IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Jerry Reeves, Appellant,	:	
v.	:	No. 17-1043
Brian Coleman, Superintendent, S.C.I. Fayette, Appellee.	:	

APPLICATION FOR CERTIFICATE OF APPEALABILITY

I. Introduction

Jerry Reeves is an innocent man convicted of murder and serving life in prison. Reeves is left-handed, but the surveillance video of the murder shows that the real killer was right-handed. Reeves's conviction rested on his own confession, but that confession was riddled with major errors and did not contain a single fact only the real killer could have known. And *another* man confessed to this murder, several times to several different credible witnesses—his confessions *did* contain facts only the real killer could know. But because his lawyer botched the habeas corpus statute of limitations, Reeves filed his habeas corpus petition late.

Prisoners like Reeves who file late petitions can have review of their constitutional claims if they make strong enough showings of their actual innocence. *McQuiggan v. Perkins*, 133 S. Ct. 1924, 1935 (2013). This gateway innocence showing must include "new evidence." This appeal presents an important issue of law that this Court has not decided and that has split the circuits: does innocence evidence qualify as new if the jury never heard it but it was available to trial counsel?

The district court answered this question no, and on this basis it dismissed Reeves's petition as untimely, without reaching his constitutional claim or deciding if he is innocent. But none of the sources the district court cited to answer the new-evidence question are controlling precedent. It relied mainly on a Third Circuit opinion that expressly left the question open. R&R 45–46 (citing *Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010)).[1] And the dicta from *Houck* that the court below relied on at least arguably cuts *against* the district

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1 Citations to the Magistrate Judge's report and recommendation, E.C.F. # 38, are in the format "R&R __." Citations to the district court's single-page order adopting in its entirety the report and recommendation, denying petitioner's objections, dismissing the petition, and denying a certificate of appealability, E.C.F. #42, are in the format, "Order." Citations to the district court's memorandum explaining its ruling, E.C.F. #41, are in the format, "Mem. __." Citations to exhibits to the amended habeas petition, E.C.F. #11, are in the format, "Ex. __."

All E.C.F. citations refer to the district court docket.

court's view. *Houck* said it was "arguably . . . unfair" to "require a petitioner . . . in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new." *Id.* Four other circuits have answered the new-evidence question posed here—three rejected the position the district court adopted. *See Cleveland v. Bradshaw*, 693 F.3d 626, 636–37 (6th Cir. 2012); *Griffin v. Johnson*, 350 F.3d 956, 961–63 (9th Cir. 2003); *Gomez v. Jaimet*, 350 F.3d 673, 679–80 (7th Cir. 2003); *but see Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (en banc). Because the district court's ruling rested explicitly on its answer to a legal question that is unsettled and debatable, Reeves is entitled to a certificate of appealability (COA).

More broadly, a COA is warranted because the district court was wrong that Reeves failed to prove his actual innocence. While the actual innocence standard is demanding, the evidence Reeves presented is extraordinary. Reeves's burden in district court was to show that it is more likely than not that any reasonable juror would have a reasonable doubt, and his burden now is simply to show that the district court's decision was debatable. Because "it surely cannot be said that a juror, conscientiously following the judge's instructions requiring proof beyond a reasonable doubt, would vote to convict," *Schlup v. Delo*, 513 U.S. 298, 331 (1995), the district court's ruling to the contrary is debatable and a COA should issue.

II. Procedural history

Jerry Reeves was convicted in Pennsylvania state court in 2010 of second-degree murder and carrying a firearm without a license, and he was sentenced to life in prison without parole. After Reeves's direct-appeal attorney filed an *Anders* brief, the court upheld his conviction and sentence. *Commonwealth v. Reeves*, No. 1193 MDA 2010 (Pa. Super. July 31, 2011). He filed a counseled petition under the Post Conviction Relief Act 364 days later, which was denied without a hearing by the Dauphin County Court of Common Pleas. The Superior Court affirmed on appeal and the Supreme Court of Pennsylvania denied review on March 25, 2014.

