No. 10-2419; 10-2420

In the
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FREDRICK THOMAS FREEMAN,

Petitioner-Appellee; Cross-Appellant,

v.

JAN TROMBLEY,

Respondent-Appellant; Cross-Appellee.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Denise Page Hood

PETITIONER-APPELLEE'S/CROSS-APPELLANT'S PRINCIPAL AND RESPONSE BRIEF

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Petitioner agrees with Respondent that oral argument is necessary in this legally and factually complex case.

JURISDICTIONAL STATEMENT

Petitioner Fredrick Freeman accepts Respondent's Jurisdictional Statement, and adds the following. After Respondent filed a timely Notice of Appeal on October 15, 2010, Petitioner filed a timely Notice of Cross-Appeal on October 21, 2010. R. 44, Notice of Appeal; R. 47, Notice of Cross-Appeal. On January 7, 2011, the district court granted in part and denied in part Mr. Freeman's motion for a Certificate of Appealability. R. 55, Order Grant. Cert. of Appeal. Therefore, this Court has jurisdiction pursuant to 28 U.S.C. § 2253 to hear Respondent's appeal of the district court's grant of habeas corpus relief and Petitioner's appeal of the denial of relief as to the issues for which the district court granted a certificate of appealability.

STATEMENT OF ISSUES PRESENTED

I. Did the district court correctly find that Petitioner made a showing of actual innocence sufficient to overcome the procedural default and statute of limitations bars to reviewing the merits of his claims?

II. Did the district court correctly hold that Petitioner's due process rights were violated by the admission of jailhouse informant Philip Joplin's false trial testimony?

III. Did trial and appellate counsel provide ineffective assistance in failing to call Michelle Woodworth, who would have confirmed that Petitioner was in the Escanaba area at the exact time the murder occurred in Port Huron?

IV. Did Petitioner receive ineffective assistance of counsel when his attorney refused to permit him to testify and his appellate attorney failed to litigate the issue on direct appeal?

V. Did the district judge abuse her discretion in refusing to recuse herself?

VI. Did Petitioner receive ineffective assistance due to his trial counsel's addiction to cocaine and alcohol and his appellate counsel's failure to litigate this issue on appeal?

VII. Were Mr. Freeman's due process rights violated by his presentation to the jury in shackles and jail clothing?

VIII. Were Mr. Freeman's due process rights were violated by cumulative error?

STATEMENT OF THE CASE

This is an appeal and cross-appeal in a habeas corpus case. The petition was filed in 2007, and the district court granted relief on three grounds in 2010. In reaching the merits of the petition, the district court found that Petitioner had made a compelling case of actual innocence so as to excuse procedural defaults and statute of limitation bars.

The district court also denied relief on other claims, and Petitioner filed a notice of cross-appeal as to those other grounds. The district court granted a certificate of appealability as to four of the denied claims.

In this appeal and cross-appeal, Petitioner argues that the district court was correct to find that Petitioner made a sufficient showing of actual innocence to merit review of his claims, that the district court was correct to find three of Petitioner's claims meritorious, and that the district court should have also granted relief on three more of Petitioner's claims. Petitioner also argues that there were no grounds for the district judge to recuse herself from the case.

STATEMENT OF FACTS

A. Introduction to the Facts

Fredrick Freeman was convicted of the murder of Scott Macklem, who was shot and killed in a community college parking lot in Port Huron, Michigan, on November 5, 1986. He has now served nearly twenty-five years in prison. During the trial, no physical, biological, fingerprint, or ballistic evidence was presented to link Mr. Freeman to the scene of the crime. Mr. Freeman's only link with the victim was Crystal Merrill, who was engaged to Mr. Macklem at the time of his death and who had briefly dated Mr. Freeman some five months earlier. At the time of the killing, Mr. Freeman lived near Escanaba, Michigan, with his girlfriend, Michelle Woodworth, and he had not spoken to Ms. Merrill since they separated in June 1986.

