IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

DERRICK X. SHIELDS,	§	
Petitioner,	§	Case No. 5:18-cv-00265-BSM-BD
v.	§	
JAMES GIBSON, WARDEN;	§	
Respondent.	§	

REPLY IN SUPPORT OF PETITION FOR
WRIT OF HABEAS CORPUS UNDER 28 U.S.C. § 2254

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Respondent does not address the merits of Derrick Shields' constitutional claims in any meaningful way, Response to Amended Petition for Writ of Habeas Corpus ("Resp.") at 29-36, and instead argues that Mr. Shields' claims are procedurally barred by default. To the extent any of Mr. Shields' claims may be procedurally defaulted, Mr. Shields' actual innocence overcomes any default. While Respondent disputes the evidence regarding Mr. Shields' innocence, an evidentiary hearing is necessary to resolve the factual and credibility disputes raised by Respondent. Each of the pieces of evidence that Respondent argues is unreliable goes directly to the heart of Mr. Shields' actual innocence claim and the *Schlup* innocence gateway. In addition, to the extent Respondent touches on the merits of Mr. Shields' *Napue* claim, he simply disputes the underlying facts; he in no way challenges that the facts alleged state a valid claim of unconstitutional state misconduct. Accordingly, at a minimum, this Court should grant an evidentiary hearing to resolve these factual disputes.

I. DERRICK SHIELDS' INNOCENCE OVERCOMES ANY PROCEDURAL DEFAULT.

Derrick Shields is innocent. The purpose of the procedural actual innocence standard is to prevent the manifest injustice of the continued confinement of an innocent man or woman. *Schlup v. Delo*, 513 U.S. 298 (1995). "[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Id.* at 325 (citing *In re Winship*, 397 U.S. 358, 372 (1970) (the "fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free"). The evidence of innocence here establishes not only a colorable-gateway claim of actual innocence, but also a freestanding claim of actual innocence. *See* section II, *infra*. Comparing Mr. Shields' evidence to that presented in *Schlup v. Delo*, *House v. Bell*, and *McQuiggin v. Perkins*, Mr.

Shields easily satisfies the requirements of a gateway claim. *Schlup v. Delo*, 513 U.S. 298 (1995); *House v. Bell*, 547 U.S. 518 (2006); *McQuiggin v. Perkins*, 569 U.S. 383 (2013).

Mr. Shields has always maintained his innocence. He falsely confessed as a 15-year-old after three days of relentless, coercive interrogation by detectives, including threats of the death penalty against him and his brother. Derrick recanted at his first opportunity – both at his first court appearance and to the court-appointed psychologist in his pre-trial evaluation – and has persistently and zealously sought to prove his innocence ever since. *See* Amended Petition for a Writ of Habeas Corpus, November 9, 2018, Doc. No. 10 ("Am. Pet.") at 18-19; *see also* Affidavit of Derrick Shields, dated August 30, 2019, attached hereto as Exhibit 36 ("Shields Aff."). Unfortunately, his trial counsel did not listen to his pleas of innocence and he was without counsel for years after conviction. *See* Am. Pet. at 64-97; Ex. 17-18 (Shields' letters to trial counsel); Ex. 36 (Shields Aff.).

No physical evidence ever connected Mr. Shields to the crime, despite the collection of ample physical evidence from the scene, including many fingerprints. No witnesses identified him despite photographic line-ups shown to several witnesses the night of the crime. Mr. Shields was tested for gunpowder the night of the crime; it was negative. And Mr. Shields had a rock solid alibi; he was at home and had spoken to his probation officer in the precise timeframe that the crime occurred. *See* Am. Pet. at 1; 55-58.

Today, however, Mr. Shields presents this court with ample evidence establishing his innocence and proving that his confession – the centerpiece of the prosecution case – is false. Am. Pet. at 30-59. Mr. Shields now has four different witnesses who confirm his innocence and consistently identify Mario "Bowlegs" McNichols as the true third perpetrator. Stunningly, one of those witnesses is the mother of his co-defendant Kuntrell Jackson, who has been trying to tell

the State that Derrick is innocent and Mario McNichols is guilty for over eighteen years, but no one will listen. Another is Kuntrell's aunt, who corroborates Ms. Jackson's statements, because Kuntrell also told her that Derrick is innocent and McNichols is the true third perpetrator. None of the four new witnesses have any reason to lie or anything to gain from coming forward. To the contrary, each has something valuable to lose – the love of close family and friends.

Mr. Shields also now presents several new pieces of evidence proving the falsity of his confession, including: (1) new witness statements that Scott Adams, one of the detectives who interrogated Derrick, has a pattern and practice of coercive interrogation tactics, including regularly threatening suspects with the death penalty, as well as other specific tactics described by Derrick; (2) new cognitive testing conducted on Mr. Shields that demonstrates he would have been uniquely vulnerable in the interrogation room, which was not in use before 2003; (3) new science firmly establishing that adolescents are uniquely vulnerable in the interrogation room and at increased risk of falsely confessing; and (4) new research regarding the inherent coerciveness of Reid-style police interrogations and the significant risk of false confessions, particularly when such tactics are used on minors.

To prove his actual innocence, Derrick must present "new reliable evidence" "that was not presented at trial," *Schlup*, 513 U.S. at 324, even if that evidence would not necessarily be admissible at trial, *House*, 547 U.S. at 537. The standard does not require the petitioner to prove his innocence with "'absolute certainty.'" *Brown v. Kelley*, Ex. 20, No. 5:16-CV-00381-BRW-JJV, 2018 WL 3999705, at *6 (E.D. Ark. Aug. 21, 2018) (quoting *House*, 547 U.S. at 538). Rather, evidence need only establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327; *see also Bragg v. Norris*, 128 F. Supp. 2d 587, 604 (E.D. Ark. 2000) (considering procedurally defaulted

claims and granting the petition where newly discovered evidence called into question the reliability of the prosecution's primary witness at trial).

The court must consider "all the evidence," "old and new," "without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial,'" when determining what a reasonable juror would do today. *House v. Bell*, 547 U.S. 518, 538 (citing *Schlup*, 513 U.S. at 327-28). Thus, even if this Court concludes that some of this evidence is not new, the Court must consider it when determining whether a reasonable juror would find Mr. Shields guilty beyond a reasonable doubt.

A. Four New Witnesses Exonerate Derrick Shields and Identify Mario McNichols as the True Third Perpetrator

Mr. Shields presents statements from four new witnesses who provide compelling, reliable evidence of his innocence and of the identity of the true third perpetrator. Respondent has conceded that two of the witnesses are new. To the extent Respondent disputes that the other two witnesses are new, he is wrong for the following reasons.

1. The Evidence is New

First, Stella Young – the aunt of both of Mr. Shields' co-defendants – has now come forward to share that Kuntrell Jackson told her that Derrick Shields is innocent and that Mario McNichols is the true third perpetrator. Am. Pet. at 33-36. Respondent State does not disagree that Ms. Young is a new witness.

Second, Sherell Buckley is a new witness. Respondent does not dispute that no one knew about him at the time of Mr. Shields' trial. Current counsel only learned of Mr. Buckley because he posted a public comment on an online discussion board about Mr. Shields' innocence: "They should have gotten the right person derrick shouldn't have been convicted." Am. Pet. at 36-37. Mr. Buckley personally observed Kuntrell Jackson, Travis Booker, and Mario McNichols together the night of the crime; Derrick Shields was not with them. Jackson had a sawed-off .410

shotgun with tape on the handle. *Id.* Mr. Buckley joined the three boys to go shoot the gun in an open field, but he parted ways when they rode off on their bikes to "hit a lick at Movie Magic." *Id.* Mr. Buckley was also subsequently in the county jail with Jackson and Booker when both Jackson and Booker told him that Derrick was not involved in the murder. *Id.*

Third, Tony Rudd is a new witness. Respondent does not dispute this. Rudd was also in the county jail at the same time as Jackson, Booker, and Shields. *Id.* Rudd, like Buckley, states that Jackson and Booker told him that Shields was not there when Laurie Troup was killed. Am. Pet. at 37. He added that they complained to him that they would not be in jail if Shields had not named them to police. *Id.* They blamed him for their arrest and capital murder charges. *Id.*

Travis Booker is also a new witness to Mr. Shields' innocence. While, of course, everyone knew about Booker at the time of trial because he was a co-defendant and he testified against Derrick at his trial – what is new is that he is finally clawing back his trial testimony and his confession. It is well-established that a defendant cannot be held accountable for a witness's refusal to tell the truth earlier in the process, particularly a co-defendant. *See Amrine v. Bowersox*, 128 F.3d 1222, 1228-29 (8th Cir. 1997) (*Amrine I*) (witness recantation is considered "new evidence" and can show innocence if that witness was heavily or solely relied upon at trial, and remanding for an evidentiary hearing, recognizing that a case presenting recantations from trial witnesses "raises the real possibility that his case may be an example of the 'extremely rare' scenario for which the actual innocence exception is intended"). *See also Bragg*, 128 F.Supp.2d at 602 (E.D. of Arkansas recognizing that evidence available at trial may still be new if it did not become exculpatory until later). The State's cry that this would "excuse unlimited delay in procuring evidence of innocence in every case" is a red herring. Any delay caused by Travis's unwillingness to come forward sooner cannot be charged to Shields.

Finally, Marie Jackson – perhaps the most compelling witness to Derrick Shields' actual innocence – is new because Mr. Shields' trial counsel failed to notice the police report documenting her statements to police which exonerated his client. Ms. Jackson is the mother of Derrick's co-defendant, and she came to the police station of her own volition, not to exonerate her son, but to provide information that further implicated her son. She not only implicated Kuntrell Jackson and Travis Booker, but she divulged to the police the true identity of the third perpetrator – Mario "Bowlegs" McNichols. In doing so, she risked alienating her family and McNichols' mother who happened to be one of her closest friends. She was trying to do the right thing – to help an innocent kid who was locked up in jail and facing a life without parole sentence for a crime he did not commit. But everyone ignored her.

Respondent claims that Mr. Shields cannot now rely on Ms. Jackson's consistent account of her son's statements that Derrick Shields is innocent – both then (to police in 2003), and again in 2013, and again in 2018 – because the fact that she tried to do the right thing back in 2001 was disclosed to defense counsel prior to Derrick's trial. That cannot be right. The fact that no one – not the police, not the prosecutor, and not Mr. Shields' own defense attorney – acted on this information cannot fairly be held against Mr. Shields. He was wronged by the police who failed to follow up on the highly credible information provided by a co-defendant's mother; by the prosecutors, who either were aware of this information or should have been, and failed to follow up on this information; and then by his trial attorney who failed to notice the police report of Marie Jackson's exculpatory statement and thus failed to call her at Derrick's trial – a trial in which Derrick's defense placed blame for the crime squarely on the shoulders of Mario McNichols, Travis Booker, and Kuntrell Jackson. To the extent the Eighth Circuit held otherwise in *Kidd*, that case was wrong. *See* section I.A.2, *infra*. Instead, "in a case where the underlying

constitutional violation claimed is ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway." *Reeves v. Sci*, 897 F.3d 154, 164 (3d Cir. 2018) (quoting *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (8th Cir. 2003)).

"[T]he injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325. Indeed, "the conviction of an innocent person [is] perhaps the most grievous mistake our judicial system can commit," and thus the contours of the actual innocence gateway must be determined with consideration for correcting 'such an affront to liberty.'" *Reeves*, 897 F.3d at 164 (quoting *Satterfield v. Dist. Att'y Phila*., 872 F.3d 152, 154 (3d Cir. 2017)).

a. This Court Should Consider All Evidence Not Presented at Trial to be New for *Schlup Analysis*

Respondent argues that Marie Jackson's account is not newly discovered evidence because she was available at the time of trial and the fact that she had exculpatory information could have been discovered through due diligence. Respondent also argues that Booker's recantation is not new because trial counsel could have gotten this from him at the time of the trial. The State further asserts that the ineffectiveness of Mr. Shields' trial counsel in failing to discover this exculpatory evidence does not render it new. The State is wrong on all counts.

The State relies on an outdated 2001 Eighth Circuit case, *Amrine v. Bowersox*, to assert that evidence must *not have been available at the time of trial* in order to be "new." 238 F.3d 1023, 1029 (8th Cir. 2001) (emphasis added). But this case law is under attack and should no longer be followed. Every other federal circuit court to rule on the question of whether evidence must be newly discovered or whether it is sufficient that it was not presented to the trial jury – adding up to seven other federal circuit courts – has disagreed with the Eighth Circuit. *See*

Reeves v. Sci, 897 F.3d 154, 161-64 (3rd Cir. 2018) (explaining that the Eighth Circuit is out of step with the other federal courts on this question, and summarizing case law from the other circuits holding that evidence is "new" if it was not presented at trial); *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010); *Perkins v. McQuiggin*, 670 F.3d 665, 673 (6th Cir. 2012); *Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 962-63 (9th Cir. 2003); *Lopez v. Trani*, 628 F.3d 1228, 1230-31 (10th Cir. 2010); Riva v. Ficco, 803 F.3d 77, 84 (1st Cir. 2015); Rivas v. Fischer, 687 F.3d 514, 543, 546-47 (2d Cir. 2012).[1] The Eighth Circuit was the first federal court to decide this question and it did it in a mere two sentences, with little to no explanation, and it has not revisited the issue since 2001. *Amrine*, 238 F.3d at 1029.