Reeves filed his habeas corpus petition in federal court on July 31, 2014, roughly four months late, followed by an amended petition. E.C.F. #1, 11. He squarely acknowledged this untimeliness under 28 U.S.C. § 2244(d)(1)(A), explained that it was caused by his PCRA counsel's gross error in calculating his federal filing deadline,[2] and

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2 In a letter from prior counsel to Reeves dated March 26, 2014, prior counsel informed petitioner that the time for filing his habeas petition "starts 90 days from today's final ruling [the denial of PCRA allocator by the state Supreme Court] and runs for 1 year." Ex. 21 (letter 3/26/2014). This statement reflects two distinct errors. First, the habeas limitations period is not tolled for the 90 days available to seek certiorari from the United States Supreme Court during post-conviction. *Lawrence v. Florida*, 549 U.S. 327 (2007). Second, the one-year period does not begin to run at the end of post-conviction proceedings, but instead begins to run at the

asserted that his actual innocence excused it. His underlying constitutional claim is that his trial counsel unreasonably failed to investigate and present the key evidence of his innocence. The Commonwealth answered, E.C.F. #34, and Reeves replied, E.C.F. #35.

The Magistrate Judge recommended that Reeves's petition be denied as untimely, without an evidentiary hearing. E.C.F. #38. After Reeves filed objections, E.C.F. #40, the district court adopted the recommendation in its entirety, issued a memorandum opinion, dismissed the petition, and did not issue a COA, E.C.F. #41, 42.

III. Relevant facts

Jerry Reeves is serving a life sentence for a murder committed during a robbery of the City Gas and Diesel on State Street in Harrisburg, and the whole thing was caught on videotape. The video shows the killer:

- pointing the gun at the clerk with his right hand,

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end of direct-appeal proceedings and is not tolled until the PCRA is filed. Prior counsel also told petitioner they would not begin work on his federal habeas case until he retained them for that purpose and paid the retainer fee, and prior counsel told petitioner's father that petitioner could wait until August of 2014 to retain them. Ex. 5 ¶ 28. Prior counsel admits his error. Ex. 20 ¶ 21. He admits that he represented Reeves at the time of the error, and that Reeves relied on his erroneous advice. Ex. 20 ¶¶ 2, 21. Reeves's father confirms this. Ex. 5 ¶ 29.

- reaching to prevent the clerk from closing the bulletproof glass with his right hand,
- shooting the clerk with the gun in his right hand,
- shifting the gun to his other hand to pick up money from the counter with his right hand,
- gesturing at the collapsing clerk with his right hand,
- jumping behind the counter and picking up money on the floor with his right hand, and
- emptying money from the cash register with his right hand.

The real killer was right-handed.[3]

Jerry Reeves is left-handed. When he was nine years old, a psychologist examined him, and she observed him so closely that her report described how his knuckles turned white from gripping the pencil tightly when he drew. She recorded, "Jerry is left handed."[4] His foster sister who lived with Jerry for a year when he was about 11 remembers he is left-handed; they were close in age and played sports together often, and Jerry always played left-handed.[5] His foster mother remembers Jerry used to love to draw and was pretty good at it: "Remembering him drawing is the way I remember best that he was

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3 Reeves lodged a computer disc containing the store security video with the district court.

4 Ex. 1 (Psychological evaluation of Gerald Drayton by Veronique Valliere, 6/30/97). Drayton is Petitioner's birth surname; it changed to Reeves when he was adopted by Terrie Reeves in 2001.