Mr. Freeman presented ten disinterested witnesses at trial who confirmed that they saw and spoke with him in Escanaba a few hours before and a few hours after Mr. Macklem was murdered in Port Huron. Escanaba, located in the western Upper Peninsula of Michigan, is over 400 miles away from Port Huron by road. After these witnesses testified, the prosecution came up with a new theory at the very end of trial, unsupported by any evidence, to explain away the overwhelming evidence that Mr. Freeman was in Escanaba just before and just after the shooting

in Port Huron: perhaps Mr. Freeman chartered an airplane. An additional alibi witness, Michelle Woodworth, was prepared to testify that she was with him in Escanaba at the exact time of the shooting, but she was not called to testify by Mr. Freeman's trial counsel.

The prosecution's case was predicated on the testimony of two witnesses who were in the general area of the shooting, but did not actually witness the shooting itself, and the testimony of a jailhouse informant, Philip Joplin. Since Mr. Freeman's conviction, it has been revealed that the witnesses were subjected to a highly suggestive photographic line-up, which was altered and misrepresented to the jury at trial. Furthermore, the jailhouse informant has since recanted and admitted on video and in court that he had received inducements from the prosecution in exchange for his falsified testimony.

In reviewing Mr. Freeman's Petition for Writ of Habeas Corpus, the district court made a finding of "actual innocence," permitting review of Mr. Freeman's claims that would otherwise have been procedurally defaulted or barred by the statute of limitations. The district court then found three of Mr. Freeman's claims meritorious and granted relief.

B. Procedural History

Mr. Freeman was convicted of first degree murder following a jury trial in April and May of 1987 in the St. Clair County Circuit Court. He was sentenced to life imprisonment without parole on August 3, 1987.

After his conviction and before his sentencing, Mr. Freeman filed a motion for a new trial, where his trial attorney attempted to introduce Michelle Woodworth's alibi testimony as newly discovered evidence. The trial court denied the motion on the ground that Ms. Woodworth's testimony was available at the time of trial. R. 19-19, Mot. New Trial 6/15/87, pp. 9, 15.

On direct appeal, the Michigan Court of Appeals remanded to the trial court for an evidentiary hearing to determine whether jailhouse informant Philip Joplin received inducements from the prosecution that were not revealed at trial and whether counsel was ineffective for failing to suppress the eyewitness testimony of three witnesses. That hearing was held on September 4 and November 26, 1990. On July 17, 1991, the trial court denied the motion for a new trial. The Michigan Court of Appeals affirmed the conviction on September 13, 1993. R. 19-23, Ct. of Appeals Op. Mr. Freeman's application for leave to appeal was denied by the Michigan Supreme Court on May 27, 1994, and his motion for reconsideration was denied on August 29, 1994. R. 19-23, Supreme Ct. Order Denying Leave; R. 19-23, Supreme Ct. Order Denying Reconsideration.

On October 1, 2004, Mr. Freeman filed a Motion for Relief from Judgment in the state trial court pursuant to MCR 6.501, et seq. R. 19-21, Mot. for Relief. On January 11, 2005, the trial court denied Mr. Freeman's motion for relief from judgment, and the court denied Mr. Freeman's motion for reconsideration on February 3, 2005. R. 19-24, Circuit Ct. Op. and Decision; R. 19-24, Circuit Ct. Order Den. Mot. Reconsideration.

The Michigan Court of Appeals denied leave to appeal on August 16, 2005. R. 19-22, Order Denying Leave. The Michigan Supreme Court denied leave to appeal on January 30, 2006. R. 19-24, Order Denying Leave.