Just last month, a Missouri state court also explicitly declined to follow *Amrine*, labeling the Eighth circuit standard "uniquely preclusive," and concluding that *Amrine* conflicted with U.S. Supreme Court precedent. *Kidd v. Korneman*, Case No. 18DK-CC00017 (43d Cir. Ct. Aug. 14, 2019), attached hereto as Exhibit 43. The *Kidd* court held that *Amrine* inappropriately "change[d] *Schlup*'s standard by adding that innocence evidence proffered in support of a *Schlup* claim is not 'new' if trial counsel could have discovered it through the use of due diligence." *Kidd* at 94. The *Kidd* court rejected such a rule because it conflicted with U.S. Supreme Court precedent and "inevitably diminish[es] the reliability of the innocence determination." *Id.* at 94-95.[2]

[1] The Eleventh Circuit thus far has refrained from reaching the issue of whether a petitioner's evidence that was available at trial but not presented should be considered "new" for purposes of *Schlup*. *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1081 n.21 (11th Cir. 2012).

[2] A Missouri state appellate court similarly rejected Eighth Circuit precedent when it overturned Dale Helmig's conviction in 2011. The Eighth Circuit had previously denied him relief in 2006. *Helmig v. Kemna*, 461 F.3d 960 (8th Cir. 2006); *see also Helmig v. Kemna*, No. 4:02 CV 574 DDN, 2005 WL 2346954, at *9 (denying his *Schlup* gateway actual innocence claim predominantly because he failed to show the new evidence was "unavailable at or before petitioner's trial"). A Missouri state circuit court later found him innocent on the same body of

This Court has also previously recognized that "[t]he Supreme Court in *Schlup* explained that the gateway is intended to 'focus the inquiry on actual innocence,' rather than legal innocence." *Bragg*, 128 F.Supp.2d at 600 (citing *Schlup*, 318 U.S. at 327, and *Calderon*, 523 U.S. 538.). "Thus, this court is 'not bound by rules of admissibility that would govern at trial'" and should consider evidence that was "wrongly excluded" at trial. *Id.* (quoting *Schlup*, 318 U.S. at 327-28).

The widespread disagreement makes sense because the language of *Schlup* was clear: the petitioner must "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was *not presented at trial*," *Schlup*, 513 U.S. at 324 (emphasis added). In addition, the Court explicitly referred to evidence that was "wrongly excluded" at trial when listing things that a court must assess for a gateway actual innocence claim. *Id.* at 327-28. *See also Bragg*, 128 F.Supp.2d at 600 (quoting *Schlup*, 513 U.S. at 327-28) (recognizing that a court conducting a *Schlup* analysis should consider "the probative force of relevant evidence" that was "wrongly excluded" at trial). The *Schlup* Court was firm in its instruction to lower courts to conduct a holistic evaluation of "all the evidence" "old and new" and judging its likely effect on reasonable jurors applying the reasonable doubt standard. *Id. See also Reeves*, 897 F.3d at 162 (interpreting *Schlup*).

All of these federal circuit courts consistently have agreed that the U.S. Supreme Court was clear in *Schlup* and its progeny that evidence is new if it was not admitted at trial, regardless

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evidence previously rejected by the federal court, and the Missouri Court of Appeals for the Western District sustained the writ, holding that he could also show cause and prejudice to excuse his procedural default. *State ex rel. Koster v. McElwain*, 340 S.W.3d 221 (Mo. Ct. App. 2011). Mr. Helmig served five additional years of wrongful incarceration as a result of the Eighth Circuit's overly narrow misinterpretation of *Schlup*.

of its availability at that time. Indeed, "a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway." *Gomez*, 350 F.3d at 679-80. In fact, in *Schlup* itself, the evidence that the U.S. Supreme Court relied upon was an affidavit containing witness statements that were available at trial. *Reeves*, 897 F.3d at 162. *See Schlup*, 513 U.S. at 307, 331-32. If the U.S. Supreme Court had intended the rule adopted by the Eighth Circuit, then *Schlup* would have been decided the other way. *Id.*

The Supreme Court's case law since *Schlup* has only further confirmed that the Court intended for all newly presented evidence to be considered by lower courts assessing a gateway actual innocence claim, regardless of whether it was available at the time of trial. In *Calderon v. Thompson*, 523 U.S. 538 (1998), the Court cited *Schlup* in holding that "a claim of actual innocence must be based on reliable evidence not presented at trial." Then, in *McQuiggin*, the Court held that no threshold diligence requirement applies to actual-innocence claims; instead, the delay is simply a factor in the court's reliability evaluation. 569 U.S. at 399. *See also Floyd v. Vannoy*, 894 F.3d 143, 156 (5th Cir. 2018).

The *McQuiggin* Court emphasized that its holding honored the rationale of the miscarriage of justice exception of ensuring "that federal constitutional errors do not result in the incarceration of innocent persons." *Id.* at 400 (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). If any question about the Eighth Circuit's error in analysis remained, that question was resolved by the Supreme Court in *McQuiggin*. *Id.*

b. Ineffective Assistance of Counsel Should Excuse Any Failure to Discover Evidence that May Have Been Available at Trial

Respondent also relies on *Kidd v. Norman* to assert that a claim of ineffectiveness of counsel claim cannot cure a petitioner's failure to discover evidence that may have been available at the time of trial. Response to Amended Petition for Writ of Habeas Corpus, filed

June 19, 2019, Doc. No. 29 ("Resp.") at 11, 13, 15, citing 651 F.3d 947, 953 (8th Cir. 2011). First, the above analysis – including the U.S. Supreme Court's instruction in *Schlup*, *McQuiggin*, and *Calderon* – rebuts this argument and indicates that *Kidd* was wrongly decided by the Eighth Circuit. There is no diligence requirement for *Schlup* evidence to be considered "new;" thus, the court need not ask whether any ineffectiveness by trial counsel can cure a lack of diligence.

To the extent this court is unconvinced that the U.S. Supreme Court requires that all evidence *not presented at trial* be considered new, then this court should at least carve out an exception for cases, like this one, where the reason that the evidence was not presented at trial was due to the ineffectiveness of trial counsel. *See Reeves*, 897 F.3d at 163-64. The Third Circuit has adopted such an exception for "when a petitioner asserts ineffectiveness of counsel based on counsel's failure to discover the very exculpatory evidence on which petitioner relies to demonstrate his actual innocence." *Id.* at 163. The Third Circuit observed that this "limited approach" "ensures that reliable, compelling evidence of innocence will not be rejected on the basis that it should have been discovered or presented by counsel when the very constitutional assertion is that counsel failed to take appropriate actions with respect to specific evidence; and (2) is consistent with the U.S. Supreme Court's command that a petitioner will pass through the actual innocence gateway only in rare and extraordinary cases." *Id.* at 164 (citing *Schlup*, 513 U.S. at 324. The Court held that such an exception "avoids an inequity that could lead to the 'injustice of incarcerating an innocent individual.'" *Id.* (quoting *McQuiggin*, 569 U.S. at 393). Similarly, the Seventh Circuit concluded:

> If procedurally defaulted ineffective assistance of counsel claims may be heard upon a showing of actual innocence, then it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation. The burden for proving actual innocence in gateway cases is sufficiently stringent and it would be inappropriate and unnecessary to develop an additional threshold requirement that was not sanctioned by the Supreme Court.

Gomez, 350 F.3d at 679–80.

Finally, it is important to note that the petitioners in the two overly restrictive Eighth Circuit cases – which Respondent asserts limit or preclude Mr. Shields' relief – Joseph Amrine and Ricky Kidd – were ultimately found to be actually innocent, based on substantially the same body of evidence that *Amrine* precluded the federal court from considering and released by Missouri state courts. Mr. Amrine was released over two years after the Eighth Circuit denied him relief on the basis that his evidence of innocence was not "new" because it was available at the time of trial. Mr. Kidd was released over eight years after the Eighth Circuit denied him relief on its erroneous decision that he could have discovered the new evidence of innocence at trial if he had effective counsel. While justice was finally done for Amrine and Kidd, the Eighth Circuit's overly narrow rules denied justice to actually innocent men for years, and they continued to sit behind bars as a result. This Court should decline to follow the Eighth Circuit's outdated, outnumbered, and plain wrong case law. Otherwise it will unacceptably draw out the injustice done to Mr. Shields, just as was done to Amrine and Kidd.

In Missouri, state habeas law evolved after the *Amrine* decision to make habeas corpus relief available to state prisoners in state court. But the opposite is true in Arkansas state courts, where the habeas writ is construed so narrowly to be essentially meaningless. Hart & Dudley, *Actual Innocence,* at 634 (citing *Renshaw v. Norris*, 989 S.W.2d 515, 517- (Ark. 1999)). *See also* Am. Pet. at 27. Given that Mr. Shields, like most state prisoners in Arkansas, had no access to habeas corpus relief (or any other post-conviction relief) in state court, federal habeas corpus is the only safety net for innocent prisoners in Mr. Shields' circumstances. *See* Josephine Linker Hart & Guilford M. Dudley, *Available Post-Trial Relief After a State Criminal Conviction When Newly Discovered Evidence Establishes "Actual Innocence,"* 22 U. ARK. LITTLE ROCK L. REV.

629, 646 (2000) (hereinafter, "*Actual Innocence*") ("[t]here is no remedy in the Arkansas criminal court system which permits prisoners to make claims of actual innocence based on newly discovered evidence if such a claim falls outside the narrow limitations of existing remedies," meaning that "Arkansas will accept a shocking injustice: innocent persons will serve sentences of imprisonment or be put to death despite the discovery of the new evidence that could prove their innocence."). *See also* Am. Pet. at 25-29. If Mr. Amrine, Mr. Kidd, and Mr. Helmig had been wrongfully convicted in Arkansas, rather than Missouri, they would still be in prison.

If the purpose of the *Schlup* actual innocence gateway is to "avoid incarcerating an innocent individual," *McQuiggin*, 569 U.S. at 393, then the ultimate exonerations of Amrine and Kidd demonstrate that Eighth Circuit's narrow construction of these rules – in direct contradiction of U.S. Supreme Court precedent and without persuasive, or really any, explanation at all – utterly fails to accomplish that goal. For these reasons, Mr. Shields urges this court to consider all the evidence that he has presented in support of his innocence, including any evidence that may have been available at trial if trial counsel had exercised due diligence.

2. The Evidence is Reliable

a. An Evidentiary Hearing is Required to Resolve Disputes Regarding Credibility & Reliability

To the extent there are questions about the reliability of Mr. Shields newly presented witnesses to his actual innocence, an evidentiary hearing is required to resolve those questions. *See Schlup*, 513 U.S. at 331-32 (remanding for a hearing to assess the reliability and credibility of new witness affidavits); *Amrine I*, 128 F.3d 1222 (remand for evidentiary hearing to evaluate the credibility and reliability of recanting witnesses); *Bragg*, 128 F.Supp.2d at 595 (holding evidentiary hearing to assess the documentary evidence of innocence, including new witness

statements). A habeas petition is an initial pleading; a petitioner is only required to set forth a prima facie case of a constitutional violation or, in other words, plead sufficient facts to state a legal claim. The State does not argue, much less prove, that Mr. Shields failed to state a legal claim; instead, the State wholly ignores Mr. Shields' legal claims. Where there is no dispute that legal claims have been pled, the Court is required to hold an evidentiary hearing to resolve factual disputes, determine the credibility of witnesses. Here, where much of the new evidence is witness statements, an evidentiary hearing is the only way to resolve the case. *See Schlup,* 513 U.S. 332 (recognizing that the district court is best-suited to evaluate credibility and "take testimony from key witnesses").

In a case where the State never had any physical evidence implicating Mr. Shields, and the case was built solely upon statements, witness statement evidence of actual innocence is very likely the only kind of evidence that will ever exist. As an Eastern District of Arkansas judge concluded in *Brown v. Kelley*, granting habeas relief to a wrongfully convicted man last year: "What additional evidence could a petitioner in Mr.[Shields'] situation provide to show actual innocence?" The only direct evidence against him was his own coerced – and immediately recanted – confession, and the testimony of Travis Booker that was fruit of the poisonous tree of Derrick's coerced confession. "Police collected numerous items of physical evidence, yet none of it connected [Mr. Shields] to the scene of" the murder. As in *Brown*, the "circumstantial evidence against [Mr. Shields] was unreliable at best – and it is likely false and the result of several constitutional violations." Ex. 20 (Brown Order) at 14.

Of course, it would be nice to have exculpatory forensic evidence but the lack of it speaks only to the weakness of the State's case against Mr. Shields, nothing else. While the police collected significant physical evidence at the scene, *none of it linked Mr. Shields to the crime.*

Many fingerprints were collected; none matched Shields. A gunshot residue test was done on Shields; it was negative. Witnesses viewed photo line-ups including Shields; none identified him.

Respondent asserts that some of Mr. Shields' newly presented evidence is "stale." While diligence in discovering and presenting evidence to this court is relevant to reliability as a general matter, *see McQuiggin*, any "staleness" does not impugn the reliability of this evidence. The doors to federal court have been closed to Mr. Shields since 2003, one year after his conviction became final. The only reason he now has this chance to present this evidence to the federal court is because his 2017 resentencing order pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) (which established that Mr. Shields was serving an unconstitutional sentence for a juvenile) gave him a renewed opportunity to file an original habeas corpus petition in this court.

Respondent also argues that "[e]vidence that merely impeaches evidence admitted at trial" does not satisfy *Schlup*. Resp at 16. But this Court has explicitly rejected that proposition. In *Bragg*, this Court recognized that "the newly presented evidence may . . . call into question the credibility of witnesses presented at trial." *Bragg*, 128 F.Supp.2d at 600. In fact, the State raised and this Court rejected the exact same argument in *Bragg*. *Id.* While this Court recognized that impeachment evidence may not be sufficient if the impeachment in question had "little value," the Court found that was not the case in Bragg. *Id.* It is certainly not the case here where the evidence directly contradicts, rebuts, and undermines the only evidence presented at trial. Indeed, in a case where the State had no physical evidence and only a single testifying witness, the main evidence of actual innocence that could be brought forth is impeachment evidence.

b. Derrick Shields' New Evidence is Sufficiently Reliable

Respondent's main argument that Mr. Shields' new evidence is not reliable is that the witnesses did not sign affidavits. As an initial matter, this argument only relates to Mr. Shields'

new witness evidence; it is irrelevant to the new evidence he presents undermining his confession. Respondent fails to raise any argument that the confession-related evidence of innocence is unreliable. With regard to the witnesses, while they did not sign affidavits, there are other significant indications of the credibility of each the statements.

