); and (2) "it is more likely than not that no reasonable juror would have convicted him" when considering "all the evidence," including both the new evidence and the evidence already in the record, *id.* at 327–28

(quotation marks omitted). Because a gateway innocence claim involves "evidence the trial [fact-finder] did not have before it," the inquiry "requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *House*, 547 U.S. at 538.

Hubbard has supplemented the record with new reliable evidence in the form of a recanting affidavit from the State's main witness at trial; several additional cross-corroborating affidavits, including an eyewitness account of the shooting; and police records obtained from a FOIA request. Especially in light of the weak case against Hubbard at trial, it is more likely than not that any reasonable juror weighing all the evidence would have reasonable doubt about whether Hubbard murdered Rodnell Penn. At the very least, Hubbard's gateway innocence claim should not be rejected without an evidentiary hearing to assess the reliability of the new affiants.

I. Hubbard Presented New Reliable Evidence of Innocence.

The evidence Hubbard has presented with his petition is both new and reliable. It is new because it was not presented at trial, and it is reliable because it is cross-corroborating and comes from credible sources, including government archives, a certified polygraph examiner, and

multiple witnesses with no apparent motive to lie. And as long as a habeas petitioner has presented "*some* new reliable evidence," the court may proceed to the second prong of the actual-innocence inquiry, at which point the court's analysis "is not limited" to the new evidence but must be based on "all the evidence, old and new." *House*, 547 U.S. at 537–38 (emphasis added) (quotation marks omitted).

A. Hubbard Has Presented New Evidence.

The district court did not deny that Hubbard has presented new evidence, and for good reason. "As long as the evidence relied on was not presented at trial . . . it may be considered new for purposes of showing actual innocence." *Simmons v. Chapman*, No. 20-2104, 2021 WL 1902525, at *4 (6th Cir. Apr. 21, 2021) (citing *Souter*, 395 F.3d at 595 n.9, 601 n.16). Such evidence is "considered 'new' for purposes of showing actual innocence irrespective of whether [Petitioner] acted with reasonable diligence in discovering it and pursuing relief." *Freeman v. Trombley*, 483 F. App'x 51, 57 (6th Cir. 2012).

Hubbard's petition relies on numerous pieces of evidence not presented at trial, including:

- The 10/31/17 affidavit of Curtis Collins, who recants his prior testimony against Hubbard and explains that he withdrew his

original recantation only because the police threatened to charge him with perjury or the murder itself. R.51 (Am. Petition), PageID#2253–54.

- A 2/2/2018 polygraph examination report indicating that Collins was being truthful when he acknowledged that he was not at the crime scene. *Id.*, PageID#2306–07.

- The 7/28/14 affidavit of Raad Konja, a co-owner of the Special K Party Store, who avers that he was working in the front of the store that night and didn't see Collins, who in any event was not allowed in the store due to past misbehavior. *Id.*, PageID#2246.

- The 7/28/14 affidavit of Samir Konja, a co-owner of the Special K Party Store who confirms that he and his co-owners had a policy against allowing Collins in the store. *Id.*, PageID#2248.

- Government records obtained in response to a 2016 FOIA request that show that the prosecutor instructed Sergeant Kinney to subpoena records from the Checker Cab company in order to corroborate Collins' story. *Id.*, PageID#2309–10.

- The 2/1/11 affidavit of Askia Hill, a man from the neighborhood where the murder took place who avers that he saw Mark Goings argue with the victim and then shoot him. *Id.*, PageID#2237–39.

- The 9/8/2011 affidavit of Roy Burford, a man from the neighborhood where the murder took place who avers that he was in the party store at the time and never saw Hubbard or Collins in the area; that Collins told him he lied to get back at Hubbard for robbing him and to satisfy the police; and that people were saying Mark Goings killed Penn as payback for Penn's involvement in the murder of Goings' brother. *Id.*, PageID#2243–44.

- The 5/23/2011 affidavit of Raymond Williams, who avers that he heard Collins crying in his cell in 1992 about Sergeant Kinney forcing him to incriminate Hubbard. *Id.*, PageID#2324–25.

- A 4/16/2001 newspaper article describing a DOJ investigation into the Detroit police department's use of coercive tactics to induce cooperation and procure false statements and detailing one 1995 murder case in which a judge found that a police team that included Sergeant Kinney "manufactured the facts." *Id.*, PageID#2329–32.

- The 6/25/2009 affidavit of Emmanuel Randall, who avers that he knows for a fact that Collins wasn't near the crime scene because he was with Collins playing dice at Roney Fulton's house on Corbet Street. *Id.*, PageID#2321–22.

- The 1/2/08 affidavit of Elton Carter,[2] who avers that after Hubbard was found guilty, Collins admitted to Carter that he was not at the scene and lied because of pressure from the police. *Id.*, PageID#2334–35.

All of this evidence is "new" for present purposes because none of it was presented at Hubbard's trial. That includes Collins' affidavit, even though it is not the first time Collins has recanted, because it is the first time he has recanted the testimony he gave on the third day of trial and explained why he disavowed the prior recanting testimony he gave on the first day of trial.[3] The only question then is whether at least "some" of this new evidence can be considered "reliable." *House*, 547 U.S. at 537.

---

[2] Although dated 1/28/04, the affidavit was notarized in 2008.