5 Ex. 2 at ¶ 2 (Declaration of Brittany Patterson).

left-handed."[6] His junior-high baseball coach who put Jerry in to pitch remembers he is left-handed:

> I remember Jerry. Our teams weren't real good at the time, but he was one of our best players. He wasn't tall, but he was a good player and he hustled. He was a little stocky, light-skinned. Mostly he played outfield, but I also had him pitch some. I coached him in 8th and 9th grade, maybe 10th grade too.
>
> Jerry was left-handed. He threw lefty, and I'm pretty sure he batted lefty too. When I first tried to remember, I thought he was right-handed. But then I remembered that he pitched for us, and that's when I remembered Jerry was left-handed. Left-handed pitchers aren't too common.[7]

Jerry's adoptive father who every day saw him write and eat and unlock doors and hammer nails and brush his teeth and paint a house knows he is left-handed.[8]

Reeves's left-handedness is strong evidence of his innocence, but there is more. The prosecution's case against Reeves depended entirely on his own confession to police interrogators. The prosecution had no physical evidence: no DNA, no fingerprints, no gun purchase, no gun recovered, no post-crime spending spree—just Reeves's own confession. And that confession was riddled with statements that are demonstrably false:

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6 Ex. 3 at ¶ 3 (Declaration of Debra Patterson).
7 Ex. 4 at ¶ 3 (Declaration of Robert Stern).
8 Ex. 5 at ¶ 7 (Declaration of Terrie Reeves).

- Reeves said he waited until the store was empty before entering,[9] but the real killer burst in while a customer was still at the counter and pointed the gun before the customer was out the door; Reeves told his interrogators he wore a t-shirt and no mask, but the real killer wore a hooded sweatshirt with the hood up, a baseball cap, and a mask over his face;
- Reeves said the gun was large—a 9 millimeter[10]—but the real gun was small—a .25 caliber;[11]
- Reeves said he put the gun in the window and then the clerk started struggling with him,[12] but the clerk never struggled with him—he only tried to slam closed a sliding glass window;
- Reeves said he did not remember getting anything from the store,[13] but the real killer grabbed cash from the counter, then from the floor, then from the register.
- Reeves said he left the store running north-east;[14] the real killer left walking west.

The video of the murder flatly contradicted what Reeves told the interrogators.

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9 Ex. 6 at 5, 8 (Voluntary statement of Jerry Reeves, 7/29/09).
10 *Id.* at 8. A nine-millimeter is equivalent to a .357.
11 N.T. 50.
12 Ex. 6 at 6.
13 *Id.*
14 *Id.* at 7; *see* Ex. 7 (Google Maps map of City Gas & Diesel Mini Mart).

Reeves's confession did get a few facts right, but these were not facts only the real killer could know. Reeves was right that: the victim was the store clerk; the killer's gun was a handgun; and only one shot was fired.[15] Those facts all had been released to the public and reported in the news. The day after the shooting, the local newspaper reported that: the victim was the store clerk; the killer used a handgun; and only one shot was fired. "'Thakur was killed by a single bullet from a small-caliber handgun. . . . 'It was just one bullet, but unfortunately it was a terribly lethal shot.'"[16]

Reeves did not describe the victim. He did not say where the bullet struck the victim. He did not say whether the cash register was opened, or how. He did not explain the killer's right-handedness. Only after being led with, "Do you remember did you jump up" did he say, "I think I jump behind the counter."[17]

The most unforgettable moment of the murder came after the clerk's desperate attempt to close the bulletproof window failed, after the killer shot the clerk. The clerk held up his hands in surrender and rose up from the floor, trying to obey. Mortally wounded, the clerk opened the cash register, found a bag, and for several seconds he filled the bag with money, until he paused, slumped, and collapsed

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15 Ex. 6 at 6, 8, 11.

16 Ex. 8 at 1–2 (Tom Bowman, Night-Shift Horror, Patriot-News (Harrisburg), May 26, 2006).

17 Ex. 6 at 6.

backwards to the floor to die. This is the only-the-real-killer-could-know detail that all interrogators are trained to elicit. Reeves's confession said nothing about it.

And there is still more.