Marie Jackson agreed to be recorded and this Court can review that recording. She also repeated the exculpatory statements three different times, to at least three different people, over a seventeen-year period. She never wavered. Finally, and perhaps most significantly, Ms. Jackson further inculpated her son before trial, and inculpated an uncharged twelve-year-old son of her close friend; she had absolutely nothing to gain and a lot to lose by coming forward.

Stella Young also agreed to be recorded and this Court can review that recording. Her and Ms. Jackson's statements corroborate each other, increasing their reliability. Respondent questions why it took Ms. Young years to come forward but she did not know that Mr. Shields had a legal team until she ran into the investigator completely by chance in 2017.[3]

Travis Booker was also recorded and this Court can review that recording. He also made repeated statements on multiple occasions, confirming that Mr. Shields is innocent and that McNichols is guilty. Respondent argues that recantations are inherently unreliable and should not be credited by this Court. Resp. at 9-10. But many courts have found the *Schlup* actual innocence gateway satisfied by recantations. *See, e.g.*, *Sharpe v. Bell*, 571 F.Supp.2d 675, 681 (E.D. Cal. 2008) (finding *Schlup* actual innocence on basis of recantation of one of three

[3] Respondent also accuses Marie Jackson and Stella Young of making "inconsistent" statements, and argues that their inconsistency undermines the reliability of both. But the purported inconsistency – that Jackson told his mother that he gave police Shields' name because he was mad that Shields gave them his name, but Stella Young said Jackson said that he was made at Derrick's brother Wendell – is not actually an inconsistency. Both things can be, and likely are, true.

eyewitnesses where there was no physical evidence tying defendant to the crime); *Cleveland v. Bradshaw*, 693 F.3d 626, 636, 641-42 (6th Cir. 2012) (finding *Schlup* innocence, in part, on basis of recantation, overcoming attacks on reliability of recantation and concluding it was more credible than trial testimony); *Eastridge v. United States*, 372 F. Supp. 2d 26, 50, 56 (D.D.C. 2005) (finding *Schlup* innocence on basis of trial witness' recantation). *See also Amrine I*, 128 F.3d at 1228 (recognizing that recantations from trial witnesses "raises the real possibility" of actual innocence). And in some cases where all the State had at trial was witness testimony – like here – recantations may be the only possible evidence of actual innocence that will ever exist. Moreover, in the case relied on by Respondent for the unreliability of recantations, the Eighth Circuit states: "recanted testimony that bears . . . directly on defendant's guilt will warrant a new trial." *United States v. Dogskin*, 265 F.3d 682, 685 (2001). Booker's new statements go directly to Mr. Shields' guilt, or rather his actual innocence. The best way to determine the reliability of a recantation is to put the witness on the stand and evaluate his credibility in person.

Respondent claims that the fact the true perpetrator is no longer prosecutable is of no matter is too "convenient," and undermines the reliability of Ms. Jackson and Booker's statements. Resp. at 14-15. But Ms. Jackson implicated McNichols when he was still prosecutable; the fact that he was not investigated or prosecuted is on the State – it cannot be the fault of, or held against, these witnesses. More importantly, the fact that McNichols – and not Derrick Shields – was the true third perpetrator of the Movie Magic murder is corroborated by other evidence. Within a week of the crime, Marie Jackson went to the police in Blytheville and told them that her son Kuntrell had told her that McNichols, and not Shields, was involved. The police received other tips after Shields' arrest naming "Bowlegs" and both Jackson and Booker told other inmates in the county jail that Derrick was innocent. When police later arrested

McNichols for a weapons offense, they recovered a .410 shotgun from McNichols and his co-defendant Travis Rumph. Booker identified that .410 shotgun as the gun used in Movie Magic.

Finally, to the extent the Court may have any remaining questions regarding witnesses' refusal to sign an affidavit, there is a compelling explanation. For nearly two decades, the full truth of who killed Laurie Troup has been kept from being fully aired in a court of law by two powerful codes operating in Blytheville – the code of the streets which frowns upon snitching and the code of family loyalty which proclaims that "blood is thicker than water" and keeps family members from telling what they know about crimes committed by their kin. *See* Am. Pet. at 22-23; 58. (In Booker's case, his refusal also derives from his fear of perjury charges.) Counsel for Mr. Shields has done everything in their power to persuade the witnesses to sign affidavits. Mr. Shields lost eighteen years of his life to these codes, it is time that these witnesses be subpoenaed to come to Court to finally tell the truth so justice can be done. This is the best – and only – way for this Court to assess their reliability.

B. New Evidence Relating to Mr. Shields' False Confession Establishes that He is Actually Innocent

Mr. Shields' conviction, and the jury's determination of his guilt, was contingent on his confession.[4] The credibility of Shields' confession must be evaluated in light of the newly-discovered evidence. *Floyd*, 894 F.3d at 157; *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329). The persuasive impact of Shields' confession must be scrutinized in light of all of the evidence, both evidence presented at trial and new evidence. *Floyd*, 894 F.3d at 159 (citing *McQuiggin*, 569 U.S. at 386, and *Schlup*, 513 U.S. at 329.

[4] While the jury also relied upon Travis Booker's testimony implicating Mr. Shields in the crime, Booker's statements were the direct result, and a tainted fruit of the poisonous tree, of Derrick's coerced *See* Am. Pet. at 16.

Mr. Shields now presents four forms of new evidence proving that his confession is false and proving his actual innocence. *See Floyd*, 294 F.3d at 155 (recognizing that evidence that undermines the defendant's confession is evidence of "actual-innocence" "because it supports [the defendant's] assertions his confessions were false").[5] Respondent argues that evidence that his confession is false is not new because Mr. Shields knew that his confession was false at trial, and was of course personally aware of the tactics that police used and the ways he which he himself was uniquely vulnerable. This is just a different version of the same tired argument that an actually innocent person knew he was innocent at trial, so any innocence evidence cannot be considered new. Such a ridiculous rule cannot be right.

1. New Evidence that Scott Adams, the Blytheville Detective who Interrogated Derrick Shields, has a Pattern and Practice of Using Coercive Interrogation Tactics that Mirror Those that Derrick Shields Asserts Adams Used on Him

Mr. Shields presents compelling new evidence regarding Scott Adams, one of the two Blytheville police officers who interrogated him. Specifically, Mr. Shields has discovered that then-detective Adams has a modus operandi of using highly coercive interrogation tactics, including threats of the death penalty, which mirror the tactics that Mr. Shields has consistently described Adams using on him during his 2001 interrogation, when Mr. Shields was only fifteen years old. This evidence corroborates Mr. Shields' account of his coercive interrogations and provides compelling evidence that goes to the involuntariness and falsity of his confession, and ultimately to Mr. Shields' actual innocence. This evidence also calls into question the testimony of the State's witnesses, Lt. Ross Thompson and then-detective Adams, regarding the

[5] Respondent meekly argues that evidence that undermines a confession is not S*chlup* evidence because it does not "exonerate," which is the "heart of an actual innocence claim." *Floyd* proves this wrong. *Id.* In any event, even if this Court held that the evidence undermining the confession is not "new" evidence of purposes of Schlup, this Court must still consider the evidence in its holistic evaluation of all the evidence.

circumstances of and tactics used during Mr. Shields' multiple interrogations. This case, like all false confession cases, has always turned upon the credibility of the interrogating officers versus the credibility of Mr. Shields himself. This new evidence requires that Mr. Shields be credited over the officers. To the extent any credibility question remains, an evidentiary hearing is required to resolve it.

In cases like Derrick's, where the underlying interrogations are not fully recorded, questions about the voluntariness and reliability depend upon a swearing contest between officers and suspects about what happened during the interrogation. Derrick gave a detailed contemporaneous account of the coercion to his psychologist and described in great detail to his attorney the extent of this coercion. At an evidentiary hearing, Derrick is prepared to testify consistent with these descriptions and with the attached affidavit. The best way to determine whether Adams is more credible than Shields, is to put them under oath at an evidentiary hearing.

In addition, Mr. Shields now has direct documentary evidence that Adams engaged in serious misconduct, including suppressing the recantation of a single eyewitness to a murder and falsifying a related police report. The Blytheville Police Department conducted an internal investigation into this incident and ultimately demoted Adams from Captain of the Criminal Investigation Division to an administrative position. This new evidence destroys any credibility or integrity Adams had left. In fact, it also impugns the integrity of the Blytheville Police Department as a whole, as an Arkansas circuit court judge recently concluded, Ex. 40 at 70-72, and Ross Thompson specifically, because he was the Chief of Police at the time of this incident (and remains Chief today).

a. Scott Adams Coerced Suspects in a 2005 Murder Investigation Using the Threats of Death Penalty Just Like with Derrick Shields

Cassandra Johnson and John Bolan were each interrogated in 2004 by then-detective Scott Adams, along with other Blytheville Police officers, during the investigation of the murder of a man named George Russell. *See generally Johnson v.State*, 233 S.W.3d 123 (Ark. 2006) (affirming Ms. Johnson's capital felony-murder and aggravated robbery conviction and life without parole sentence). Under significant coercion, both Ms. Johnson and Mr. Bolan confessed to participating in the murder of Russell. *See* Affidavit of Cassandra Johnson, dated 8/22/19, attached hereto as Exhibit 37 ("Johnson Aff.") and Affidavit of John Bolan, dated 8/22/19, attached hereto as Exhibit 38 ("Bolan Aff.").[6] Both recanted their confessions and maintain their innocence to this day. Exs. 37 and 38. See also Supplemental Declaration of James Trainum, attached hereto as Exhibit 42 ("Trainum Dec.") at 1-3.

Cassandra Johnson recanted her confession immediately and litigated the involuntariness and falsity of her confession before trial. At a pre-trial hearing regarding her confession, she testified:

> I remember officers Wicker, Flora, and Adams. Adams did not come until after I had talked to the other two officers. I remember talking to the police before the tape recorder was put on. They were telling me about the murder, about how they felt I had committed it. They said they knew I hadn't killed anybody but they had me into believing I was there. They

[6] Counsel submits these affidavits to this court now because they either did not previously know of a witness and her relevance to this case (Cassandra Johnson), or because counsel did not have access to this witness until now (John Bolan).

This Court may consider exhibits attached to a reply in a 28 U.S.C. 2254 proceeding. *See, e.g.*, *United States v. Lee*, NO. 4:97-CR-00243-(2) GTE, Civil Case No. 4:06-CV-1608, 2008 U.S. Dist. LEXIS 109771, at *70 (E.D. Ark. Aug. 28, 2008) (considering affidavits from experts questioning DNA testing submitted with reply); *Pigg v. Kelley*, 5:16-CV-000212-JLH/JTR, 2018 U.S. Dist. LEXIS 89436, at *34, 2018 WL 2435600 (E.D. Ark. May 30, 2018) (considering excerpts from trial testimony, closing argument, a Rule 37 hearing, and Petitioner's statement to the police submitted with reply); *Love v. Norris*, 5:06CV00018 JTR, 2007 U.S. Dist. LEXIS 57069, at *11 (E.D. Ark. Aug. 3, 2007) (considering correspondence with circuit court clerk submitted with reply); *Sasser v. Norris*, No. 00-4036, 2007 U.S. Dist. LEXIS 1769, at *1, 2007 WL 63765 (W.D. Ark. Jan. 9, 2007) (affidavit supporting Petitioner's claim of mental retardation submitted with reply).