[3] Hubbard also submitted to this Court two additional, more recent affidavits from Collins that further explain the circumstances under which the Detroit police pressured him to provide false statements incriminating Hubbard. *See* 6th Cir. R.7 at 5–8 (Affidavit of Curtis Collins, Dec. 7, 2021); *id.* at 9 (Supplemental Affidavit of Curtis Collins, Dec. 7, 2021). In addition, Hubbard submitted a signed letter from the

B. Hubbard's New Evidence Is Reliable.

Hubbard's new evidence is reliable because it consists of mutually corroborating sworn affidavits, including an eyewitness account, that are also supported by other evidence, such as trial testimony, government records, and a certified polygraph exam. Reliable evidence may include, but is not limited to, "exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence." *Reinthaler v. Gray*, No. 20-3376, 2020 WL 5822506, at *4 (6th Cir. Aug. 28, 2020) (quoting *Schlup*, 513 U.S. at 324). "'[T]here are no categorical limits on the types of evidence that can be offered' under *Schlup*." *Howell v. Superintendent Albion SCI*, 978 F.3d 54, 60 (3d Cir. 2020) (quoting *Hyman v. Brown*, 927 F.3d 639, 660 (2d Cir. 2019)); *see also Muchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012) ("*Schlup*'s three categories are not an exhaustive list

---

Checker Cab company, dated March 1, 2022, stating that its record retention policy is to keep "records of driver logs, trip records, dispatch records, driver ID, passenger name and phone number, and all other information regarding taxicab trips for a period of five (5) years from the date of service." 6th Cir. R.8 at 1–2 (Memorandum Letter). Hubbard did not receive these pieces of evidence in time to include them in his habeas petition. Although Hubbard can establish his actual innocence claim without this evidence, if the Court denies Hubbard's appeal, Hubbard requests that the Court permit him to include this evidence in a successive petition on remand.

of the types of evidence that can be 'reliable'"); *Cleveland v. Bradshaw*, 693 F.3d 626, 640 (6th Cir. 2012) (finding recanting affidavit "reliable" where affiant had "'no evident motive to lie'" (quoting *House*, 547 U.S. at 552)).

The "'cross-corroboration'" of affidavits that are consistent with each other also "support[s] their reliability." *Lopez v. Miller*, 915 F. Supp. 2d 373, 401 (E.D.N.Y. 2013) (quoting *United States v. Leppert*, 408 F.3d 1039, 1042 (8th Cir. 2005)). Furthermore, because a gateway innocence claim is an equitable claim based on *actual* innocence (rather than *legal* innocence), "the habeas court must consider all the evidence . . . without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, 547 U.S. at 538 (quotation marks omitted).

The district court did not question the reliability of the cab-company subpoena evidence or the affidavits from the co-owners of the Special K Party Store, who confirmed that Collins could not have been in their store on the night of the shooting. And for good reason. The State itself provided the subpoena evidence in response to a FOIA request, R.51 (Am. Petition), PageID#2312 (FOIA Request), and the store owners "do[]

not have any apparent motive to lie on [Hubbard's] behalf," *Cleveland*, 693 F.3d at 641. The district court did, however, err in assuming that several other pieces of new evidence were unreliable.

1. The Hill Affidavit. The district court's first mistake was to reject out of hand the affidavit of Askia Hill, who gave a detailed eyewitness account of the murder, simply because of "Hill's delay in bringing out this evidence" and "the co-incidence of his incarceration with Hubbard." R.66 (Op.), PageID#4188. Although it is true that an "*[u]nexplained* delay" in bringing out new evidence is a factor that may detract from its reliability, *McQuiggin*, 569 U.S. at 399 (emphasis added), the "passage of time" is not "sufficient in and of itself to render [Hill's] affidavit unreliable," *Cleveland*, 693 F.3d at 641. Hill explained in his affidavit that he "never told anybody" what he witnessed that day because he lived in the neighborhood where the shooting took place and was "afraid for [his] life and . . . didn't want any trouble with anybody in the neighborhood." R.51 (Am. Petition), PageID#2238 (Affidavit). Hill's delay is therefore explained, not unexplained.

Nor does Hill's incarceration with Hubbard automatically render the affidavit unreliable. While it is true that courts often greet affidavits

from fellow inmates with skepticism, there is no per se rule that such evidence is unreliable. *See, e.g.*, *Muhammad v. Close*, 379 F.3d 413, 417 (6th Cir. 2004) (holding that a fellow inmate's affidavit was "at the very least, a significant piece of evidence" in a Section 1983 action). Moreover, the district court overlooked aspects of Hill's affidavit that enhance its reliability in several ways.

To start, Hill's account of the murder is corroborated by other record evidence. For example, Hill's observation that Mark Goings got into a car after shooting Penn outside of 3960 Gray Street is consistent with the affidavit of Roy Burford, who saw a "car light down the street" by the house where Penn was killed shortly after the shooting. R.51 (Am. Petition), PageID#2243 (Affidavit). And Hill's observation that Goings shot Penn after he started to walk away is consistent with the evidence at trial that Penn was shot in the back. *Id.*, PageID#2237 (Affidavit). In a portion of Burford's affidavit that the district court did not address, Burford also said that he was at the party store that night and did not see either Hubbard or Curtis Collins. *Id.*, PageID#2243. While the district court dismissed Burford's affidavit as hearsay, those observations were based on Burford's personal knowledge. Similarly, the district court

dismissed Emmanuel Randall's affidavit as hearsay even though Randall averred that he was personally with Collins the night of the murder playing dice. The district court focused solely on Burford's and Randall's statements that they had heard from people in their community that Goings killed Penn as revenge for his brother's murder. R.66 (Op.), PageID#4179. But there was more to those affidavits than those statements.

Moreover, the district court should also have considered Burford's and Randall's hearsay statements because hearsay affidavits are not automatically unreliable. *See, e.g.*, *Lopez*, 915 F. Supp. 2d at 401 ("Although the affidavits of Guido and Rivera are hearsay, the court has no difficulty concluding that they are reliable and may be considered for [Petitioner's] actual innocence claim"). And while hearsay alone may be insufficient to support a claim of actual innocence, here the affidavits corroborate a detailed eyewitness account. In any event, it is well-established that "the habeas court must consider all the evidence . . . *without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial.*" *House*, 547 U.S. at 538 (emphasis added) (quotation marks omitted).