On January 8, 2007, Mr. Freeman filed a petition for a writ of habeas corpus in the district court. R. 1, Pet. Although many of Mr. Freeman's claims were procedurally defaulted and time-barred, the district court held that Mr. Freeman's showing of actual innocence equitably tolled the statue and permitted it to consider the constitutional claims. On October 14, 2010, the district court granted Mr. Freeman relief on three claims, finding that Mr. Freeman was denied his Sixth Amendment right to testify at trial; that trial counsel's failure to call Michelle Woodworth constituted ineffective assistance of counsel, also in violation of the Sixth Amendment; and that Mr. Freeman's Fourteenth Amendment Due Process rights were violated by witness Phillip Joplin's coerced and false testimony. R. 41, Op. Granting Writ.

After Respondent initiated an appeal, Mr. Freeman filed a notice of cross appeal. R. 44, Notice of Appeal; R. 47, Notice of Cross-Appeal. On January 7, 2011, the district court granted a certificate of appealability as to four claims: (1) ineffective assistance of counsel stemming from trial counsel's drug use; (2) trial court error for presenting Petitioner to the jury in jail garb and shackles; (3) prosecutorial misconduct for law enforcement making threats to Michelle Woodworth that caused her not to testify at trial; and (4) cumulative error. R. 55, Order Granting and Den. Certificate of Appealability.

C. The Trial

1. Scott Macklem's Murder and the Eyewitness Accounts

On Wednesday, November 5, 1986, at 9:00 a.m., Scott Macklem was shot and killed in a parking lot at St. Clair Community College in Port Huron, Michigan. Autopsy reports showed that he was killed by a single shotgun wound to his side. R. 19-12, Trial Tr., pp. 993, 1000. Fingerprints were lifted from a shotgun shell box found nearby in the parking lot, but they did not match Mr. Freeman. R. 19-11, Trial Tr., p. 823; R. 27-2, Mot. to Expand Record Ex. 9, p. 1; R. 1-5, Pet.'s Mot. Ex. F, Freeman Investigation, pp. 1-2. No physical evidence was ever found at the scene of the crime or elsewhere linking Mr. Freeman to the murder.

Two prosecution witnesses were in the parking lot that morning near the scene of the murder: Rene Gobeyn and Cathleen Ballard.[1] Rene Gobeyn testified that he was in the parking lot at 9:00 a.m. on November 5, when he heard a loud bang, followed by screaming. R 19-12, Trial Tr., p. 1010. At the time, Mr. Gobeyn thought the sounds were "more or less like somebody was joking around" and he "didn't see anything unusual." *Id.* A. few moments later, looking in the direction of the sound, Mr. Gobeyn observed a small, light gold-colored, "extremely clean," "station-wagon type" car driving in his direction. *Id*. at 1011, 1014, 1038. The car was "not swerving or anything, just going normal speed." *Id*. at 1012. As the car passed him, Mr. Gobeyn testified that he noted the license plate number was 882 DHH. *Id*. at 1016.[2]

Although Mr. Gobeyn said he got a good look at the driver, *id*. at 1012, Officer Carmody, the local investigating officer who first interviewed Mr. Gobeyn on the scene, reported that Mr. Gobeyn was only able to describe the driver as a white male around twenty-five years of age. R. 19-2, Prelim. Examination, pp. 132-133. During this initial interview, Mr. Gobeyn came up with the idea of

[1] Trial transcripts incorrectly spelled her first name as "Kathleen."

[2] The license plate number that Mr. Gobeyn identified did not belong to a station wagon nor to any other vehicle linked to the crime or to Mr. Freeman but instead belonged to a Buick Rivera owned by a jewelry store owner in Mount Clemens. R. 19-12, pp. 1057-1058. In other words, Mr. Gobeyn apparently got the license plate number wrong.

undergoing hypnosis to enhance his memory. *Id*. at 156-157. Officer Carmody then walked with Mr. Gobeyn to approach Dr. Mooney, Mr. Gobeyn's psychology professor, who hypnotized Mr. Gobeyn. *Id.* During trial, a motion to exclude Mr. Gobeyn's hypnotically induced testimony was denied. R. 19-12, Trial Tr., pp. 849-853.