> told me to tell them the truth, they told me the consequences of not telling the truth, that **I could have lethal injections, capital murder, death penalty, life in prison. I kept telling them I had nothing to do with it. I didn't know anything about it. They didn't want to hear that. They were telling me to save myself** and don't take up for anybody else. They said it would be better if I told the truth. **Then Scott Adams came back and said he had a confession.** Somebody is already saying you were there. That is when Scott Adams showed up with the tape and I heard Miss McNichols implicating me at the scene.
>
> **It was an audio tape and they played me her voice. They played me the part where she was saying that Cassandra didn't kill him but that Cassandra was there, and she was holding his arms down while John Bowlin [sic] beat him, and then they stopped the tape. That is when they started to tell me that right here was enough to convince me that I should save myself. They told me it was capital murder and I could get lethal injection or the death penalty. He told me it would be better if I was honest. He was telling me to save myself. He told me I was going down for capital murder or murder one. He said I was not going to go home. I was scared. I felt like I was being set up, there was nothing I could do about it.** I had just smoked crack cocaine before they brought me in. When you smoke crack cocaine, you are already paranoid, then when the police come in, you really get scared.
>
> I felt like I had lost. I didn't have any wind left. That is why I told them that I had been there. I knew what to tell them because I had already talked to them twice and knew practically everything that they knew. **The officers told me what had happened. I just kind of felt like they were coaching me through it. I felt like I was being pressured to say what they wanted to hear.** Because after telling them over and over, they weren't listening to anything else. They told me to tell the truth, that I was lying and that I was going down for capital murder and was going to get the death penalty. They said that Miss McNichols had already said I was there and that they now

Johnson, v. State, No. CR 05-1030 2005 WL 4148910, at *14-16 (Ark. Dec. 21, 2005).[7]

Notably, then-Detective Adams also testified at the pre-trial suppression hearing and did not deny threatening Ms. Johnson with the death penalty or lethal injection. He testified that he did not remember doing so, but he admitted that it might have happened. *Id.* at 13 ("I possibly could have told her she could get life without parole, or the death penalty.") Adams also admitted

[7] Counsel for Mr. Shields has thus far been unable to locate the transcripts from Ms. Johnson's pre-trial hearing and trial, and thus is relying on the abstract of testimony from the briefing on appeal which is available on Westlaw. The abstract summary of testimony cites record transcript pages 77-91 for Ms. Johnson's testimony at the suppression hearing. Counsel will continue efforts to locate the transcripts and provide the relevant excerpts to the court if obtained.

sharing details of the crime with her that another witness had included in her confession. *Id.* ("I went over what I had learned in Jonesboro, the statement that Tracy McNichols had given us. . . . I informed her of all of that. I informed her of the victim being pushed or slammed against the wall. . . . Cassandra told me she did not remember. I gave her the details that Tracy had given to me.").[8]

To this day, Ms. Johnson recants her confession and maintains her innocence. She came forward and submitted a notarized affidavit, signed under the penalty of perjury, with this court because, in her own words, "Det. Adams, David Flora, and Jeff Wicker threatened me with the death penalty and put words in my mouth" and "forced me to confess to something I didn't do," so "I want to do what I can to prevent it from happening to anyone else." Ex. 37 ¶¶ 17-19 (Johnson Aff.). In her sworn affidavit, Ms. Johnson once again testifies that then-detective Adams threatened her with the death penalty – specifically lethal injection – if she continued to refuse to confess. *Id.* at ¶¶12, 13, 15. She reported that Adams told her that he did not think that she killed the man, but he thought she was there and that she needed to help them what happened. *Id.* at ¶11. Ms. Johnson swears that Adams told her she "need to save" herself. *Id.* at ¶12. And she said that Adams, and his fellow officers, told her what to say. "Ultimately, I just agreed with them. I told them what I thought they wanted to hear. I made it up. It kind of felt like they were coaching me through it. I learned all the details that I included in my confession from the detectives." *Id.* at ¶14.

John Bolan also recanted his confession to this murder and has come forward today and submitted a notarized, signed and sworn affidavit. He states: "I was interrogated by Scott Adams

[8] The abstract indicates that Adams' testimony at the suppression hearing is at pp. 67-74 of the transcripts.

of the Blytheville Police Department and other officers. Adams repeatedly told me that I would get the death penalty, specifically lethal injection if I did not confess to the murder." Ex. 38 ¶¶ 5-6 (Bolan Aff.). Bolan's interrogation was videotaped, so there is documentary evidence that Adams explicitly threatened Bolan with the death penalty and repeatedly referenced "capital murder." Ex. 42 (Trainum Aff. at 2). In the video, Adams tells Bolan: "you are going to be the first person to sit that chair completely innocent and get the death penalty because capital murder means death penalty." *Id.* The tape also shows Adams pervasively feeding facts to Bolan and contaminating his statement by sharing the details of what other witnesses and suspects have said. *Id.*

Ms. Johnson's and Mr. Bolan's accounts of Adam's coercive interrogation tactics parallels Mr. Shields' account, which has been consistent from 2001 to this day. *See* Ex. 41 (Trainum Aff.) at 1-3. Like Ms. Johnson, Derrick repeatedly tried to tell the truth that he was not there and knew nothing about the murder of Ms. Troup, but his denials were shut down and ignored. Am. Pet. at 49-50. Like Ms. Johnson, Derrick was told that Adams and Thompson did not believe that he was the one who killed Ms. Troup, but they did believe he was there and that he knew who did. *Id.* at 49-50. He was advised that he should save himself, and not go down protecting someone else. Like Ms. Johnson and Mr. Bolan, Det. Adams threatened Derrick with the death penalty, and threatened Derrick that his brother Wendell – Derrick's best friend and provider at the time – would get the death penalty if Derrick didn't tell them who really did the murder. *Id.* at 18-19, 49-50. And, like with Ms. Johnson, Scott Adams used the audiotape of Derrick's confession to pressure Kuntrell Jackson to say that Derrick did the murder. *Id.* at 15. Finally, like Ms. Johnson, Adams fed Derrick details of the crime and essentially told him what to say in his confession. *Id.* at 49-50. *See also* Ex. 42 (Trainum Aff.) at 2-3.

b. Scott Adams Demoted to Administrative Duty for Misconduct that Resulted in Dismissal of 2017 Capital Murder Case

More recently, when Scott Adams was Captain of the Criminal Investigation Division of the Blytheville Police Department, he and a subordinate officer buried the recantation of the only eyewitness to a homicide and falsified a police report regarding that eyewitness. *See generally* Ex. 39 (Compilation of Documents Regarding Adams' Misconduct in T. Young Case) ("Adams Doc").[9] *See also* Ex. 42 (Trainum Aff.) at 3-6 (analyzing the related police file and Adams' conduct). As a result, the police department conducted an internal investigation of Adams, put him on temporary administrative leave, and ultimately demoted him from Captain of the CID to an administrative position. Ex. 39; Ex. 42 at 4. Such serious misconduct, particularly when documented, verified, and resulting in significant professional consequences, constitutes new evidence corroborative of Mr. Shields' actual innocence. Ex. 42 (Trainum Aff.) at 6. *See also* Floyd, 894 F.3d at 158. It goes directly to Adams' credibility, integrity, willingness to falsify evidence and lie in high-stakes criminal investigations and prosecutions, and willingness to suppress exculpatory evidence, even when a person's life is literally on the line. *Id.* All of these considerations are directly relevant to Mr. Shields' conviction.

According to police reports, letters from the prosecutor, and court transcripts, in 2017, Terry Mitchell, the girlfriend of the victim and only eyewitness to the murder, came to the Blytheville police station the day after she identified Travis Young out of a photograph line-up to report that she realized she had identified the wrong man. Ex. 39; *see also* Ex. 42 (Trainum Aff.)

[9] Counsel received these materials from other Arkansas attorneys who learned of the relevance to Mr. Shields case after counsel filed the amended habeas petition in this case. The evidence is new because the events happened well ever Mr. Shields 2003 trial. Counsel had no way to know that these files existed until counsel was put in touch with the attorneys from this capital murder case, and resulting 1983 litigation. *See also* footnote 5, *supra*, for case law supporting this Court's authority to consider exhibits submitted with the reply in a 28 U.S.C. 2254 proceeding.

at 4.. She spoke with Captain Adams and another officer named Huckabay. *Id.*. Adams told her "he already got away with one murder, he won't get away with another." *Id.* That was it until nine months later, when Adams was summoned to a meeting with the chief of police, Ross Thompson at that time, the prosecuting attorneys because Mr. Young's defense attorney had learned what had happened. *Id.* Neither Adams nor Huckabay documented the visit from the eyewitness in any police report or log. *Id.*

Later the same day of his meeting with the chief and the prosecutors, Adams wrote a false police report, stating that Huckabay had met with the eyewitness alone and then told Adams that she recanted but it was because the Young family threatened her. Subsequent correspondence between Prosecuting Attorney Curtis Walker and Chief of Police Thompson confirm that this police report was false. *Id.* As a result of Adam's misconduct with the eyewitness, and additional misconduct in lying a police report, he was put on leave and then demoted. *Id.*

The defendant in that dismissed capital murder case spent over 260 days in jail as a direct result of Adams' and Huckabay's suppression of powerful exculpatory evidence. Ex. 39. In subsequent litigation attempting to obtain police documents related to the officers involved, Chief Thompson was questioned about the recanting eyewitness's interactions with Adams and Huckabay, the lack of documentation about the interaction, the response from his department, and the follow-up investigation into the true perpetrator. *See* Ex. 40 (Transcript from *State of Arkansas v. Camiya Storey*, dated 1/23/18) ("Storey Transcripts") at 43. Chief Thompson was less than forthcoming. When asked about any follow-up investigation regarding the alternate suspect identified by the eyewitness, Chief Thompson said it was not sure any investigation had been initiated. Ex. 42 (Trainum Aff.) at 5; Ex. 40 (Storey Transcripts) at 43. The judge

concluded, on the record, that she had serious concerns about Chief Thompson and the Blytheville Police Department's "lack of candor," their policies and procedures (to the extent they existed, and the department's organization, at a minimum." *See* Ex. 40 ((Storey Transcripts) at 70-72.[10]

c. Newly-Discovered Evidence Regarding Interrogator's Pattern & Practice of Coercive Interrogation Tactics & Other Misconduct Support Derrick Shields' Actual Innocence Claim

At trial, Mr. Shields' attorney argued to the jury that the confession was unreliable because it was coerced by police from a young, vulnerable suspect. Ex. 2 (trial transcripts) TT4: at 399. He said " You can do the math. He was just a young kid – just a kid. And he's down there with the police officers being interrogated over a two or three-day period*." Id.* Trial counsel did not provide any evidence or testimony, however, to support this thin argument. The problem is that jurors cannot "do the math" without being given anything to work with, especially in a confession case (where the jurors heard a recording of Mr. Shields confess), where the caselaw and research prove that confessions always convince jurors.

Whether this Court considers this new pattern and practice evidence as newly discovered evidence of Mr. Shields' innocence, or instead considers at part of cohesive analysis of all evidence, old and new, the impact is the same: this evidence powerfully corroborates what Mr. Shields has said from the beginning – he was coerced by detectives using extreme tactics, including threats of the death penalty, implied promises of leniency, fact-feeding, and other

[10] These concerns led her to hold that access to personnel files, citizen complaints, police department policies and procedures, and other police files, were necessary for defense counsel in a case that directly implicated the credibility of officers. Ex. 40 (Storey Transcripts). That is true in this case, as well, and is one reason why Mr. Shields is now seeking discovery, including the personnel files of Scott Adams, Ross Thompson, as well as the other officers involved in the investigation of this case. *See* Motion for Discovery, filed either contemporaneously with this Reply brief, or the next business day.

classic Reid-style interrogation tactics, known to risk overbearing the will of young suspects. Particularly when considered with Dr. Jeffrey Aaron's examination of Mr. Shields, concluding Mr. Shields has many characteristics that would have made him uniquely vulnerable in the interrogation room, *see* section I.B.2, *infra*, the new evidence "undermine[s] the validity of [Shields'] confession, in support of his actual-innocence claim" *See Floyd v. Vannoy*, 894 F.3d at 158.

Mr. Shields' new evidence of Adams' pattern and practice of highly coercive interrogation tactics, and other egregious misconduct, is analogous to the new evidence that the Fifth Circuit recently relied upon in finding a criminal defendant satisfy the *Schlup* gateway of actual innocence. *Id.* at 158-59. In *Floyd*, the petitioner had evidence the subsequent mistreatment of other suspects by the detective who interrogated him. *Id.* at 158. Also, similar to here, Floyd presented evidence that his interrogator had a modus operandi of contaminating interrogations by providing suspects details of the crimes in question, and showing them crime scene photographs. *Id.* The Floyd court found that this new evidence corroborated Floyd's allegations that the detective had mistreated and coerced him during his interrogation, and "severely weakened" the State's assertions at trial "that the credibility of Floyd's confessions was demonstrated through his volunteering crime-specific facts." *Id.*

Just as the Fifth Circuit concluded in *Floyd*, the "credibility of [Shields'] confessions" and Scott Adams' trial testimony regarding the voluntariness of Shields' confession, "are appropriately considered in the light of the newly discovered evidence of the detective's conduct during a subsequent interrogation" *Id.* at 158 (citing *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 329)). The State's assertions at trial that Mr. Shields' confession is proven true by his knowledge of specific crime details, including the type of gun, is also "severely weakened by the

[new] evidence" that Adams regularly provides suspects with many details of the crime at issue. *Id.*

The Fifth Circuit noted that "[a]lthough jurors are likely to find confessions compelling, our court must make a 'probabilistic determination' of the hypothetical jurors' opinions of the newly-discovered evidence, and voluntariness of" Shields' confession." *Id.* (citing *House* (547 U.S. at 538) (quoting *Schlup*, 513 U.S. at 329)). "Considering the evidence as a whole," as this Court is required to do, "it is likely a reasonable juror would doubt" Shields' "confession was freely and voluntarily made and therefore lacked credibility to alone establish his guilt beyond a reasonable doubt." *Id.* at 158-59 (internal quotation marks and citations omitted) (citing *House*, 547 U.S. at 538).

2. Evidence of Derrick's Vulnerability

Mr. Shields has also presented new evidence that he was uniquely vulnerable in the interrogation room for a number of significant reasons. Forensic adolescent psychologists Dr. Rahn Minagawa evaluated Mr. Shields in 2017, in preparation for *Miller v. Alabama* resentencing proceedings, and Dr. Jeffrey Aaron's evaluated Mr. Shields in 2018, employing some methods not available at the time of trial, and found that Mr. Shields had the following traits that rendered him especially vulnerable to police coercion: youth, developmental immaturity, and related deficits of adolescent brain development; an I.Q. of 84, which places him in the borderline to low average range; a score of his verbal and nonverbal reasoning skills, the General Ability Index ("GAI") of 80, that places him in the borderline to low average range of cognitive functioning; a history of trauma that impaired his cognitive functioning; and symptoms of Post-Traumatic Stress Disorder.