Less than half an hour after the robbery-murder, two convicts—Kai Anderson and Michael Holmes—were due back at the work-release center in Harrisburg, less than three miles from the convenience store. Neither man returned. The work-release center employees knew about the robbery-murder, and on their own initiative they called police detectives to report the inmates' escape; they told detectives that other inmates noted that Anderson fit the description of the convenience-store killer. They told detectives they thought it was "very coincidental" that they were gone when the robbery-murder occurred.[18]

A couple days after the crime, police received a second, independent tip tying Kai Anderson to the murder. Police spoke to Danielle Ignazzito, the mother of Anderson's child, after Ignazzito's mother contacted police. Ignazzito said Anderson called her several times during the early morning of May 27 (two days after the murder), suddenly promising to give her a lot of money for their child after long failing to do so. Ignazzito also was called by Kenneth Marlow, who

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18 Ex. 17 at 38 (collected Harrisburg Police Department reports in Reeves case).

told her he was calling on behalf of Anderson and told her Anderson and Michael Holmes had fled the state because police were looking for them for the murder at the City Gas and Diesel.[19]

A week after the murder, police found Kai Anderson, hiding in the apartment of the girlfriend of Michael Holmes. Anderson told police Holmes was hiding in the same apartment. He admitted talking to Kenny Marlow after the crime and getting Marlow to call Ignazzito for him. He denied confessing to Marlow, and denied being involved in the robbery. But then he told police that he had just happened to run into another man, who just happened to up and confess to committing the robbery—supposedly he told Anderson he "had to pop someone" and "they should have just given me the money." Yet Anderson was not charged in connection with the murder.[20]

Two weeks after the murder, police interviewed Kenny Marlow, and Marlow gave police more evidence against Anderson. Marlow corroborated that Kai Anderson got him to call Ignazzito to tell her the police were looking for him for the shooting on State Street. Marlow said Anderson "told me that he went to a friend's house got a gun went to the gas station and shot the dude and robbed him."[21]

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19 *Id.* at 24, 42.
20 *Id.* at 46.
21 Ex. 18 (Statement of Kenneth Marlow 6/9/06).

Then, a month after the murder, yet another witness independently contacted the police. Johnathan Johnston, a local prisoner, told detectives he recently had been housed with an inmate, and that the inmate admitted robbing the gas station at 15th and State Street and killing the clerk. The inmate's name? Kai Anderson. What Anderson told Johnston matched the prior witnesses' accounts on a host of non-public points. Anderson told him who his partner had been: Michael Holmes. Anderson said he tried to get Johnston to threaten Ignazzito, because she also knew he was guilty. Anderson said he had confessed to Marlow.[22]

Anderson's confession to Johnston overflowed with accurate, non-public detail about the crime: Anderson had hidden from the store security cameras,[23] they all dressed in black,[24] they knew the window was the only way into the clerk's area and the shooter was chosen because he was small enough to fit,[25] and police already had interviewed both Anderson and Ignazzito.[26]

Unlike Reeves, Anderson knew how the killer left. Anderson said they came to the convenience store from Summit Street, and that they left down an alley; Johnston understood Anderson to mean that he left

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22 Ex. 19 at 2, 5, 6 (Statement of Johnathan Johnston 6/28/06).
23 *Id.* at 5.
24 *Id.* at 13.
25 *Id.* at 14.
26 *Id.* at 9, 10.

the store on foot, walking back to Summit Street by way of Hoerner Street.[27] From the convenience store, Summit Street and Hoerner Street are both to the west[28]—the same direction the killer exited in the video.

And then there is what Anderson said about the killing itself. Here is what Anderson told Johnston:

> He said he wasn't supposed to shoot him he said he was supposed to just go in there and get the money and like had the gun like waist like between his waist and his stomach like holding it and the gun went off he said *when the gun went off the guy fell then got back up and he fell again* and the guy with the gun jumped on the counter and ducked under and went thru the, the little spot and got the money and came back out.[29]

The verifiable, unreported facts of this crime—the facts Reeves missed or got wrong—Kai Anderson knew and got right. Two different men confessed, but only one man's confessions had facts only the real killer could have known: Kai Anderson's.