A few days after his hypnosis, Mr. Gobeyn went to the Port Huron police station to look at photographs. *Id.* at 1019. Mr. Gobeyn selected one of the five photos he was shown as the person he had seen driving out of the parking lot. *Id.* At trial, he testified that he recognized Exhibit 26 to be the same five photographs, and that he had selected the one on the left end of the exhibit. *Id.* at 1019-20. Detective Bowns also stated that this photo of Mr. Freeman was the one Mr. Gobeyn had selected. *Id*. at pp. 1401-1402.

However, the photographs the prosecution presented at trial were *not* the ones the police used in the initial photo arrays. In 2008, a private investigator hired by Mr. Freeman, Herbert Welser, obtained copies of Exhibit 26 and of the original photographs used in the arrays; those copies were filed with the district court. R. 27-1, Mot. to Expand Record Ex. 1, p. 1; R. 27-2, Mot. to Expand Record Ex. 7, Trial Exhibit 26; R. 27-2, Mot. to Expand Record Ex. 6, Photo Line-up. Exhibit 26 contained just the front-view mug shots, and each photograph had been cropped to only display the neck and head, thus eliminating the police identification signs that

the witnesses had seen in the original photos. R. 27, Mot. to Expand Record Ex. 6. A comparison between the photographs used in the array and the ones presented at trial reveals several suggestive elements that were not shown to the jury:

1. The identification sign on Mr. Freeman's chest read "Pleasant Ridge, MI," while the other four individuals wore identifications signs from the Port Huron Police Department (PHPD).

2. Mr. Freeman's photo is glossy and sharp in contrast to the older and faded PHPD mug shots.

3. In all four PHPD mug shots there is a solid white background behind the subject. In contrast, Mr. Freeman's photograph has a black and white striped background. This effect is much less noticeable in the cropped version of the photographs shown to the jury.

4. Mr. Freeman's Pleasant Ridge mug shot profile shows the left side of his face, while the other individuals face the opposite direction in their profile shots.

R. 27, Mot. to Expand the Record Ex. 6-7.

About two weeks after viewing the suggestive photo array, Mr. Gobeyn was asked to view a physical line-up of six individuals. *Id.* Mr. Gobeyn selected Mr. Freeman as the driver of the vehicle; he also acknowledged that he personally knew two of the other participants in the lineup. R. 19-12, Trial Tr., p. 1021.

At the preliminary examination, Mr. Gobeyn gave a much more detailed description of the driver of the vehicle than he had in his initial interviews: a white male, approximately 20 to 25 years old, with a full mustache and a somewhat thinner beard, a larger than normal nose, dark eyes, and a facial structure that he

had “memorized.” R. 19-2, Preliminary Exam, pp. 189, 200. Mr. Gobeyn repeated this account at trial, omitting a description of the eyes. R. 19-12, Trial Tr., pp. 1013, 1047. Mr. Gobeyn stated that he observed the driver for about five seconds as the car passed by, but that was enough time to “[see] his face exactly,” *Id.* at 1022, 1029, and that Mr. Freeman was definitely the person he saw. *Id.* at 1015. Despite Mr. Gobeyn’s confidence about his identification at trial, on cross-examination he acknowledged that about an hour after the murder, he “saw a person that resembled the driver” in the parking lot with a light-colored, “rust bucket” car with a Florida license plate, and told the police “it’s a possibility you might want to check out.” *Id.* at 1033-1034.

The second eyewitness from the parking lot, Cathleen Ballard, testified at trial that she could not identify Mr. Freeman as the man she saw driving out of the parking lot moments after at 9:00 a.m. when she heard gunshots and screaming. R. 19-13, Trial Tr., pp. 1079, 1081. Ms. Ballard said that the car was “reddish-tan color. . . smaller-sized. . . and kind of boxy,” was “swerving a little bit, like [the driver] didn’t know what he was doing,” and was traveling “a little faster than he should have been.” *Id.* at 1083, 1086. She testified that the driver of the vehicle was an “attractive” male Caucasian between 18 and 25 years old. *Id.* at 1084, 1087.