This is new evidence relevant to this Court's *Schlup* analysis. *See Floyd*, 894 F.3d at 158 (holding that evidence of a forensic psychologist's examination of petitioner which rendered him

vulnerable to police coercion were relevant new *Schlup* evidence, and holding that petitioner satisfied *Schlup* innocence gateway in part based on that evidence). *See also Bryant v. Thomas*, 274 F.Supp.3d 166, 186-189 (S.D.N.Y. 2017) (considering an expert report from psychologist Saul Kassin regarding "risk factors in police interrogations" that would have made the petitioner "vulnerable and likely to confession to the police," including his youth, low IQ, the length of the interrogation, and the factual discrepancies in the confession, and holding *Schlup* gateway satisfied, in part, on this basis). In *Floyd*, the Fifth Circuit also relied upon new evidence from a forensic psychologist who examined Floyd and found that he had a low I.Q. and deficient communication skills, rendering him "extremely vulnerable to police coercion." *Id.* at 158. The Court concluded that the doctor's "findings regarding Floyd's susceptibility to coercion" is "newly discovered evidence" that impacts the "credibility of Floyd's confessions and his trial testimony he was coerced by [the] [d]etective." *Id.*

The psychologist who evaluated Derrick before trial – to whom Derrick recanted his confession and explained that the detectives coerced him into confessing – did not do any of the testing done by Dr. Aaron or Dr. Minagawa that was conducted on Mr. Shields. Dr. Minagawa conducted intelligence testing that was not available at the time of Mr. Shields' trial and revealed deficits which have particular relevance to his vulnerability in the interrogation room and his suggestibility. Dr. Minagawa conducted the WAIS-IV, which was published in 2008. Ex. 4 (Minagawa Rep.). Mr. Shields full-scale IQ tested at 84, which places him in the low average to borderline category of functioning.

Perhaps most significantly, Dr. Aaron computed a score regarding cognitive functioning, called the General Ability Index ("GAI"), that was not available at the time of Mr. Shields' trial, which Dr. Aaron concludes is a more accurate appraisal of overall cognitive abilities than the

Full Scale IQ." *See* Ex. 40 (Declaration of Dr. Jeffrey Aaron, dated 8/25/19) ¶¶1-2, 3 (GAI not incorporated into published tests until 2003 and 2008). Dr. Aaron decided this calculation was important for his evaluation of Mr. Shields for this case because there was a "significant discrepancy across the major domains of cognitive functioning" on Mr. Shields WAIS results. *Id.* at ¶1. In layman's terms, this indicated to Dr. Aaron that Mr. Shields full-scale IQ score may have been "inflated" by "higher scores on subtests that measure capacities" less integral to basic intelligence and cognitive ability, such as processing speed. *Id.* ¶8.

This new evidence regarding Mr. Shields' vulnerability in the interrogation room as a fifteen-year-old is highly relevant to this Court's analysis because, as Dr. Aaron stated in his declaration, "[c]ognitive functioning has been clearly identified in the research literature as a factor associated with an individual's vulnerability to coercive interrogation approaches and to falsely confessing." *Id.* ¶7. *See also Floyd*, 894 F.3d at 158. *See also Fare v. Michael C.*, 442 U.S. 707, 725 (1979) ("mandates . . . evaluation of [a] juvenile's age . . . and intelligence" as part of a voluntariness analysis); *Colorado v. Connelly*, 479 U.S. 157, 165-66 (1986) (recognizing that "mental condition is surely relevant to an individual's susceptibility to police coercion," and holding that police unconstitutionally "overreach" when their questioning "exploit[s]" known weaknesses of a vulnerable suspect); *U.S. v. Preston*, 751 F.3d 1008, 1021 (9th Cir. 2014) (holding a confession involuntary where the police fed facts to an eighteen year old suspect with an IQ of 65). Indeed, "consideration of [a suspect's] reduced mental capacity [is] a factor that is critical because it [may] render[] him more susceptible to subtle forms of coercion." *Preston*, 751 F.3d at 1021.

"Thus, the accurate measure and description of cognitive capacity has significant import for the assessment of such vulnerabilities."Ex. 41 (Aaron Dec). at ¶7, 11. Mr. Shields' full-scale

IQ, which was not available at trial, indicates that he would have been particularly vulnerable and suggestible in the interrogation room because it falls in the low average range. His GAI puts him at even heightened risk because it places him in the borderline to low average range of cognitive functioning. *Id.* at ¶8. Dr. Aaron explained that the distinction between Mr. Shields' IQ and GAI is "meaningful," in terms of his vulnerability, because it means the difference between functioning in the low average range and the borderline to low average range. *Id.* at ¶11.

The evidence of Mr. Shields' history of childhood trauma, its negative impact on his cognitive functioning, and the likelihood that it increased his vulnerability in the interrogation room is also new evidence that this Court must consider because (1) the pre-trial psychological evaluation did not inquire about or weigh his trauma history, and (2) the research suggesting that childhood trauma negatively impacts brain function, and may implicate vulnerability in the interrogation room, was not available at the time of Mr. Shields' trial. S*ee* Am. Pet. at 48-49.

3. New Science Regarding Adolescent Brains and Behavior, Coercive Police Interrogation Tactics, and Expert Opinions Applying New Research to Mr. Shields' Case

The psychologist that evaluated Derrick pre-trial also did not seem to recognize that Derrick was uniquely vulnerable to coercive police interrogation tactics and particularly susceptible of falsely confessing. Despite the fact that Derrick recanted this confession, asserted his innocence, and told him at least some of the specific tactics that police used to coerce him, Dr. Hogue did not raise any concerns about the voluntariness or reliability of Mr. Shields' confession.

While Dr. Hogue should have had some skepticism regarding Mr. Shields' confession as a matter of common sense, or professional expertise, it is important for this Court to recognize that the science and research demonstrating the following highly relevant principles was not developed yet at the time of Derrick's trial: (1) the interrogation tactics that police have used in

every state across our country since the middle of the twentieth century are inherently coercive, (2) youth are inherently vulnerable in the interrogation room because of issues relating to adolescent brain development, and (3) the toxic combination of coercive police tactics with youth neurological vulnerabilities results in markedly higher numbers of proven false confessions from juveniles. *See* Am. Pet. at 44-51 (detailing the new science, research, and Supreme Court jurisprudence embracing and relying on the new science).[11]

The change in science regarding adolescent brain development and the significant risk of false confession when youth are interrogated by police using standard tactics is newly discovered evidence that this Court must consider pursuant to *Schlup*. *House*, …. *See Bryant v. Thomas*, 274 F.Supp.3d at186. *See also Holmes v. Capra*, 14-CV-06373 (DLI)(LB), 2018 WL 1221121, at *3 (E.D.N.Y. 2018) (recognizing that new scientific research regarding "adolescent brain science" may constitute newly-discovered evidence for a *Schlup* actual innocence standard, where a petitioner supports the claim with sufficient new exculpatory scientific evidence, but holding that pro se petitioner's claim fails because he did not attach any evidence to his submission). *See also Rivas*, 687 F.3d at 546-47 (finding *Schlup* actual innocence, in part, based on new scientific

[11] While Respondent tries to make much of the fact that the U.S. Supreme Court issued some early cases recognizing that a child is no match for an adult interrogator, and Mr. Shields' embracing of those early precedents, it is undeniable that there has been a sea change over the past fifteen years regarding the Court's recognition that youth – and their brains – are different in ways that are constitutionally relevant, including relevant in the interrogation room. *See, e.g.*, *J.D.B. v. North Carolina*, 564 U.S. 261, 275 (2011) (recognizing that the "risk [of false confessions] is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile)." *See also Corley v. United States*, 556 U.S. 303, 321 (2009) ("there is mounting empirical evidence that these pressures can induce a *frighteningly high percentage of people* to confess to crimes they never committed"). See also *Roper v. Simmons*, 543 U.S. 551, 569 (2005) (embracing new neuroscience about adolescent brains, and holding that it is relevant to the Eighth Amendment and limitations on extreme sentencings for youth); *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Miller v. Alabama*, 132 S. Ct. 2455 (2012);

expert testimony). Mr. Shields' habeas petition, as well as Dr. Aaron's report, attached to habeas petitions as Ex. 3, and James Trainum's report, attached to the habeas petition as Ex. 25, sets out the change in science in detail, including the risk factors for vulnerability in interrogation room.

At the same time, increasing recognition that the interrogation tactics that police use across this country are inherently coercive. *See, e.g., Corley*, 556 U.S. at 321 (2009) ("there is mounting empirical evidence that these pressures can induce a *frighteningly high percentage of people* to confess to crimes they never committed"). *See also* Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 L. & HUM. BEHAV.. 34:3, 7 (2010) (an American Psychological Association White Paper on the risk factors of false and involuntary confessions) (a white paper is an authoritative report on a subject) .Expert James Trainum's expert report, attached to the habeas petition as Exhibit 25, sets forth the risk factors for vulnerability to police interrogation and red flags of a false or unreliable confession. This is new evidence because many of these risk factors and red flags had not been established by researchers at the time of Derrick's trial.[12] To the extent any research had been previously conducted, it was not widely known, widely available in the public domain, or widely accepted at the time of Mr. Shields' trial.

Expert Trainum's report and opinion, along with the report and opinion of Dr. Aaron, are analogous to the expert report of Saul Kassin considered by the Eastern District of New York in *Bryant v. Thomas* and relied upon to hold that the petitioner in that case satisfied the *Schlup* actual innocence gateway. 274 F.Supp.3d 166, 186. In *Bryant*, "Kassin's affidavit identifies several factors that would have made Petitioner vulnerable and likely to falsely confess to the

[12] For example, the White Paper, issued by the American Psychological Association and authored by Saul Kassin, on the risk factors for false and involuntary police-induced confessions was not published until 2010.

police, including that: Petitioner was eighteen at the time of interrogation, a young age; Petitioner was evaluated as having an I.Q. of 71; the interrogation lasted over half a day without any identified interruptions; the interrogating officers did not permit Petitioner to leave the interrogation room; and Petitioner's confession had factual errors from what the police had determined occurred from crime scene evidence." *Id.* at 186. Kassin also observed in his affidavit that "25% of confessions he has reviewed involving DNA evidence exonerations are false." *Id.* The *Bryant* court concluded that "Kassin's observations raise questions about Petitioner's guilt" and "raises the specter of falsity as to content of Petitioner's confession," and that "undermin[ing] Petitioner's confession in turn undermines the likelihood a reasonable juror would find Petitioner guilty beyond a reasonable doubt." *Id.*

The same is true here. Mr. Shields was three years younger than Bryant; his I.Q. was close to Bryant's and in the borderline to low average range; he was subjected to days of interrogation, and denied sleep and food in between; we now have corroborating evidence of the threats, including threats of the death penalty, and promises of leniency police wielded against him; there is evidence that the police fed Mr. Shields facts to include in his confession, including the type of gun, which the State then used as the lynchpin of the reliability of the confession; and, there were "factual errors" from the true crime facts. *Id.* at 186. As in *Bryant*, this Court should conclude that the new evidence undermining Mr. Shields' confession, considered with the new science and new expert opinions, raise doubts about Mr. Shields' guilt, undermines his confession, and in turn undermines the likelihood that a reasonable juror would find Mr. Shields guilty beyond a reasonable doubt. *Bryant,* 274 F.Supp.3d at 186. *See also Schlup,* 318 U.S. at 331-32.

C. Considering All the Evidence, Old and New, It is Clear that No Reasonable Juror Would Find Derrick Shields Guilty Beyond a Reasonable Doubt

All of the evidence presented at trial must be evaluated along with the newly discovered evidence presented herein. *House*, 547, U.S. at 537-38. The federal court must conduct a cumulative assessment of the prosecution's evidence at trial, along with the newly discovered evidence when considering whether actual innocence is proven. *Id.* The Supreme Court instructs federal courts to examine the strength of the prosecution's case at trial when weighing the significance of all newly discovered evidence. *House*, 547 U.S. at 539-53 (assessing newly discovered evidence within the state's theory of the case at trial).

The prosecutor here told the jury in closing argument "all the evidence you need is in the statement made by Derrick Shields. That's everything right there." Ex. 2 (Trial Transcript) TT3: 385. Of course, he did – that was all the prosecution had. The prosecution's case at trial was weak and entirely contingent on Mr. Shields' confession. The only other evidence presented at trial was Travis Booker's testimony which, as already discussed, directly resulted from and is fruit of the poisonous tree of Mr. Shields' involuntary and false confession. Now that Booker has essentially recanted his testimony, admitted that Mr. Shields is innocent, and indicated that McNichols was in fact the true third perpetrator, Mr. Shields' confession is all that is left.

The credibility of Shields' confession must be evaluated in light of the newly-discovered evidence. *Floyd*, 894 F.3d at 157; *McQuiggin*, 569 U.S. at 386 (citing *Schlup*, 513 U.S. at 329). The new evidence presented by Mr. Shields in his amended habeas petition and this reply eviscerates any credibility one could attach to his confession. Mr. Shields presents multiple forms of newly discovered evidence that directly undermine his confession, including evidence that relates to the interrogators' conduct and evidence that relates to his vulnerability in the interrogation room. New evidence now firmly establishes that Mr. Shields was uniquely vulnerable in the interrogation room and particularly likely to falsely confess under the pressures

and coercion inherent in any police interrogation. But, here, the coercion was not typical; it was extreme. Robust new evidence proves what Mr. Shields has always said: Det. Adams threatened him and his brother with the death penalty, tricked him into thinking he would not get in trouble if he just admitted he was there and knew who did it, and fed him the details of the crime. Any credibility that Adams' testimony at trial denying any of this has been irrevocably damaged by his record of such extreme coercive practices and more recent egregious misconduct, revealing extremely poor judgment and un utter lack of integrity.

Moreover, all of the other new evidence establishing Mr. Shields actual innocence and McNichol's guilt corroborates the falsity of his confession.

If Mr. Shields' case was tried today, the jury would hear:

- No physical evidence connects Mr. Shields to this crime. Gunshot residue test on the night of the crime was negative. Fingerprints do not match. Eyewitnesses who viewed photographic line-ups did not identify him.

- Mr. Shields had an alibi corroborated by, not only his father, but a law enforcement officer.
- Expert testimony that Mr. Shields was uniquely vulnerable in the interrogation room due to his youth, his low level of intelligence and cognitive functioning, and his history of childhood trauma and symptoms of PTSD.