IV. A COA should issue because the ruling below is debatable.

A. Controlling law

A COA is granted when one circuit judge finds that the applicant has made a substantial showing of the denial of a constitutional right.

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27 *Id.* at 14.
28 Ex. 7 (Google Maps map of City Gas & Diesel Mini Mart).
29 Ex. 19 at 13 (emphasis added).

28 U.S.C. § 2253(c); 3d Cir. L.A.R. 22.1. An appellant meets this standard if he shows that the issues are "debatable among jurists of reason." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). "[A] claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338. When a petition is denied on a procedural ground, a COA should issue when the merits issue and the procedural ruling both are debatable. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

Actual innocence provides an equitable exception to the federal habeas corpus statute of limitations. *McQuiggan v. Perkins*, 133 S. Ct. 1924, 1932 (2013). Under this standard, a petitioner who presents new, reliable innocence evidence is entitled to merits review of his untimely claim if, viewing the record as a whole, it is more likely than not that any reasonable juror would have a reasonable doubt. *House v. Bell*, 547 U.S. 518, 538 (2006). This standard does not require absolute certainty of innocence and is designed to ensure that the innocence gateway is "meaningful." *Id.* at 537–38.

B. The district court's ruling is debatable because it depended on the debatable legal premise that evidence that was available to trial counsel cannot be "new."

The district court's ruling rested on its view that Reeves's strongest innocence evidence was irrelevant to his gateway actual-

innocence showing because it was available to trial counsel, even though the jury never heard it, and even though that evidence is central to the very ineffective-assistance-of-counsel claim whose untimeliness Reeves seeks to overcome. R&R 40 ("Here, whether Reeves has presented a colorable showing of actual innocence depends on the definition of 'new evidence.'"). At its heart, this is a dispute about whether it matters that Kai Anderson alone knew what the real killer alone could have known: that after the victim was shot he got back up and then fell again. The district court understood that the evidence pointing to Kai Anderson as the real killer was "strong," R&R 47, but it did not weigh it as part of Reeves's actual-innocence showing because it was available to trial counsel. The district court's ruling is plainly debatable among jurists of reason.

A sharp circuit split exists on the question of whether, for actual-innocence-gateway purposes, evidence is "new" if it was available to trial counsel but never heard by the jury. The earliest circuit to address this question stated that available-but-unpresented evidence is *not* new:

- In the course of ruling in the petitioner's favor by remanding for consideration of an actual-innocence issue, the Eighth Circuit stated in passing, "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox*, 128 F.3d 1222,

1230 (8th Cir. 1997) (en banc) (citations omitted). The Eighth Circuit did not explain the basis for this rule, but the two cases it cited both involved facts known by the petitioner personally at the time of trial, and one was "the clearest possible case of the deliberate withholding of a claim . . . . The affidavit was known to the petitioner, and he instructed counsel not to use it." *Smith v. Armontrout*, 888 F.2d 530, 542 (8th Cir. 1989).

In the two decades since *Amrine*, no circuit has adopted the Eighth Circuit's position and three circuits have held to the contrary:

- The Seventh Circuit held, "All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial." *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003) (citations omitted). It squarely addressed the issue, analyzed it at length, and rejected the state's argument that evidence is not new if the petitioner was aware of it at the time of trial. *Id.* The court explained that "it would defy reason to block review of actual innocence based on what could later amount to the counsel's constitutionally defective representation." *Id.* at 680.
- The Ninth Circuit "h[e]ld that habeas petitioners may pass *Schlup*'s test by offering 'newly presented' evidence of actual innocence," rejecting the state's argument that only newly discovered evidence can qualify as new. *Griffin v. Johnson*, 350 F.3d 956, 961–63 (9th Cir. 2003). Like the Seventh Circuit, it

analyzed the issue with care. *Id.*

- The Sixth Circuit held that evidence was new even though it was available to trial counsel. *Cleveland v. Bradshaw*, 693 F.3d 626, 636–37 (6th Cir. 2012). It carefully considered and rejected the position that evidence is not new if it was available at trial.