Furthermore, an affiant's "willingness to testify" live may also support his reliability. *Jimenez v. Lilley*, No. 16CIV8545, 2017 WL 4535946, at *10 (S.D.N.Y. Oct. 10, 2017), *report and recommendation adopted*, 2018 WL 2768644 (S.D.N.Y. June 7, 2018). Hill stated in his affidavit that he is willing to testify under penalty of perjury. R.51, PageID#2239 (Affidavit). And while it is true that Hill was incarcerated with Hubbard and had seen him in the neighborhood, he averred that he does not know Hubbard "personally." *Id.*, PageID#2238. In other words, "there is no evidence of any close ties between the two individuals." *Cleveland*, 693 F.3d at 641. Hill's affidavit therefore lacks "the same risk of bias as an affidavit made by close friends or relations of [Hubbard]." *Id.*

2. The Collins Affidavit. The district court also gave short shrift to the recanting affidavit of Curtis Collins. As the court recognized, Collins was "[t]he prosecution's key witness." R.66 (Op.), PageID#4172. The district court found his recanting affidavit unreliable on the ground that belated recantations are generally viewed with "extreme suspicion." *Id.*, PageID#4189 (quoting *United States v. Chambers*, 944 F. 2d 1253, 1264 (6th Cir. 1991)). But while that skepticism may be warranted "in

the mine-run case," *Fontenot v. Crow*, 4 F.4th 982, 1041 (10th Cir. 2021), *cert. denied sub nom. Crow v. Fontenot*, 142 S. Ct. 2777 (2022), every recantation must be judged on its own terms, and recanting affidavits sometimes play a pivotal role in successful gateway innocence claims. *See, e.g.*, *Cleveland*, 693 F.3d at 639–40 (crediting a recanting affidavit offered 15 years after trial); *Howell*, 978 F.3d at 60–61 (granting evidentiary hearing based on recantations three decades later); *Arnold v. Dittmann*, 901 F.3d 830, 838–39 (7th Cir. 2018) (remanding for an evidentiary hearing to determine a recantation's reliability); *Teleguz v. Pearson*, 689 F.3d 322, 331–32 (4th Cir. 2012) (remanding for consideration of an actual-innocence claim based on new evidence, including recantation affidavits); *Bryant v. Thomas*, 274 F. Supp. 3d 166, 186–88 (S.D.N.Y. 2017) (ruling that the petitioner established a credible innocence claim based in part on eyewitness recantation), *aff'd*, 725 F. App'x 72, 73 (2d Cir. 2018) (mem.).[4]

[4] The district court's reliance on *Lewis v. Smith*, 100 F. App'x 351, 355 (6th Cir. 2004), which involved a mine-run recantation in an AEDPA deference posture, is misplaced in this actual-innocence case, subject to de novo review, involving a recantation with multiple indicia of reliability.

Here, the district court disregarded the many particular factors that distinguish Collins' affidavit from the "mine-run case." *Fontenot*, 4 F.4th at 1041. While "[a]s a general matter, a recantation *in the absence of corroborating evidence or circumstances* will probably fall short of the standard of reliability . . . that does not mean that recantation evidence is to be categorically rejected." *Howell*, 978 F.3d at 60 (emphasis added). Like other evidence, it "should be analyzed on an individual and fact-specific basis." *Id.* "[S]tatus as a recanting witness" is "not a bar to the acceptance of such testimony," especially where the witness has "proffered a convincing reason" for recanting, such as being "coerced . . . to lie" by prosecutors "threatening to charge him." *Fairman v. Anderson,* 188 F.3d 635, 646–47 (5th Cir. 1999).

The Collins affidavit is not a run-of-the-mill recantation that comes out of the blue decades after a conviction. Like the recanting affidavit this Court found reliable in *Cleveland*, Collins' affidavit is consistent with the testimony Collins himself gave *at trial*—and withdrew only when threatened with going to "jail for perjury." *Cleveland*, 693 F.3d at 640. The reliability of Collins' affidavit is also "greatly enhanced" because

unlike most recantations, it "matches" testimony he gave much earlier. *Fontenot,* 4 F.4th at 1041.

It is more credible than the incriminating testimony he gave at trial, under threat of being charged for perjury, because it is more "corroborat[ed]" by the record as a whole, *Howell*, 978 F.3d at 60; *cf. Davis v. Bradshaw*, 900 F.3d 315, 333 (6th Cir. 2018) (finding recantation unreliable where original testimony had "more corroboration"). This corroboration comes from both the original trial record and the new evidence submitted with Hubbard's petition. The notion that Collins identified Hubbard from the back of his head 400 feet away in the dark was always implausible on its face. The store owners say Collins was not allowed in their store and they did not see him the night of the murder; several witnesses with no apparent reason to lie have consistently maintained that Collins was at a house gambling with them that night; and multiple affiants also aver that Collins admitted to them that he lied because of pressure from the police. *See* R.51 (Am. Petition), PageID#2324–25 (Affidavit of R. Williams), *id.*, PageID#2334–35 (Affidavit of E. Carter). In short, the corroboration for Collins' recantation is multifaceted and unusually strong.

The "circumstances surrounding [Collins'] recantation" also "render it more credible than his trial testimony or pre-trial statements." *Cleveland*, 693 F.3d at 640. In contrast to Collins' earlier attempts to placate prosecutors threatening him with criminal charges, here "the fact that [Collins] had no motive to recant his testimony but instead sought to do so on his own free will, and has not subsequently withdrawn that testimony, lends it credibility." *Id.* Nor is Collins a "close friend[]" or other relation whose sympathies might present a "risk of bias." *Id.* at 641. Indeed, Collins testified at trial that he and Hubbard had a "falling out" and "dislik[ed] each other." R.56-12 (Trial Tr.), PageID#3511. Yet the district court ignored the fact that Collins has "no evident motive to lie" on Hubbard's behalf. *Cleveland*, 693 F.3d at 640 (quoting *House*, 547 U.S. at 552).