- Expert testimony that his confession has all the hallmarks of a false confession.

- Expert testimony that there is evidence that the police used highly coercive tactics on him, including threats of the death penalty, just like at least one of the interrogating detectives has done in subsequent videotaped interrogations.

- Expert testimony that the police conducted an inadequate investigation, showed clear signs of tunnel vision, focusing in on Mr. Shields to the exclusion of other likely suspects (like McNichols), and failing to document key investigative events and phases of Mr. Shields' interrogations.

- Expert testimony that the gun that Mr. Shields described in his confession does not actually match the .410 shotgun used in the crime.

- Each of the state witnesses would be significantly impeached.

- Travis Booker likely would not testify again given his recantations. But, if he did, his credibility would be destroyed by his subsequent inconsistent statements.
- Adams would be fatally impeached by the documentary and witness evidence of his pattern and practice of coercive interrogations, and egregious misconduct.
- Thompson would be impeached by his "lack of candor" in the Young cae, and the significant departmental problems that the Young case revealed, which were also present in this case (including documentation, recording of witness statements, etc.)

If this case could even make it to a retrial, it is "more likely than not that no reasonable juror would [find]" Mr. Shields "guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. S*ee also Bragg*, 128 F.Supp.2d at 603. This new evidence is "so strong that [this Court] cannot have confidence in the outcome of the trial." *Schlup*, 513 U.S. at 298.

D. Derrick Shields' New Evidence is Analogous to Evidence Presented in *Schlup* and Other Successful *Schlup* Cases

The new evidence presented by Mr. Shields is analogous, but more substantial, than the evidence of innocence presented by *Schlup*. 513 U.S. at 307, 331-32. Schlup presented only witness statements as the new evidence of actual innocence. *Id.* He presented three new witnesses; Mr. Shields has five. Like Schlup, Mr. Shields has a confirmed alibi. *Id.* at 303, 311-12. Like Schlup, no physical evidence has ever connected Mr. Shields to the crime. In fact, the physical evidence that exists is all exculpatory. *Id.* Like Schlup, the identity of the true perpetrator was well-known and at least one of his new witness statements identified the true perpetrator. *Id.* at 310. Here, all five of Mr. Shields' new evidence consistently corroborate – consistent among each other and over time – the identity of the true third perpetrator.

This case is also similar to *Bragg v. Norris*, where this Court found the *Schlup* actual innocence to be satisfied where the credibility of the state's star witness at trial was subsequently devastated by newly discovered evidence. 128 F.Supp.2d at 603. The *Bragg* court concluded that

the law enforcement agent's testimony is no longer "worthy of belief." *Id.* Here, the ample new evidence of Adams' lack of integrity and credibility establishes that his testimony that he did not coerce Mr. Shields into confessing is not "worthy of belief." *Id.*

Finally, this case is also quite similar to recent successful *Schlup* case in the Eastern District of Oklahoma. *Fontenot v. Allbaugh*, Case No. CIV 16-069-JHP-KEW, 2019 WL 3995957 (E.D. Ok. Aug. 21, 2019), copy attached hereto as Exhibit 44. Fontenot's conviction rested primarily on his confession, and like here, no physical evidence connected him to the crime. *Id.* at 10. At trial, the State also presented three witnesses linking Fontenot to the crime, while here there was only the lone compromised witness, Booker. *Id.* at 10-11 Like here, witnesses at the time of the crime failed to identify Fontenot as the perpetrator. *Id.* at 12. Like Shields, Fontenot recanted his confession while in custody before his trial. *Id.* at 11. The district court in F*ontenot* held that no reasonable juror would find him guilty beyond a reasonable doubt once presented with new evidence, including a new witness to his innocence, a recantation from one of a trial eyewitness, and evidence that law enforcement used pressure to change statements. *Id.* at 17-48.

II. DERRICK SHIELDS ALSO SATISFIES FREESTANDING ACTUAL INNOCENCE STANDARD

For all of the reasons set forth in section I, *supra*, Mr. Shields' case also satisfies the standard for a freestanding claim of actual innocence. *See Dist. Atty's Office for the Third Jud. Dist. v. Osborne*, 557 U.S. 52, 71-72 (2009); *In re Davis*, 557 U.S. 952, 952 (2009) (recognizing that in the proper case, a freestanding claim of innocence would be recognized in the habeas context). *See also Missouri v. Kidd*, Ex. 43, at 105 Ex. 43 (finding that Kidd satisfied the standard for a freestanding actual innocence claim, as well as the *Schlup* procedural gateway claim, and concluding that there is no recent to limit freestanding actual innocence claims to

petitioner sentenced to death); *State ex rel. Amrine v. Roper*, 102 S.W.3d 541 (2003) (en banc) (holding that *Amrine* satisfies the *Herrera* standard for a freestanding actual innocence claim and overturning Amrine's death sentence and conviction on that basis).

Respondent fails to show otherwise. Respondent merely raises factual disputes with Mr. Shields' evidence of innocence, which requires an evidentiary hearing to resolve. Thus, independently of whether Mr. Shields may pass through the *Schlup* gateway, he is entitled to habeas relief. *Herrera*, 506 U.S. at 405 (constitutional due process protections extend beyond the death penalty to wrongful incarceration); *United States v. U.S Coin & Currency*, 401 U.S. 715, 726 (1971) (Brennan, J., concurring) ("[T]he government has no legitimate interest in punishing those innocent of wrongdoing….").

III. DERRICK SHIELDS' SIXTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent wholly ignores the merits of Mr. Shields' claims of unconstitutional ineffective assistance of counsel, and fails to dispute any of the facts underlying these claims.[13] A petition for a writ of habeas corpus is a civil proceeding. *See Cross v. Burke*, 146 U.S. 82, 88 (1892) (citing *Ex parte Tom Tong*, 108 U.S. 556 (1883)) ("It is well settled that a proceeding in habeas corpus is a civil, and not a criminal, proceeding."). A fundamental rule of civil procedure is that facts that are not denied in a response to a complaint are deemed admitted. Because Respondent does not deny any of the factual bases of the Sixth Amendment claims presented by Mr. Shields, this Court may grant habeas relief upon the papers, and the implicitly admitted factual assertions, before it. At a minimum, this Court should order an evidentiary hearing to

[13] Respondent also inaccurately summarizes Mr. Shields' ineffective assistance of counsel claims, omitting a couple of Mr. Shields.

resolve any remaining factual questions because it is beyond dispute that Mr. Shields has pled sufficient facts to state a legitimate claim that his Sixth Amendment rights were violated.

A. Derrick Shields Received Ineffective Assistance of Counsel at Trial[14]

This Court should grant habeas relief on the basis that Mr. Shields' Sixth Amendment rights were violated by the ineffective assistance of counsel at trial. Mr. Shield has sufficiently pled, and while not required he has proven, that his trial attorney was deficient in at least several significant regards, and that the result of his trial would have been different had he been effective. Trial counsel's prejudicial failings include:

1. Marie Jackson: Jury Did Not Hear from Co-Defendant Kuntrell Jackson's Own Mother Exonerated Derrick Shields

Mr. Shields' trial counsel knew or should have known that Kuntrell Jackson's mother went to the police station to report that her son told her that Derrick Shields was innocent, and that Mario McNichols was the true third perpetrator. Trial counsel had two separate police reports in his trial file documenting this conversation. There is no valid strategic reason for failing to investigate the exculpatory testimony that Ms. Jackson could have provided at Mr. Shields' trial. Mr. Bradley never met with or spoke to Ms. Jackson. Strategic reasons must be informed by reasonable investigation. Where there is no investigation, there can be no valid strategic reason. Ms. Jackson's testimony would have been admissible at trial on several grounds. *See* Ex. 17 (Buckingham Rep.) at 22-27.

Trial counsel's failure to investigate and present Ms. Jackson at trial was fatal to Mr. Shields' defense. She should have been the centerpiece of his defense. She would have provided highly credible evidence of Mr. Shields' innocence, as well as credible evidence of the identity

[14] While Petitioner may be grouping the ineffective-assistance-of-trial claims differently here, these are all claims that were presented in the amended petition.

of the true third perpetrator. She also would have corroborated and bolstered the other defense witnesses presented at trial – both the inmate witnesses who testified about McNichols being the third perpetrator and the alibi witnesses – all of whom suffered credibility problems because of trial counsel's ineffectiveness. In sum, Ms. Jackson would have tied together Mr. Shields' entire case, filled gaping holes, and shored up otherwise problematic testimony. In a confession case, where the defense has to overcome the jurors' compulsion to believe the confession, it is indefensible to omit testimony from a credible exculpatory witness like Ms. Jackson. S*ee* Ex. 17 (Buckingham Rep.) at 1. This mistake cost Derrick eighteen years of his life.

2. Confession: Derrick Shields' False Confession was Admitted at Trial & Jury Did Not Hear Compelling Reasons Why It was False

Trial counsel failed in four significant and distinct ways relating to Mr. Shields' false and involuntary confession. First, counsel failed to adequately investigate the circumstances surrounding the interrogation, including both Mr. Shields' characteristics that rendered him uniquely vulnerable in the interrogation room and the tactics used by police during the interrogation. He did even take the minimal investigative step of interviewing his client about his experience of the interrogation and his explanation of why he falsely confessed despite the fact that he knew Mr. Shields immediately recanted the confession (1) to the forensic psychologist who conducted the court-ordered pre-trial evaluation, and (2) in multiple letters to trial counsel himself. Mr. Shields' assertions of innocence were not just empty pleas; instead, he specifically explained what the police did to him, why he ultimately confessed to something he did not do, and how he knew what to say. In other words, he handed trial counsel the necessary building blocks for his investigation and trial strategy. But trial counsel either did not read the letters and psychologist report, or ignored what he read. He failed to follow up in any way.

Second, one important follow-up that trial counsel should have done was consult with an expert about Mr. Shields' interrogation and confession. Either a psychologist, like Dr. Aaron or Dr. Minagawa, who could have evaluated his vulnerabilities and suggestibility in the interrogation room, or an expert on police interrogations, like Jim Trainum or more traditional confession experts, like Saul Kassin, or both. *See Bryant*, 274 F.Supp.3d 186-189. An expert could have provided evidence that Mr. Shields' confession was false, unreliable, and involuntary. He also could have assisted trial counsel to develop an effective investigation, pre-trial and trial strategy to rebut the false confession. Confession cases are notoriously challenging to win, so it is imperative to amass as much evidence as possible to undermine and rebut the confession.

Third, trial counsel should have moved to suppress Mr. Shields' confession as involuntary. S*ee* Ex. 17 (Buckingham Rep.) at 7-18. Had he presented Mr. Shields' testimony, expert testimony, and been able to effectively impeach the testifying police interrogators at the motion to suppress, or done any of the above, he would have had a viable chance of suppressing the confession. Had the confession been suppressed, the charges against Mr. Shields may have been dropped. If the prosecution had proceeded to trial without the confession, Mr. Shields likely would have been acquitted. Even if the confession had not been suppressed, Mr. Shields' defense would have been significantly improved by information gleaned from the suppression hearing. Once the confession was admitted, trial counsel failed to take some basic steps to challenge the confession at trial, such as elicit basic facts regarding the coercion of the interrogation (interrogated multiple times over three days, not permitted to see his father who was right outside and asking to see him, etc.). He also could have elicited some basic facts revealing the unreliability of his confession, such as (1) the fact that Shields was in training school when he supposedly bought the gun used in the crime, *see* Ex. 17 ((Buckingham Rep.) at 20; and (2)

while Shields may have said ".410," the gun he described in his confession was not a .410 (suggesting he did not even know what a .410 was). *See* Ex. 17 ((Buckingham Rep.) at 20; Ex. 11 (Coleman Aff.). He also could have presented expert testimony regarding false confessions, Mr. Shields' psychological vulnerabilities, or at least from a firearm expert who could explain that, while Mr. Shields may have said ".410," the gun he described in his confession was not a .410 (suggesting he did not even know what a .410 was). *See* Ex. 17 ((Buckingham Rep.) at 20; Ex. 11 (Coleman Aff.). Instead, trial counsel blindly adopted the officers' version of events, after meeting with then-detective Adams before trial and hearing his account, without conducting any independent investigation.

Mr. Shields was severely prejudiced by trial counsel's failure to investigate and challenge his false confession in all of the ways detailed above. Without the confession, Mr. Shields likely would not have been tried but, if he was, he more than likely would have been acquitted. At the very least, trial counsel should have presented testimony rebutting and undermining the confession, and been prepared to effectively cross-examine the interrogating detectives about the circumstances of the confession.

3. Trial Counsel Failed to Reasonably or Adequately Investigate Any Aspect of Mr. Shields' Defense, Thus No Valid Strategic Reason for Failures

Trial counsel failed to conduct reasonable investigation of Mr. Shields case. As set forth above, he failed to investigate the veracity of Mr. Shields' coerced confession and he failed to investigate the key exculpatory witness. Trial counsel similarly failed to adequately investigate the other pieces of the defense that he did present at trial. Counsel presented an alibi defense, but he failed to adequately investigate other witnesses who could have corroborated Mr. Shields' rock-solid alibi. Counsel presented a third-party culpability defense, but he did it through three incarcerated witnesses who he knew would be heavily impeached by the State merely by the fact

of who they were and their status of inmates. There were several leads on other evidence and witnesses pointing to Mario McNichols as the true third perpetrator that he failed to follow, including but not limited to Marie Jackson's statements to police and the fact that the gun was found with McNichols and friends (who counsel could have interviewed). Finally, had counsel heeded Mr. Shields' repeated pleas to come speak with him about his innocence and his coerced and false confession, *see* Ex. 17 and 18, Mr. Shields would have been able to provide counsel additional leads and information regarding his actual innocence.