In this Circuit, the question is open. The Court has acknowledged the circuit split but expressly declined to take a precedential position. *See Houck v. Stickman*, 625 F.3d 88, 93–95 (3d Cir. 2010). *Houck* "stop[ped] short" of adopting a new-evidence rule "because we need not do so" to decide the case, instead deciding the case by "assum[ing] without deciding" that the evidence at issue—available to trial counsel but never presented to the jury—was new. *Id.* at 95.

No further analysis is necessary to demonstrate that Reeves is entitled to a certificate of appealability. The ruling below turned on an issue that has sharply split the circuits and that this Court expressly left open. That is a paradigmatic instance of a decision that is debatable amongst jurists of reason.

Further, the court below here answered the question of what "new" means by interpreting a passage from *Houck* that it correctly identified as dicta. R&R 45–46. The adopted recommendation said, "Despite being dicta, we think *Houck* is persuasive evidence of how the Third Circuit would rule if presented with the issue." R&R 45.

Even before assessing whether it read the *Houck* dicta correctly, the fact that the decision below explicitly rested on the court's assessment of the persuasiveness of dicta underscores that reasonable jurists could debate it.

Finally, the district court's interpretation of *Houck*'s dicta is itself debatable. The adopted recommendation quoted *Houck*'s statement that "if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence." *Houck*, 625 F.3d at 94. That statement is most naturally read to *support* Reeves's position, but the recommendation parsed it in a hyper-technical way: it gave dispositive significance to the use of the word "discovered," instead of 'discovered and presented.' Under this view, if trial counsel unreasonably failed to *find* evidence, that evidence can be new, but if counsel found but unreasonably failed to *present* evidence, it cannot. R&R 45–46. But the recommendation overlooked a more plausible explanation for why *Houck* referred to "evidence [that] was not discovered"—because the only ineffective-assistance claim raised in *that case* was that counsel was "ineffective for failing to discover." 625 F.3d at 94. Nothing else in *Houck* suggested an intent to conjure out of thin air a distinction between failure-to-discover ineffective-assistance claims and failure-to-present ineffective-assistance claims. To the

contrary, *Houck* favorably quoted the Seventh Circuit's statement that, "'Particularly in a case where the underlying constitutional violation claimed is the 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.'" *Id.* (quoting *Gomez*, 350 F.3d at 679–80) (emphasis added). And the Eighth Circuit has read *Houck*'s dicta to encompass claims for failure to present, not just failure to discover. *Kidd v. Norman*, 651 F.3d 947, 953 (8th Cir. 2011). So the district court's reading of *Houck*'s dicta is abundantly debatable.

While the district court overruled Reeves's objections and adopted the recommendation in its entirety, Judge Mannion's memorandum arguably took a different approach to defining new evidence. Instead of repeating the recommendation's analysis of *Houck*, the memorandum quoted statements from an earlier district court case that "evidence is not 'new' if it was available at trial," and "A petitioner's choice not to present available evidence at trial to the jury does not open the gateway." Mem. 13 (internal quotation marks omitted) (citing *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004)). But *Hubbard* does not put the new-evidence question beyond debate any more than *Houck* does. In *Hubbard*, the only purportedly new evidence offered by the petitioner was an affidavit by the petitioner

himself, even though he had testified at trial, that "essentially alleges the same facts" the defense presented at trial: "The 'new' evidence Hubbard puts forth in alleging actual innocence is nothing more than a repackaging of the record as presented at trial." *Id.* at 340, 341. *Hubbard* explained, "To allow Hubbard's own testimony that he proffers (supported by no new evidence) to open the gateway to federal review . . . would set the bar for 'actual innocence' claimants so low that virtually every such claimant would pass through it." *Id.* at 341; *see also Smith*, 888 F.2d at 542. *Hubbard* bears no resemblance to this case, it lends no support to the district court's view that evidence cannot qualify as new if it was available to ineffective trial counsel, and it does not support denial of a COA.