Furthermore, contrary to the district court's suggestion, there was no substantial "*[u]nexplained* delay" in Collins' decision to sign the recanting affidavit. *McQuiggin*, 569 U.S. at 399 (emphasis added). As Collins explained in the affidavit, he testified against Hubbard on the third day of trial "because of the fear [he] had of Sergeant Kinney and Gale's threats." R.51 (Am. Petition), PageID#2253 (Affidavit). He went

to prison in 2014 and 2015, which pricked his conscience because of "how hard and difficult it was in prison during that ten months." *Id.* And upon his release he learned that the prosecutors and police officers in Hubbard's case were retired, so he no longer had to worry about their threats to prosecute him. *Id.*, PageID#2253–54. The affidavit does not say that Collins waited "two more years" between learning this new information and signing the affidavit, as the district court seems to have assumed. R.66 (Op.), PageID#4190. And even if Collins had waited two years, that would not be an unreasonable amount of time for an individual—especially one with limited sophistication and an abundance of negative experiences with the legal system—to decide whether to take the significant step of formalizing his recantation in a sworn affidavit.

Finally, unlike most recanting affidavits, Collins' affidavit is also corroborated by a certified polygraph examination report. R.51 (Am. Petition), PageID#2306–07 (Polygraph Report). The district court erroneously excluded the polygraph evidence from consideration altogether on the ground that it is "not admissible evidence in Michigan state courts." R.66 (Op.), PageID#4191–92. In the first place, it is well-established that a habeas court addressing an actual-innocence claim

"must consider *all* the evidence . . . *without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial*." *Davis*, 900 F.3d at 326 (quoting *House*, 547 U.S. at 538) (emphasis added); *see also id.* at 333 (citing "a polygraph," among other evidence, as "corroboration" of a witness's testimony).

Moreover, the district court briefly acknowledged that "evidence that a person was willing to take a polygraph test may be admissible." R.66 (Op.), PageID#4191 (citing *Murphy v. Cincinnati Ins. Co.*, 772 F.2d 273 (6th Cir. 1985)). Yet without explanation, the court neglected to address that evidence in this case. Collins stated unequivocally in his affidavit that he was "willing to take a polygraph test" to prove that his incriminating testimony against Hubbard was false and that his recantation is truthful. R.51 (Am. Petition), PageID#2254 (Affidavit). As in *Murphy*, "[Collins'] willingness to submit to a polygraph examination reflected upon his credibility." 772 F.2d at 277. The district court did not give any reason for ignoring that indicium of reliability.

This Court should accept the new evidence as sufficiently reliable to proceed to the next step in the gateway innocence inquiry. But if the Court finds that the affiants' credibility requires further assessment, it

should remand for an evidentiary hearing where the affiants can be evaluated. As this Court has recognized, given the fact-intensive nature of the innocence inquiry and the dearth of prior opportunities for a hearing on new evidence, "it may frequently be appropriate to require the district court to hold an evidentiary hearing to enable a procedurally-barred habeas petitioner to develop the factual record necessary to support equitable tolling under the actual innocence standard." *McSwain*, 287 F. App'x at 461–62. "[A] petitioner is due some form of hearing suited to the circumstances, [u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief." *Bowman v. Haas*, No. 15-1485, 2016 WL 612019, at *5 (6th Cir. Feb. 10, 2016) (quoting *Christopher v. United States*, 605 F. App'x 533, 537 (6th Cir. 2015)).

II. Considering All the Evidence, Including the New Evidence, Any Reasonable Juror Would Likely Have Reasonable Doubt About Hubbard's Guilt.

Once a petitioner has presented some new reliable evidence, the Court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Davis*, 900 F.3d

at 326 (quoting *House*, 547 U.S. at 538). "To establish actual innocence, a petitioner must demonstrate that 'in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.'" *Penney v. United States*, 870 F.3d 459, 462 (6th Cir. 2017) (quoting *Bousley v. United States*, 523 U.S. 614, 623 (1998)). This probability standard is "less strict" than the familiar sufficiency-of-the-evidence standard set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979), and "does not require absolute certainty about the petitioner's guilt or innocence," *Cleveland*, 693 F.3d at 633 (quotation marks omitted). The evidence need only "undermine[] confidence in the result" of the trial. *Souter*, 395 F.3d at 590–91. Here, considering all the evidence, old and new, any reasonable juror would likely have at least reasonable doubt about Hubbard's guilt.

A. The Evidence Against Hubbard at Trial Was Extremely Thin.

To begin with, the evidence against Hubbard at trial was weak. A criminal case must be built on a "solid foundation in established facts." *Morgan v. Dickhaut*, 677 F.3d 39, 51 (1st Cir. 2012) (quoting *Commonwealth v. Salemme*, 481 N.E.2d 471, 475 (Mass. 1985)). In this case, the prosecution's "key witness," as the district court noted, was

Curtis Collins. R.66 (Op.), PageID#4172. Yet Collins' testimony was like quicksand—a mire of inconsistencies and incongruities. The account he gave on the third day of trial was overwhelmingly contradicted by the evidence, including his own prior testimony on the first day of trial, the physical facts indicating that he could not plausibly have identified Hubbard fleeing the scene, the testimony of Collins' own friends, and Hubbard's alibi witnesses.

On the first day of trial, Collins steadfastly insisted that on the night of January 17, 1992, he was not at the party store, he was nowhere in the area of Gray and Mack, and he never saw Hubbard. R.56-12 (Trial Tr.), PageID#3472–87. He also fully recanted his initial statement to the police and his preliminary examination testimony. *Id.* He explained that he went along with the story the police wanted to tell because he was supposed to be "on a tether," which he had removed in violation of his parole conditions, and the police threatened him with charges or penalties. *Id.*, PageID#3493–95, 3503–05. In fact, even though Collins knew how to read and write, the police wrote out the statement for him, which he then signed. *Id.*, PageID#3502–03.

After that testimony, Collins was arrested for perjury and locked up. R.56-11 (Trial Tr.), PageID#3233–34, 3237. Facing additional prison time, he gave in and cooperated with the government. *See id.* On the third day of trial, he dutifully provided another version of his account incriminating Hubbard. He testified that he saw Hubbard in the party store on January 17, 1992, left the store, and rounded the corner, at which point he heard gunshots, "[t]urned around and looked back across Mack" to see Hubbard running through the vacant lot across the street from 3960 Gray. *See id.*, PageID#3231–32.