4. Trial Counsel's Advice to Mr. Shields Not to Testify was Prejudicially Deficient Given that He had Not Investigated His False Confession or Actual Innocence At All

Given trial counsel's failure to reasonably investigate this case, his failure to discuss the case with his client (despite repeated requests), and his failure to investigate and move to suppress Mr. Shields' confession (giving an opportunity to assess the power and credibility of Mr. Shields' potential trial testimony), it was ineffective for trial counsel to advise Mr. Shields not to testify. This deficiency was particularly prejudicial because trial counsel did not present any evidence undermining Mr. Shields' confession.

Thus, Mr. Shields would have filled a gaping hole in the trial and answered a lot of questions that were in the jurors' minds. Even if jurors were not already wondering about this fifteen-year-old boy's confession, trial counsel raised the question to them in his closing argument. Respondent asserts that this piece of counsel's closing argument defeats a claim of ineffectiveness; in other words, it proves that trial counsel was not ineffective because he argued to the jury that Mr. Shields' confession was coerced. To the contrary, counsel's mere X-sentence argument compounded the prejudice of counsel's ineffectiveness. By highlighting the issue, it alerted the jurors to this as a potential issue and left them wondering where is the evidence? This is analogous to cases where trial counsel promises evidence in an opening statement but fails to

deliver, which has been held to be per se ineffective. *See, e.g.*, *Harris v. Reed*, 894 F.2d 871, 879 (7th Cir. 1990) (holding counsel was deficient where he promised in opening statement to present testimony regarding an alternate suspect but failed to do so); *U.S. ex rel. Hampton v. Leibach*, 347 F.3d 219, 257 (7th Cir. 2003); *Toliver v. Pollard*, 688 F.3d 853, 862 (7th Cir. 2012). The same is true here.

Mr. Shields is now available and willing to testify before this Court regarding his actual innocence, the circumstances of his interrogation, and the reasons why he falsely confessed to a crime that he did not commit. *See* Ex. 36 (Declaration of Derrick Shields).

5. This Court May Consider All of Derrick Shields' Ineffective Assistance of Counsel Arguments

Respondent argues that this Court should not review two of the sub-claims of Mr. Shields' ineffective assistance of counsel claim, which were articulated in his amended habeas petition. But those claims are of the same time and type as those from his original petition and arise out of common operative facts, making his new claims timely under the relation-back doctrine.

A state prisoner seeking to challenge his state-court conviction in federal court generally must file a petition for federal habeas relief within one year of the state conviction becoming final. 28 U.S.C. § 2244(d)(1)(A). However, new claims alleged in an amended petition filed outside of that one-year period will be considered timely if those newly filed claims relate back to the original petition. *Dodd v United States*, 614 F.3d 512, 515 (8th Cir. 2010). An amendment to a petition relates back to the original petition when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Courts have found that the amended petition arises out of the same conduct, transaction, or occurrence, and, thus, relates back when the

claims "are tied to a common core of operative facts" or, said differently, are of the same "time and type" as the facts in the original petition. *Mayle v. Felix*, 545 U.S. 644, 650, 657 (2005). "New claims must arise out of the same set of facts as the original claims, and '[t]he facts alleged must be specific enough to put the opposing party on notice of the factual basis for the claim.'" *Taylor v. United States*, 792 F.3d 865, 869 (8th Cir. 2015) (*quoting Mandacina v. United States*, 328 F.3d 995, 1000 (8th Cir. 2003)).

Mr. Shields' claim that his counsel was ineffective for failing to present evidence of innocence, through additional investigation and development of innocence witnesses (Claim IIIB), involves facts of the same time and type as those alleged in his original petition. Analysis of Claim IIIB reveals that the basis of the claim is that counsel failed to investigate and present witnesses to testify as to Mr. Shields' innocence – precisely the same type of operative facts found in Mr. Shields' claim that his counsel failed to investigate and present Marie Jackson's testimony in his original petition (Original Claim IIIA). Both Claim IIIA and IIIB are tied to the same type of operative of facts – trial counsel's failure to develop and call witnesses at the trial who would have testified as to Derrick's innocence; first Marie Jackson, then the number of individuals that would have corroborated Derrick's alibi evidence.

Despite Respondent's characterization, Claim IIIB focuses on counsel's failure to find and call witnesses to support Derrick's innocence rather than a wholly new alibi theory relying on unknown facts. Instead, the failure to call witnesses to corroborate Mr. Shields' claims of innocence through his alibi are of the same type and time as trial counsel's failure to develop and call Marie Jackson as a witness to corroborate Mr. Shields' innocence. As the Eighth Circuit has repeatedly stated the concern with newly amended claims is whether the opposing party was on notice of the factual basis of the new claim. There can be no doubt that opposing counsel was on

notice that Mr. Shields' initial petition raised the issue that trial counsel had failed to develop and present witnesses that would have testified that Derrick was not and could not have been at the Movie Magic video store during the murder of Laurie Troup. Plus, the theories and claims need not be the exactly the same for the amended petition to relate back to the initial petition. *See, e.g., Dodd,* 614 F.3d at 516 (finding claim in the amended petition that counsel failed to object to speculative testimony regarding drug quantities and claim in the original petition that counsel failed to cross examine witnesses and object to drug amounts referred to the same core facts). Reviewing Mr. Shields' petition in its entirety, it is clear that Claim IIIB relates to operative facts that were alleged through Derrick's initial petition in the prior references to trial counsel's failure to find, develop, and present witnesses that could testify as to Mr. Shields' innocence. In this way, Claim IIIB relates back to the initial petition.

Additionally, Claim IIID, that Mr. Shields' counsel failed to investigate and impeach Travis Booker's testimony, arises out of a common core of operative facts found in Claim I and Claims IIIB in Derrick's original petition. Mr. Shields' original petition spent tens of pages explaining, in detail, why Mr. Shields' confession was unreliable and ultimately false, and explaining the police tactics during interrogations along with police history of misconduct. *See* Claims IB and IC, and IIIB.

Mr. Shields' original petition further sets forth, in detail, Travis Booker's interactions with police related to Mr. Shields and illuminates the fact that a proper investigation of Booker's testimony against Mr. Shields' would demonstrate that the two statements of the events leading up to and culminating in the Movie Magic murder were blatantly dissimilar and demanded further investigation and questioning. *See* Claims IB1and IC2. Mr. Shields' new claim IIID arises from those common operative facts already pled in Derrick's initial petition – (1) Travis

Booker's statements were unreliable (for the exact same reasons as Mr. Shields') and (2) an investigation into Travis's and Mr. Shields' statements would demonstrate that Travis was lying about Derrick, and Derrick was innocent. As with Claim IIIB, there can be no doubt that Respondents were on notice that Travis's statements were unreliable, and that trial counsel had failed to sufficiently investigate and impeach Travis's testimony. Mr. Shields' initial petition spent dozens of pages spelling out exactly those facts.

Because Mr. Shields' Claims IIIB and IIID are "tied to a common core of operative facts" such that opposing counsel was provided with notice of the basis for Derrick's claim from the initial petition, the relation-back doctrine applies, and Derrick's amended petition is timely.

6. Derrick Shields was Prejudiced by Trial Counsel's Ineffectiveness

But for trial counsel's ineffectiveness, the result for Ms. Shields would have been different. *Strickland*, 466 U.S. at 694. Trial counsel's representation was ineffective with regard to each element of Mr. Shields' defense. Am. Pet. at 67. Marie Jackson could have and should have been the centerpiece of his defense strategy; instead, she was absent, leaving a gaping hole in the defense. This Court must assess the prejudice of trial cousnel's ineffectiveness cumulatively.

As set forth above, Mr. Shields' case may not even have gone to trial if his confession had been suppressed as involuntary. *See Adcox v. O'Brien*, 899 F.2d 735, 737 (8th Cir. 1990) (remanding a habeas case for consideration of the likelihood of success of a motion to suppress). If it had gone to trial, he likely would have been acquitted because he would have presented a powerful witness to his innocence in Marie Jackson, as well multiple other additional witnesses to his actual innocence who would also corroborate the trial testimony that Mario McNichols was the true third perpetrator. Trial counsel also would have fatally undermined his confession by putting Mr. Shields on the stand to testify about the extremely coercive tactics that police

used on him despite his vulnerabilities. *See* Ex. 19 (Buckingham Rep.) ("In a confession case, hearing fro the defendant – the confessor himself – is sometimes the only way to make the jury understand the confession may not be true, and how that can happen.") and presenting the other exculpatory evidence that trial counsel failed to investigate and present.

Trial counsel's failure to effectively impeach the state witnesses, including both the interrogating officers and Travis Booker, was both an independent ground for ineffectiveness, but also compounded the prejudice of the other failings. Finally, trial counsel's closing argument compounded the prejudice of his other errors. Not only did trial counsel fail to challenge on cross-examination the interrogators' narrative that Mr. Shields offered them the fact that the gun used in the Movie Magic murder was a .410 as a way to get out of trouble, he adopted that as the truth and repeated it the jury. He then passingly mentioned the possibility of a coerced confession without providing the jurors any evidence to rely upon. Such empty argument leaves the juror thinking that something is missing here; it left them, at the very end of trial, with the sense that, had there been any evidence that this was a coerced confession, they would have heard it. So they likely assumed there was no evidence of vulnerability or coercive tactics. When the reality was quite the opposite.

IV. DERRICK SHIELDS' FOURTHEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE STATE'S MISCONDUCT AT TRIAL

While Respondent does touch on the merits of Mr. Shields' state misconduct claim, he misconstrues the argument. Mr. Shields did not intend to argue that then-detective Adams testified that Shields mentioned the .410 shotgun to Adams before Adams ever asked him about the Movie Magic murder. Instead, Mr. Shields, based upon the analysis and expert opinion of police practices expert James Trainum, that Det. Adams met with and was briefed by Lt. Ross Thompson – an officer who participated in the initial crime investigation and had been integral to

subsequent investigation, including into the possibility of Derrick Shields as a suspect – before Adams questioned Shields about the Movie Magic murder. This contradicts Adams and Thompson' testimony because they testified that Adams went into the interrogation with little to no knowledge of the Movie Magic murder. Given that the police reports show that Adams was briefed before this interrogation, that is false.

At a minimum, there is a lack of clarity and factual disputes about the sequence of events surrounding the multiple evolving interrogations of fifteen-year-old Derrick Shields between March 26 – March 27, 2001. The lack of clarity is primarily a result of the police's failure to properly and adequately document their investigation of this case, including the details of interrogations and statements of Derrick Shields, as well as other witnesses and co-defendants. *See* Ex. 25 (Trainum Rep..); Ex. 42 (Trainum Aff) at 5-6. At this stage in proceedings, this Court is required to view the facts pled in the light most favorable to the petitioner. This is particularly true here, where significant compelling new evidence puts the interrogating and testifying officer's credibility and candor directly at issue and provides good reason to credit Mr. Shields' account of events over the officers. See Ex. (transcript where judge finds Thompson "lacks candor", department lacks organization, etc. See also (other bad docs on Adams).

Like most confession cases, this case has always been a credibility contest between Derrick Shields and the officers who interrogated him. The police's credibility has always been central to this case. The new evidence casts significant doubt about Adams' credibility and Thompson's candor. Ex. 42 (Trainum Dec.) at 5-6. At a minimum, this Court should order an evidentiary hearing so that the Court can evaluate Mr. Shields credibility against that of his interrogators. *See* Ex. 36 (Shields Aff.) (Mr. Shields is available and willing to testify at an evidentiary hearing).

V. THIS COURT CAN CONSIDER DERRICK SHIELDS' CONSTITUTIONAL CLAIMS ON THE MERITS BECAUSE HIS ACTUAL INNOCENCE OVERCOMES PROCEDURAL DEFAULT AND HE SATISFIES CAUSE AND PREJUDICE

A. Actual Innocence Overcomes Any Procedural Default

As set forth in detail in section I, *infra*, Mr. Shields' actual innocence overcomes any procedural default. Thus, this Court must consider each of his constitutional claims on the merits.

B. There is no Abuse of the Writ But, If the Court Concludes Otherwise, Actual Innocence Excuses the Abuse

Respondent boldly asserts that all of the claims in his amended petition are barred by the abuse of the writ. *See* Resp. at 27. As an initial matter, any abuse of the writ here would be excused both because Mr. Shields' actual innocence excuses any abuse of the writ, and because he can show cause and prejudice. *See Schlup*, 513 U.S. at 320 (holding that a showing of actual innocence satisfies the miscarriage of justice inquiry to allow courts to consider procedurally defaulted constitutional claims in successive or abusive habeas petitions. As discussed more fully in section I, *supra*, and section V, *infra*, Mr. Shields meets each of these standards).

In any event, there is no abuse of the writ in this case. "The doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus." *McCleskey v. Zant*, 499 U.S. 467, 470 (1991). But this Court has already held that Shields's habeas petition is not a second or successive petition, so abuse of the writ does not apply. (*See* Dkt. No. 15.)

Respondent attempts to construe abuse of the writ as a distinct doctrine that is unaffected by the issue of whether a habeas petition is "second or successive" under AEDPA. But the issues are the same – indeed, the question presented in *Magwood* was "whether abuse-of-the-writ rules, as modified by AEDPA . . . apply at all to an application challenging a new judgment." 561 U.S. 320, 336 (2010). The Court held that they did not, and that "where . . .

there is a 'new judgment intervening between the two habeas petitions,' . . . an application challenging the resulting new judgment is not 'second or successive' at all." *Id.* at 341-42. The government overlooks the core holding of *Magwood* and takes Justice Breyer's concurrence in *Magwood* to imply that abuse of the writ applies even after an intervening resentencing is held to constitute a new judgment. *See* Resp. at 28. But Justice Breyer stated only that "if *Magwood* were challenging an *undisturbed* state-court judgment for the second time, abuse-of-the-writ principles would apply." *Magwood*, 561 U.S. at 343 (emphasis added). Shields' earlier judgment was not undisturbed – as this Court already held, his re-sentencing procedures constituted a new judgment. Under *Magwood*, therefore, abuse of the writ does not apply.