Some time after the murder, Ms. Ballard went to the police station to see if she could pick the driver out of a physical line-up. *Id.* at 1091-1092. She was

unable to do so. *Id.* At trial, the most Ms. Ballard could say was that "body language and the attitude, the expressions" of the car's driver and Mr. Freeman were "the same." *Id.* She insisted that Mr. Freeman was the man on the far right of the live line-up, even after she was informed that the man was in fact James Loxton. *Id.* at 1095-1096. Ms. Ballard acknowledged that she could not say whether or not Mr. Freeman was the driver of the car. *Id.*

The third prosecution eyewitness, Richard Kreuger, was not present at the scene of the shooting but testified that he observed a man loitering in a different parking lot near the college about an hour before the murder. R. 19-13, Trial Tr., pp. 1114-1116. He described the man as about six feet tall, with a beard, and wearing a green fatigue-style jacket and a knitted cap pulled down to his eyes. *Id.* at 1119-1120. When the man noticed Mr. Kreuger observing him, he ran away. *Id.* at 1115-1117.

About two days after the incident, Mr. Kreuger viewed the same police photo array as Mr. Gobeyn. *Id.* at 1122. He later testified that based on "the eyes and the face and features and profile look," he was able to identify "the one [face] that may be the face," and he pointed to Mr. Freeman's photo in Exhibit 26. *Id.* at 1122-1123. However, at the live line-up, Mr. Kreuger, like Ms. Ballard, picked James Loxton as "the person that looks most like the person I saw." *Id.* at 1139.

Nonetheless, Mr. Kreuger testified at trial that he was confident Mr. Freeman was the man he had seen an hour before the shooting. *Id.* at 1126.

2. The Police Focus on Mr. Freeman

Approximately one hour after Scott Macklem was shot, the police called his fiancée, Crystal Merrill, and asked for the names of her former boyfriends. R. 19-10, Trial Tr., p. 551. She testified at trial that she "knew right then who it was, and [she] gave him the name John Lamar," an assumed name Mr. Freeman had used while dating Ms. Merrill. *Id.* Detective Bowns, the lead investigator in the case, testified that he never pursued any other suspects. R. 19-13, Trial Tr., p. 1223.

The police searched Mr. Freeman's home near Escanaba on November 13, 1986. R. 19-13, Trial Tr., p. 1199. They found Michelle Woodworth, Mr. Freeman's girlfriend, inside the house, but found no evidence related to the murder. *Id.* at 1201-1202.

Detective Bowns then spoke to Mr. Freeman over the phone, informing Mr. Freeman that he had a warrant out for his arrest for first-degree murder. *Id.* at 1209. Mr. Freeman replied, "I haven't done anything to anybody." *Id*.

Later that evening, Mr. Freeman called Crystal Merrill's home. Larry Merrill, Crystal Merrill's father, answered the phone and talked for forty minutes with Mr. Freeman so that the police could use the phone call to trace Mr. Freeman's location.

Id. at 1247, 1258. Mr. Merrill testified that Mr. Freeman asked for details regarding the murder, and that "he wanted to know where it happened, when it happened, and how it happened." *Id*. at 1248. Mr. Merrill testified that Mr. Freeman told him "he had to know so he could establish his alibi." *Id*. at 1249. Mr. Freeman then asked for Crystal to be put on the phone, and again asked her for details involving the murder. R. 19-14, Trial Tr., pp. 1283-1284. Ms. Merrill testified that the conversation seemed as if he was "fishing for information," including "how it happened, where it happened, with what kind of weapon." R. 19-10, Trial Tr., p. 557.