On cross-examination, however, Collins' story quickly fell apart. Collins testified that he left the store before Hubbard and walked around the corner, down Gray Street in the opposite direction from the crime scene. *See id.*, PageID#3244. When he heard the gunshots, he was about 25 to 30 feet away from the front of the store (rather than "midblock," as his police statement had said, or "three feet" as he testified at his preliminary examination). *See id.*, PageID#3244–45, 3251, 3255–56. Earlier in the trial, the State's own law-enforcement witness, Officer Richardson, had established that the front of the store was itself about 375 feet from the crime scene. R.56-13 (Trial Tr.), PageID#3588; *see* R.51

(Am. Petition), PageID#2341 (Officer Richardson's diagram); R.56-13 (Trial Tr.), PageID#3586 (admitting diagram as People's Exhibit Number 22). Collins did not explain how he could have left the store *before* Hubbard, yet managed to walk only 25 or 30 feet down the block while Hubbard walked 375 feet to the crime scene. *See* R.56-11 (Trial Tr.), PageID#3272–73. Collins also testified that he did not know what Hubbard was wearing that night, *see id.*, PageID#3240, and that the man Collins identified as Hubbard was running "[a]way from [him]," so Collins "could not see his face," but Collins supposedly identified him by "[t]he scar" on the backside of his head, *see id.*, PageID#3253. Collins did not explain how he could see a scar from more than a football field away on a dark winter night.

The other evidence at trial confirmed the implausibility—indeed, physical impossibility—of this account. In addition to establishing that the party store was about 375 feet away from the crime scene, Officer Richardson testified that the "scene itself was fairly dark." R.56-13 (Trial Tr.), PageID#3587. Although there were street lights, Officer Richardson could not recall if they were operational that night, and in any event each street light was "approximately a hundred feet away." *Id.* Officer

Richardson also acknowledged that there was "no street light" and "no other type of . . . lighting" "[d]irectly in front" of 3960 Gray, where the shooting took place. *Id.*, PageID#3591. Although the house at 3960 Gray had a porch light, it was not on. *Id.*, PageID#3598–60. And spotting Hubbard's scar at that distance would have been an astonishing feat even in broad daylight. When Officer Richardson was shown a photograph taken from the side of the party store at around 9:45 to 10:00 a.m., which depicted him standing by the crime scene, *see* R.51 (Am. Petition), PageID#2343, he admitted that he could make out no more than his "body outline" or silhouette, R.56-13 (Trial Tr.), PageID#3594–96.

The testimony of Lucinka Gross confirmed how much more difficult it would have been to see on that poorly lit street at night. Gross lived only about a block away from the crime scene, *id.*, PageID#3617, close enough that her daughters heard the gunshots from the house, *see id.*, PageID#3622–23. As Gross was walking up Gray Street towards the party store, she came across Rodnell Penn's dead body. But it was so dark that she thought she was seeing "garbage bags on the street" or "a heap of trash bags" until she "got close" and "could see it was a body." *Id.*, PageID#3618, 3621.

Under the "physical facts rule," the "testimony of a witness which is opposed to the laws of nature, or which is clearly in conflict with principles established by the laws of science," cannot be given any probative value by the jury. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 803 (6th Cir. 2000) (quoting *McDonald v. Ford Motor Co.*, 326 N.E.2d 252, 255 (Ohio 1975)); *see also Lovas v. Gen. Motors Corp.*, 212 F.2d 805, 808 (6th Cir. 1954) ("The testimony of a witness which is positively contradicted by the physical facts cannot be given probative value by the Court"). Collins' testimony that he identified Hubbard by a scar on the back of his head 400 feet away in the dark is "opposed to the laws of nature" and would not be given any credence by a reasonable fact-finder.

As if that were not enough, Collins' own friends (who did not know or barely knew Hubbard) testified at trial that Collins was with them that night and could not have been anywhere near the shooting, which took place around 9:30 p.m. Raymond Williams, who had been "best friends" with Collins for seven to eight years, testified that Collins was with him at the home of Roney Fulton (aka "Big Ron") gambling from 8:00 p.m. to at least 10:00 p.m. R.56-11 (Trial Tr.), PageID#3289–91. Collins was still there when Williams left around 10:00 p.m. to see the

premiere of the movie *Juice*, which had its opening night on the 17th. *Id.*, PageID#3291–92. Williams testified that he was not friends with Hubbard and in fact "barely know[s]" him, so he had no motive to lie. *Id.*, PageID#3293. Similarly, Roney Fulton himself testified that Collins spent "all day" at his house and was shooting dice (gambling) "all night." *Id.*, PageID#3302, 3310–11. Fulton likewise did not know Hubbard well and in fact "never had a conversation with" him. *Id.*, PageID#3309. Lucinka Gross, who knew Collins by his nickname "Curt Baby," also testified that she did not see Collins in the area as she walked up Gray shortly after the shooting, even though he testified that he ran down Gray and left the area in a cab. R.56-13 (Trial Tr.), PageID#3623–24.

Meanwhile, Thomas and Vanessa Spells, two of Hubbard's friends, testified that Hubbard was visiting them at their house that night. Thomas Spells testified that Hubbard was there with him from around 6:00 p.m. or 7:00 p.m. to around 9:00 p.m. or 10:00 p.m., when they left to pick up the Spells' baby from Hubbard's mother's house. R.56-11 (Trial Tr.), PageID#3317. Hubbard never left the apartment while they were together. *Id.*, PageID#3318–19. As Hubbard and Spells walked over, they saw an ambulance on Gray Street. *Id.*, PageID#3318. One of the

detectives talked to Hubbard, and eventually Hubbard and Spells left to go to Hubbard's mother's house. *Id.* This account was corroborated by Officer Craig Turner's testimony that Thomas Spells was with Hubbard on the street that night. *Id.*, PageID#3326.