C. Derrick Shields Satisfies Cause and Prejudice, Permitting This Court to Review His Constitutional Claims

Mr. Shields's failure to bring his claims via a state habeas action is also excused under the cause-and-prejudice standard because his appellate counsel provided ineffective assistance by not informing Mr. Shields of the nature of the post-conviction remedies possibly available to him. *See* Am. Pet. at 97. Respondent notes that *Martinez* presently applies to excuse a procedural default only when a state habeas action was actually pursued, even if *pro se*. Resp. at 31-32. But it would be illogical, unfair, and contrary to the protective purpose of *Martinez* to find that a defendant who was made aware of the availability of post-conviction remedies and pursued them *pro se* can excuse a procedural default under *Martinez*, but a defendant, like teenage Shields, who was not even made aware of these remedies by his appellate counsel, and thus could not have pursued them, has defaulted his federal habeas claims.

It would also be illogical to prejudice a defendant like Mr. Shields, who had the same attorney at trial and on direct appeal, which would have required counsel to raise his *own* ineffectiveness at trial and on direct appeal. *See Bader v. State*, 40 S.W.3d 738, 743, (2001)

(Arkansas's contemporaneous-objection rule requires objection at the trial level in order to preserve an argument for appeal). *See also Trevino v. Thaler*, 569 U.S. 413 (2013)(where a state's procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise an ineffective assistance of trial counsel claim on direct appeal, then the *Martinez* exception applies to excuse a petitioner's procedural).

Under basic doctrinal and equitable principles, a procedural default should be excused when, at the conclusion of his direct appeal, an individual is not advised by his appellate counsel of the nature of the possible post-conviction relief available to him, and therefore cannot be expected to pursue it. *See Martinez v. Ryan*, 566 U.S. 1, 12 (2012) ("The right to the effective assistance of counsel at trial is a bedrock principle in our justice system."); *Missouri v. Frye*, 566 U.S. 134, 140 (2012) ("The 'Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceeding.'") (citing *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)). This aligns with other areas in which counsel must advise a defendant of the collateral implications of criminal proceedings in order to provide effective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding "that counsel must inform her client whether his plea carries a risk of deportation"). Here too, "longstanding Sixth Amendment precedents" and "the seriousness of" defaulting one's claims as a result of failing to bring a state post-conviction claim militate in favor of excusing Mr. Shields's default. *Id.*

This is particularly true where, at the relevant time, Mr. Shields, an uneducated adolescent whose cognitive functioning is borderline to low average, and who was newly incarcerated in an adult prison, without access to family, legal assistance, or any other resources.

In the sixty days following the affirmance of his conviction on appeal, he was focused on surviving and did not know about his rights to post-conviction proceedings or any relevant deadlines. Even if he had, it is unreasonable to expect that he would have the ability to adequately investigate and plead his substantial constitutional claims. He would not have known what to write or who to write it to.

Therefore, in order to provide effective assistance to a criminal defendant after his direct appeal is exhausted, the defendant must be advised of the basic nature of his possible post-conviction remedies, including state habeas relief, though he may have to pursue those remedies on his own. Failure to do so constitutes ineffective assistance that excuses a procedural default for failing to pursue such relief. Here, Mr. Shields was informed only that he should consult another attorney if he was interested in post-conviction remedies, and received no basic advice about what those post-conviction remedies might be, or that failure to raise them might bar a later federal habeas challenge to his conviction. This ineffective assistance prejudiced Shields by preventing him from pursuing post-conviction relief in state court. His failure to pursue this relief therefore should be excused under the cause-and-prejudice standard.

Further, Arkansas's habeas statute was irrelevant for Shields because none of the claims that the State argues have been defaulted – his *Napue* and ineffective-assistance claims—could have been brought in a state habeas action. *See* Am. Pet. at 25-29. In Arkansas, "[u]nless a petitioner can show that the trial court lacked jurisdiction or that the commitment was invalid on its face, there is no basis for a finding that a writ of habeas corpus should issue." *Jones v. State*, 565 S.W.3d 100, 101-02 (Ark. 2019); *see* Ark. Code Ann. § 16-112-103(a)(1). Therefore, seeking state habeas relief would have been futile, and Shields should not be required to have pursued these inapplicable and inadequate remedies. *Lee v. Kemna*, 534 U.S. 362, 381 (2002)

(recognizing that there are "cases in which asserted state grounds are inadequate to block adjudication of a federal claim"). That Arkansas's process on one occasion granted Shields a resentencing that was explicitly required by the U.S. Supreme Court does not render Arkansas post-conviction processes sufficiently adequate to justify a default for Shields's failure to pursue them.

VI. THIS COURT SHOULD ORDER AN EVIDENTIARY HEARING ON ACTUAL INNOCENCE AND CONSTITUTIONAL CLAIMS

Derrick Shields requests that this Court grant an evidentiary hearing to permit him to develop his *Schlup* claim excusing any procedural default or abuse of the writ, if the Court concludes any of these doctrines apply. Mr. Shields believes that this Court can rule on his constitutional claims on the papers but, if the Court disagrees, then he requests an evidentiary hearing on those claims as well.

A line of Eighth Circuit cases also require the Court to hold an evidentiary hearing: "[T]he district court must hold [an evidentiary hearing] if the petitioner has alleged disputed facts which, if proved, would entitle him to habeas relief." *Newton v. Kemna*, 354 F.3d 776, 785 (8th Cir. 2004) (quoting *Smith v. Bowersox*, 311 F.3d 915, 921 (8th Cir. 2002)); *see also, e.g.*, *Bowman v. Gammon*, 85 F.3d 1339, 1342 (8th Cir. 1996); *Amrine I*, 128 F.3d 1222, 1229 (remand for evidentiary hearing to evaluate the credibility and reliability of recanting witnesses, recognizing the "evidentiary balancing inherent" in any actual innocence claim). This Court has previously recognized that it retains "general discretion" to decide whether to hold a hearing, even after the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Bragg*, 128 F.Supp.2d at 592. In *Bragg v. Norris*, where this court found the *Schlup* actual innocence gateway satisfied and granted habeas relief, this Court found an evidentiary hearing was required where the petitioner "provided indisputable documentary evidence of his innocence, giving rise to an evidentiary

hearing in the case." *Bragg*, 128 F.Supp.2d at 595. Indeed, in *Schlup*, the Supreme Court remanded for an evidentiary hearing for precisely this reason, holding "[t]he fact-intensive nature of the inquiry, together with the District Court's ability to take testimony from the few key witnesses . . . convinces us that" remand is appropriate. 513 U.S. at 332. Mr. Shields presents new witnesses, a recanting key witness, and alleges disputed facts that, if proved, would entitle him to habeas relief, *see* generally section I, *supra*, so the Court must hold an evidentiary hearing.

As a general matter, 28 U.S.C. § 2254(e)(2), as amended by AEDPA, limits the ability of federal courts to grant evidentiary hearings with respect to claims that were not developed in state courts. 28 U.S.C. § 2254(e)(2). Section 2254(e)(2), however, does not apply to Mr. Shields' request for three reasons. First, § 2254(e)(2) does not apply to hearings on procedural default. *See Teleguz v. Pearson*, 689 F.3d 322, 331 n.6 (4th Cir. 2012) ("Our sister circuits considering whether the limitation on evidentiary hearings in § 2254(e)(2) applies to *Schlup* claims have overwhelmingly found that it does not."); *Cristin v. Brennan*, 281 F.3d 404, 416 n.14, 418 (3d Cir. 2002) (discussing why § 2254(e)(2)'s restrictions do not apply to hearings on procedural default). Second, § 2254(e)(2) does not apply to "a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence." *House v. Bell*, 547 U.S. 518, 539 (2006); *see Engesser v. Dooley*, 686 F.3d 928, 937 n.3 (8th Cir. 2012). Mr. Shields' request for an evidentiary hearing is with respect to his claim on procedural default, and Mr. Shields makes his request in the context of a first federal habeas petition seeking consideration of defaulted claims based on a showing of actual innocence, so both exceptions apply, and § 2254(e)(2) does not apply to Mr. Shields' request.

Third, "a procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [State's] initial-review collateral proceeding, there

was no counsel or counsel in that proceeding was ineffective," *Trevino v. Thaler*, 569 U.S. 413, 416 (2013) (quoting *Martinez v. Ryan*, 566 U.S. 1, 17 (2012)), or "where . . . state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity to raise a claim of ineffective-assistance-of-trial counsel on direct appeal." *Id.* at 429. Both are true here. See Am. Pet. at 25-29; 94-97. *See also* Section V, *supra*.

Because § 2254(e)(2) does not apply, multiple controlling authorities require the Court to hold an evidentiary hearing. Under *Townsend v. Sain*, 372 U.S. 293 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992),

> [A] federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

Townsend v. Sain, 372 U.S. 293, 313 (1963), *overruled on other grounds by Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *see also Sardin v. Kelley*, 5:17-CV-00178-DPM-JTR, 2017 WL 6570467, at *4 n.9 (E.D. Ark. 2017) (describing the Adv. Comm. Notes to Rule 8 of the Rules Governing Section 2254 Cases in the United States District Courts as "suggesting that *Townsend* continues to apply where not superseded by § 2254(e)(2)").

Derrick is making a substantial allegation of newly discovered evidence, *see* section I, *supr*a, so *Townsend*'s fourth factor applies in this case, and as a result an evidentiary hearing is required. Moreover, as a result of the inadequacies of Arkansas's post-conviction system, *see* Am. Pet. at 15-29, (i) the merits of the factual dispute were not resolved in Derrick's state hearing, (ii)

the state factual determination in Derrick's case is not fairly supported by the record as a whole, (iii) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing in Derrick's case, and (iv) it appears that the state trier of fact did not afford Derrick a full and fair fact hearing, so *Townsend*'s first, second, third and sixth factors apply in this case as well. The line of Eighth Circuit and district courts cited above support this conclusion.

The State cites *Bannister v. Delo*, 100 F.3d 610 (8th Cir. 1996), and *Battle v. Delo*, 64 F.3d 347 (8th Cir. 1995), for the proposition that Derrick is not entitled to an evidentiary hearing. But these cases are squarely in the line of cases cited in the immediate preceding paragraph, and actually support Mr. Shields' request for an evidentiary hearing. In *Battle*, the Eighth Circuit recognized that "[if] new evidence calls the credibility of certain witnesses into question, and their credibility figures reasonably in our assessment, remand for an evidentiary hearing may be appropriate." That is precisely the case here; the new evidence puts the credibility of each of the State's witnesses – Travis Booker, Scott Adams, Ross Thompson – directly at issue. The new evidence also fatally undermines the centerpiece of the State's trial theory, Mr. Shields' confession. Thus, pursuant to *Battle*, the case cited by Respondent, an evidentiary hearing is warranted. *Bannister* does not say otherwise. In *Bannister*, the Eighth Circuit reaffirms that an evidentiary hearing is warranted where a petitioner "allege[s] facts which, if proved, would entitle him to relief." 100 F.3d at 617 (quoting *Bowman v. Gammon*, 85 F.3d 1339, 1342 (8th Cir 1996)). The *Bannister* court rejected a request for an evidentiary hearing where petitioner failed to allege facts that would warrant relief, if proven. *Id.* That is plainly not the case here.

Even if the Court decides that the authorities cited above do not require an evidentiary hearing, it still may grant one in its discretion. *Schriro v. Landrigan*, 550 U.S. 465, 468 (2007);

accord McGehee v. Norris, 588 F.3d 1185, 1200 (8th Cir. 2009); *Williams v. Norris*, 576 F.3d 850, 860 (8th Cir. 2009).

On the other hand, if this Court concludes that 28 U.S.C. § 2254(e)(2) does apply, Mr. Shields has met the threshold requirements for obtaining an evidentiary hearing in federal court because he (1) relies on a factual predicate that could not have been previously discovered through the exercise of due diligence;[15] and (2) that the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[16] *See Williams v. Taylor*, 529 U.S.420, 429-31 (2000); *Schriro vs. Landrigan*, 550 U.S. 465 (2007).

CONCLUSION

WHEREFORE, Petitioner asks that the Court grant the following relief:

1. Expand the record to include the exhibits set forth in the appendix submitted with Mr. Shields' Amendment Petition for a Writ of Habeas Corpus as well as the additional exhibits submitted herewith;
2. Issue a writ of habeas corpus ordering that Derrick Shields be brought before the Court to be discharged from his unconstitutional confinement and relieved of his unconstitutional conviction and sentence;
3. Grant Derrick Shields, upon request, the authority to obtain discovery and subpoenas for witnesses and documents necessary for an evidentiary hearing;

[15] *See* Am. Pet. at 25-29 for all of the reasons why Arkansas state court's post-conviction system precluded Mr. Shields from developing or litigating the factual bases of his claims in state court.

[16] According to the holding in *Cullen v. Pinholster*, 563 U.S. 170, 185 (2011), if a claim has been adjudicated on the merits in state court, the federal court is not authorized to take additional evidence in an evidentiary hearing. Where there has been adjudication in state court, as is the case here, the *Pinholster* decision has bearing on the district court's discretion to take new evidence under 28 U.S.C. § 2254(e)(2). *Id.* at 185-86.

4. Order an evidentiary hearing on Derrick Shields' claims; and

5. Grant such other relief as may be just and appropriate.

Respectfully submitted,

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