Neither the adopted recommendation nor the district court's memorandum ever suggested that habeas relief should be denied even if the available-but-unpresented evidence were deemed new. To the contrary, the recommendation said that whether Reeves presented a colorable actual-innocence showing depended on the definition of actual innocence, and it recognized that the evidence that Kai Anderson was the real killer was "strong." R&R 40, 47. On this record, given the debatability of the district court's new-evidence definition, the COA should issue.[30]

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30 Reeves asserted in his amended petition that he was entitled to merits review based on equitable tolling, 28 U.S.C. *(cont'd)*

C. The district court's ruling is debatable because it rested on the debatable conclusion that Reeves failed to present strong enough evidence of his innocence.

The evidence of Reeves's innocence is summarized in part III above. This affirmative evidence of innocence, viewed together with the weakness of the prosecution's evidence of guilt, readily satisfies the actual-innocence standard. No reasonable juror that knew the truth—that knew of Reeves's left-handedness; the errors and gaps in his confession; the public availability of the few facts his confession got right; Anderson's and Holmes's convenient escape; Anderson's repeated, detailed, and accurate confessions—would have found Reeves guilty beyond a reasonable doubt. The district court's conclusion that Reeves failed to meet the actual-innocence standard is debatable.

The debatability of the ruling below is reinforced by its failure to analyze the innocence evidence correctly. The recommendation assumed that at least three groups of Reeves's innocence evidence qualified as new. R&R 47–48. Any one of these assumptions should have triggered the court's duty to assess Reeves's innocence holistically, in light of all the evidence, old and new. *House v. Bell*, 547 U.S. 518, 538–39 (2006). But instead the recommendation focused on

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§ 2244(d)(1)(B), and § 2244(d)(1)(D). Although Reeves does not rely on these assertions to support his COA application, he preserves them as alternative grounds for reversal on appeal.

whether each piece of new evidence, in isolation, met the standard. R&R 47–48. The district court adopted the recommendation in its entirety, and its own memorandum opinion did not perform the required holistic analysis, either. The court's failure to follow *House*'s command supports Reeves's COA request.

D. It is at least debatable whether Reeves's underlying claim of ineffective assistance of counsel for failing to investigate and present proof of his innocence has merit.

Jerry Reeves was wrongfully convicted of murder and sentenced to life in prison, and it never would have happened if his trial counsel had done her job. The key evidence of Reeves's innocence—the proof of Reeves's left-handedness, all the errors in his confession, the news coverage, the medical records, and the Kai Anderson and Michael Holmes police reports—was all readily available at trial. The jury that convicted Jerry Reeves heard none of it. This was stark ineffective assistance of counsel.

Neither the adopted recommendation nor the district court's memorandum reached the merits of Reeves's claim of ineffective assistance of counsel. For substantially the reasons stated throughout this application, it is at least debatable among jurists of reason whether that claim has merit.

V. Conclusion

Because the district court's untimeliness ruling is at least debatable, and because the merit of Reeves's underlying ineffective-assistance-of-counsel claim is at least debatable, the Court should grant a COA on Reeves's ineffective-assistance claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Today I served this application for a certificate of appealability on opposing counsel, Ryan H. Lysaght and Amy Zapp, electronically through this Court's docketing system.

February 7, 2017

/s/ *Matthew Stiegler*
Matthew Stiegler
Counsel for Jerry Reeves

CERTIFICATE OF COMPLIANCE

I certify that this application complies with the length limitation of Rule 22.1 of the Third Circuit Local Appellate Rules because, excluding the certificates, it contains 5,158 words.

February 7, 2017

/s/ *Matthew Stiegler*
Matthew Stiegler
Counsel for Jerry Reeves