A close examination of the trial record also reveals loose ends that the government never tied up. For example, a police report shows that officers interviewed a man who reported seeing Rodnell Penn with a "Black female" approaching 3960 Gray and then hearing gunshots "[m]oments later." R.51 (Am. Petition), PageID#2345–46 (Case Report). A witness named Herman Luckey also said in a police statement that after hearing gunshots and seeing the deceased lying on the ground, he saw a black woman go up to him, then walk back into 3960 Gray. *Id.*, PageID#2348. Yet there is no mention of any woman in the account of Curtis Collins, who testified that he ran down Gray Street after the shooting. Multiple witnesses also spoke about a mysterious "white jeep" that was driving quickly down a street around the time of the shooting. *See* R. 56-12 (Trial Tr.), PageID#3520 (Trammel); R.56-12 (Witness Statement of Peter Baker), PageID#3438 ("[T]he two plainclothes officers came out . . . and hollered, white jeep, they were in a white jeep"). The

State never connected Hubbard to the jeep, and Collins told the police Hubbard drove a Gray Peugot station wagon. R.56-8 (Witness Statement), PageID#2629.

B. In Light of the New Evidence, No Reasonable Juror Could Convict Hubbard.

With the case against Hubbard built on such wobbly foundations, the new evidence delivers a powerful blow. Collins' 2017 affidavit declares in no uncertain terms that he "was not present on, or anywhere near the corner of Gray and Mack" on January 17 and "did not witness Carl Hubbard fleeing from where Mr. Rodnell Penn was found dead." R.51 (Am. Petition), PageID#2253–54 (Affidavit). Collins also explains that "Sergeant Kinney forced [him] to falsely testify at the preliminary examination." *Id.* This affidavit is backed by a polygraph report from a licensed polygraph examiner confirming that Collins testified truthfully that he was never at the scene of the crime. *Id.*, PageID#2306–07.

Collins' allegations of police using improper tactics to coerce "cooperation" also fit a pattern of documented misconduct by the Detroit police department in the 1990s. *See id.*, PageID#2329 (Article). The mayor of Detroit requested an investigation by the U.S. Department of Justice into "charges that Detroit police officers coerced false confessions

or statements from people after illegally locking them up for days at a time," and several judicial settlements followed. *Id.* In one particularly egregious instance, the City paid a five-figure settlement arising from a murder case in 1995 in which Sergeant Kinney—who had a central role in this case—admitted to locking up a witness "for days without charges against her" and "threatening to take [the witness's] children away if she did not cooperate." *Id.*, PageID#2331–32. The Wayne County circuit court judge presiding over the lawsuit said, "If I have ever seen a case where the police have manufactured the facts, this is one," and "I have never had facts as egregious as this case." *Id.*, PageID#2332.

Further corroborating Collins' recantation are the affidavits from the party store owners, Samir and Raad Konja. Raad Konja, who knew Collins well enough to have banned him from the store, says Collins "was not in the Special K Party Store on January 17th." *Id.*, PageID#2246. Raad was "working in the front" of the store on January 17th, where he "would have seen anyone who entered the store," and Collins "did not enter." *Id.* That is not surprising because, as both Raad and Samir Konja confirmed, "Collins was not allowed" in the store because of "problems [they] had with him." *Id.*, PageID#2246, 2248.

The new evidence from Hubbard's FOIA request also supports Collins' recantation. *See Id.*, PageID#2309–10 (Subpoena). According to Collins' original story, after hearing gunshots and running towards the crime scene, he left in a cab and went home. R.56-12 (Trial Tr.), PageID#3475–76. It turns out, however, that the prosecutor on this case specifically instructed Sergeant Kinney to serve a subpoena on the cab company for records to shore up Collins' questionable account. R.51 (Am. Petition), PageID#2309–10 (Subpoena). That the State never presented any such records at trial is a strong indication that the State came up empty-handed. "When it would be natural under the circumstances for a party to call a particular witness . . . and the party fails to do so, tradition has allowed the adversary to use this failure as the basis for invoking an adverse inference." *Elam v. Menzies*, 594 F.3d 463, 469 (6th Cir. 2010) (quoting 2 McCormick on Evidence § 264 (6th ed.)). The same goes for the State's failure here to present any documents obtained from the subpoena.

Then there are additional witnesses who confirm that Collins was out gambling on January 17 and lied about being at the scene. Emmanuel Randall avers that he "know[s] for a fact" that "Collins was

not on Gray [S]treet on the night of January 17, 1992 at the time of the murder" because he was with Collins over at Big Ron's house on Corbet Street gambling. R.51 (Am. Petition), PageID#2321 (Affidavit). Raymond Williams avers that he heard Collins crying in his cell during Hubbard's trial because Sergeant Kinney and another officer were "making him lie." *Id.*, PageID#2324 (Affidavit). Williams urged Collins not to lie because "me and you know you wasn't on Gray and Mack." *Id.* Roy Burford and Elton Carter also say that Collins told them he lied because of threats from the police. *Id.*, PageID# 2243–44 (Affidavit), 2334–35 (Affidavit). Randall, Williams, Burford, and Carter are all willing to testify in court if called as witnesses. *Id.*, PageID#2321–22 (Affidavit), 2324–25 (Affidavit), 2243–44 (Affidavit), 2334–35 (Affidavit).

In addition to the Collins recantation, which is corroborated by so much other evidence, Askia Hill submitted an affidavit with a detailed eyewitness account identifying a different suspect as the murderer. *Id.*, PageID#2237 (Affidavit). Hill is willing to testify that he was on his way to the party store on the night of January 17 when, as he was passing the vacant lot across from "Uncle Peter's house" (3960 Gray), he saw a man from the neighborhood named Mark Goings "arguing with somebody in

the front of" 3960 Gray. *Id.* This other person "turn[ed] his back" and "start[ed] to walk away from Mark Going," at which point Hill heard gunshots and saw the man who had been arguing with Goings fall to the ground. *Id.* Goings then stepped over him and started shooting him again. *Id.* This is consistent with the physical evidence at trial that Rodnell Penn was shot multiple times in the back and head. R.56-12 (Trial Tr.), PageID#3467–68. Hill says that Goings then got into a car with some other people parked in front of 3960 Gray and drove down Gray Street. R.51 (Am. Petition), PageID#2237–38 (Affidavit).

Hill's account is corroborated by Burford, who was at the party store that night, and Randall. After Burford heard gunshots, he stepped out of the store and "car light down the street" by the house where Penn was killed. *Id.*, PageID#2243 (Affidavit). Burford and Randall also state in their affidavits that they had heard from people in the community that Mark Goings killed Penn because Goings believed he killed his brother. *Id.*, PageID#2243 (Affidavit), PageID#2321–2322. That is a far more plausible motive than the one the State proffered for Hubbard at trial. The State emphasized in its opening statement that "[t]he most important circumstance[] that this Court should be aware of is that no

person had more of a motive" than Hubbard, because four years earlier Rodnell Penn had testified at a preliminary examination against Hubbard. R.56-12, (Trial Tr.), PageID#3460. But as the State acknowledged, Penn ultimately declined to testify at trial, and the case against Hubbard was dismissed. *See* R.56-10, PageID#3177 (Motion and Order of Dismissal). The State's theory that Hubbard continued to associate with Penn, and then suddenly retaliated four years after Penn ultimately *declined* to testify against him at trial, makes little sense.

C. The District Court's Flawed Analysis of the Actual Innocence Issue Cannot Withstand Scrutiny.

The district court's discussion of actual innocence, which is subject to *de novo* review, only grazed the surface of this evidence. For example, the court ignored altogether the affidavits of Raad and Samir Konja, the cab company subpoena, the affidavit of Raymond Williams, and the newspaper article detailing past misconduct by Sergeant Kinney. And as discussed above, the court too quickly dismissed as unreliable Collins' recanting affidavit and the affidavits from Burford, Randall, and Carter. The court failed to consider how cross-corroboration and other factors enhance the reliability of this evidence in this case, and the court at times erroneously conflated reliability with admissibility.

The district court also exaggerated the strength of the evidence against Hubbard, overlooking major inconsistencies in the State's case and indulging the State's implausible inferences. The court quoted approvingly a state post-conviction court's conclusory assertion that the circumstantial evidence of Hubbard's guilt was "surprisingly strong." R.66 (Op.), PageID#4190 (quoting R.56-6 (Op.), PageID#2555). But the state court—a single judge of the Michigan circuit court—did not explain what that evidence was or why it was supposedly strong. *See* R.56-6 (Op.), PageID#2555. And while a divided panel of the state court of appeals denied leave to appeal, Judge Stephens dissented, indicating that she would have granted leave based on Michigan Court Rule 6.508(D), which permits such relief only if the defendant demonstrates a "significant possibility of actual innocence." R.56-7 (Order), PageID#2558.

The district court's discussion of the circumstantial evidence here reveals how thin it is. The court began by highlighting Andrew Smith's testimony that he saw Hubbard in the party store before the shooting. R.66 (Op.), PageID#4185, 4190. But the State did not even mention Smith in its opening statement, focusing instead on Collins. *See* R.56-12

(Trial Tr.), PageID#3460–64. The State made only a brief reference to Smith's testimony in closing, after Collins' testimony had been dramatically undermined. R.56-11 (Trial Tr.), PageID#3360. One reason for that might be that on cross-examination, Smith testified that he knew Collins but did not see him in or near the party store on the night of the murder. R.56-12 (Trial Tr.), PageID#3613–14. Another reason might be that Smith himself had apparently been a suspect in the murder. *See* R.51 (Am. Petition), PageID#2359 (police report on "subj[ect] wanted for murder" indicating that man "[identified] himself as Andrew Smith" on telephone and later "jump[ed] [from] top porch" when police arrived at dwelling and arrested him); R.56-8 (Witness Statement), PageID#2630 (police questioning of Smith the following day). Lucinka Gross also testified that she did not see Andrew Smith that night, even though she walked up Gray Street and went into the party store to ask the store owners to call the police. R.56-12 (Trial Tr.), PageID#3625.

Even taken at face value, Smith's testimony raised more questions than it answered. Smith claimed to have seen Hubbard with "two other guys" walking on Gray Street, but he did not remember what Hubbard or anyone else was wearing, and he "couldn't tell" if the deceased person

he saw lying on the ground was "one of the same individuals" he had seen before with Hubbard. R.56-12 (Trial Tr.), PageID#3604, 3608, 3610. Smith did not offer any eyewitness testimony or any other reason to jump to the conclusion that Hubbard murdered Penn.

Next, the district court cited the testimony of John Trammel, who said he saw Hubbard "standing with a crowd of people around an ambulance and police cars right after the shooting." R.66 (Op.), PageID#4190. It is unclear why the district court thought this testimony significant. That Hubbard was at the scene *after* the shooting has always been undisputed; indeed, that was the testimony of his alibi witnesses. If anything, the fact that Hubbard was there after the shooting (and not hiding away somewhere) makes it *less* likely that he was the murderer. On the State's theory, Hubbard fled the scene in a hurry only to return when the police arrived and a crowd of neighbors, who presumably might have caught a glimpse of the shooter in the act, had gathered around to watch.

As for the testimony of Leon Penn, Rodnell's brother, the court overlooked a major weakness in his account. While Leon testified that Rodnell stayed with him the night before Friday, January 17, Rodnell's

cousin Christopher Harris testified that Rodnell stayed with *him* that night in an entirely different apartment on a different street. *Compare* R.56-12 (Trial Tr.), PageID#3526, 3530, 3532 (Leon) *with* R.56-13 (Trial Tr.), PageID#3651–52 (Harris). Leon also admitted to smoking crack "[m]aybe once or twice a month." R.56-12 (Trial Tr.), PageID#3536–37. To the extent his testimony that Rodnell had been "selling drugs for Hubbard for years" was accurate, R.66 (Op.), PageID#4190, that would only deepen the mystery about Hubbard's supposed motive; the State argued that Hubbard had a motive because Rodnell (almost) testified against him in a trial in 1988, but why would Hubbard suddenly kill Penn after working with him for years?

Perhaps to fill that gap, the district court mentions that Rodnell had "a large amount of money on him" on January 17. R.66 (Op.), PageID#4191. But the State did not present any evidence that Hubbard robbed him. Again, the fact that Rodnell was carrying a lot of money in a high-crime neighborhood would seem to cut against zeroing in on Hubbard. The court also mentions that Rodnell's girlfriend said Rodnell called her from a telephone booth and it sounded like "someone was trying to hurry him off the telephone." *Id.* But the State did not present

any evidence that Hubbard was near that telephone; the State's own witness, Andrew Smith, testified that he did not see Hubbard near the telephone at any point. R.56-13 (Trial Tr.), PageID#3614. Rodnell's girlfriend also testified that Rodnell sounded "very happy" on the phone. R.56-11 (Trial Tr.), PageID#3208.

The district court also said that Hubbard made some "false statement[s]" to the police following his arrest. R.66 (Op.), PageID#4191. But it is not clear that many of those statements have actually been proved false. *See People v. Hastings,* No. 336596, 2018 WL 6184892, at *7 (Mich. Ct. App. Nov. 27, 2018) (per curiam) (noting that a defendant's "*proved-to-be false* exculpatory statement[]" can supply circumstantial evidence of his guilt (emphasis added) (quoting *People v. Dandron*, 245 N.W.2d 782, 784 (Mich. Ct. App. 1976)). For example, the State has not proved that Hubbard was "on Gray and Mack at the time of the shooting," R.66 (Op.), PageID#4191, as opposed to after the shooting; it has presented only weak and conflicting evidence on that point. Also, the State's only evidence that Hubbard had seen Rodnell Penn more recently than the 1980s appears to be the testimony of Leon Penn, an admitted crack user whose testimony contradicted that of Christopher Harris,

Rodnell's cousin. *See supra,* at 59. Rodnell's cousin also did not testify that he had ever seen Hubbard with Rodnell; in fact, he had seen Hubbard briefly only once, in the 1980s. *See* R.56-13 (Trial Tr.), PageID#3651. Notably, Officer Craig Turner, who testified that he had seen Hubbard almost every night for three or four years, R.56-13, PageID#3564, also did not say that he had ever seen Hubbard and Rodnell together.

The district court also identified as a "false statement" that Hubbard "denied that there had been a murder charge against him where Penn had been a witness." R. 66 (Op.), PageID#4191. This uncooperativeness is hardly strong evidence of guilt, as opposed to merely a lack of trust in the police or a concern that the police would wrongly deem Hubbard guilty. "False exculpatory statements cannot by themselves prove the government's case." *United States v. Morrison*, 220 F. App'x 389, 397 (6th Cir. 2007) (quoting *United States v. Rahseparian*, 231 F.3d 1257, 1263 (10th Cir. 2000)). As the Michigan Court of Appeals has observed, "it seems clear that the People must show more than mere opportunity to commit the crime, coupled with false exculpatory statements," for "'[a]n innocent man, when placed by circumstances in a

condition of suspicion and danger, may resort to deception in the hope of avoiding the force of such proofs.'" *People v. Besonen*, 144 N.W.2d 653, 656 n.1 (Mich. Ct. App. 1966) (quoting *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 317 (1850), *abrogated on other grounds by Commonwealth v. Russell*, 23 N.E.3d 867 (Mass. 2015)); *see also United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975) ("[F]alsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak").

Ultimately, none of the circumstantial evidence in this case comes close to demonstrating Hubbard's guilt beyond a reasonable doubt. On the record considered as a whole, the evidence is more than sufficient to establish Hubbard's actual innocence and thereby toll the limitations period for his habeas petition.

CONCLUSION

For the reasons set forth above, this Court should reverse the district court and remand this matter to permit Hubbard's habeas petition to proceed on the merits.

Respectfully submitted,

/s/Alexander Kazam
Alexander Kazam
KING & SPALDING LLP
1700 Pennsylvania Avenue NW
Washington, DC 20006
(202) 737-0500
akazam@kslaw.com

Counsel for Petitioner-Appellant Carl Hubbard

December 19, 2022

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 6 Cir. R. 32(b) because it contains 12,784 words, excluding the parts of the Petition exempted by Fed. R. App. P. 32(f) and Sixth Circuit Rule 32(b).

This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). It has been prepared in a proportionally spaced typeface using Microsoft Word 365 MSO in 14-point Century Schoolbook font.

Date: December 19, 2022

/s/Alexander Kazam
Alexander Kazam

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2022, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/Alexander Kazam
Alexander Kazam

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	Description	PageID
21-2	Preliminary Examination	245–297
51	Amended Petition for Writ of Habeas Corpus & Exhibits	2131–2441
56-2	Opinion & Order Denying Hubbard's Motion for Relief from Judgment	2488
56-6	Order & Opinion Denying Hubbard's Successive (3d) Motion for Relief from Judgment	2542–2557
56-7	Order Denying Application for Leave to Appeal, Motion to Remand, and Granting Motion to Waive Fees	2258
56-8	Order & Opinion Denying Supplemental Brief and Additional Record Material	2560–2564
56-8	Witness Statement of Curtis Collins	2628–2629
56-8	Witness Statement of Andrew Smith	2630–2632
56-8	Judgment of Conviction	2786
56-10	Motion and Order of Dismissal	3177
56-10	Witness Statement of Peter Baker	3206
56-11	Trial Transcript	3207–3374
56-12	Witness Statement of Peter Baker	3438
56-12	Aug. 31, 1992 Trial Transcript	3454–3567
56-13	Sept. 1, 1992 Trial Transcript	3568–3645
56-13	Sept. 2, 1992 Trial Transcript	3647–3664
56-15	Affidavit of Ronald Giles	3785
66	Opinion and Order Denying Petition for Writ of Habeas Corpus	4172–4192
68	Order Granting in Part Certificate of Appealability	4194–4195