Contrary to Respondent's claims in this Court, the prosecution could not rely upon this conversation as evidence of guilty knowledge because Detective Bowns testified that he informed Mr. Freeman earlier the *same day* that he was wanted for the Macklem murder. R. 19-13, Trial Tr., p. 1209. Furthermore, Amy Creten later testified that she had informed Mr. Freeman of his arrest warrant on November 9. R. 19-15, Trial Tr., p. 1703. Phone records and the testimony of a phone company employee established that Mr. Freeman had placed multiple calls between November 9 and November 13 to the Flint Police Department, apparently on the mistaken belief that the murder for which he was wanted had occurred in Flint. R. 19-16, Trial Tr., pp. 1745-1748.

3. Crystal Merrill's Trial Testimony

Crystal Merrill dated Mr. Freeman for two months before the relationship ended in late June 1986. R. 19-10, Trial Tr., p. 538. She had no direct knowledge about the murder, but the prosecution relied heavily on her testimony to establish Mr. Freeman's supposed motive and to show that he was the type of person that engaged in "psychological terrorism and attempts at brainwashing," as well as "physical assaults, sexual assaults, and infliction of injuries." R. 19-17, Trial Tr., p. 1950. The trial prosecutor used her testimony to show the jury, as he put it, "the way in which [the defendant] operated." R. 19-10, Trial Tr., pp. 353-356.

Ms. Merrill testified that Mr. Freeman attempted to recruit her into a secret ninja organization. R. 19-10, Trial Tr., pp. 497-498. She also claimed that Mr. Freeman had threatened to have his ninja organization kill Mr. Macklem. *Id.* at 425. She testified that Mr. Freeman was proficient at martial arts and would "demonstrate ways to kill people or injure them really bad so they could never walk." *Id*. at 466-468. She also testified that he was frequently violent towards her. *Id*. at 419, 486. Despite the prosecution's claim that Mr. Freeman was jealous of Mr. Macklem, Ms. Merrill acknowledged that Mr. Freeman never contacted her at any time between the end of their relationship in June and his phone call to her on November 13 after Mr. Macklem's murder. *Id*. at 552.

4. Jailhouse Informant Philip Joplin

Other than the testimony of Rene Gobeyn and Richard Kreuger, the only evidence that placed Mr. Freeman anywhere near the scene of the Macklem murder was the testimony of Philip Joplin, a jailhouse informant facing stolen property charges, who testified that Mr. Freeman confessed to him shortly before the trial began. R. 19-14, Trial Tr., pp. 1335, 1338-1340, 1347-1350. Mr. Joplin testified that on April 20, 1987, while the two men were in a holding cell together, Mr. Freeman admitted that he had committed the murder: "He said that when he shot this guy [the victim] screamed." *Id.* at 1341-1342, 1348-1349.

Mr. Joplin's account was flatly contradicted by the only other person in the cell, Booker Brown. Mr. Brown recounted that Mr. Freeman told him and Mr. Joplin that he did not commit the murder. R. 19-16, Trial Tr., pp. 1817-1819.

Mr. Joplin testified that his own plea agreement did not involve providing testimony against Mr. Freeman, nor did he discuss Mr. Freeman's case with his lawyer, any prosecutors, any judge, or any police, at any point during his plea negotiations. *Id.* at 1354. He also testified that the police never briefed him on any details of Mr. Freeman's case. *Id.* at 1338.

5. Testimony Placing Mr. Freeman in Escanaba

The defense presented ten witnesses who interacted with Mr. Freeman at four different times on November 5, 1986, in Escanaba, Michigan, some 435 miles from Port Huron. Just after midnight on November 5, Mr. Freeman called Paul De Mars and asked him to meet him at an Elias Brothers restaurant to help him repair his broken-down car. R. 19-15, Trial Tr., p. 1634. Mr. De Mars testified that he spent ninety minutes with Mr. Freeman, going into the restaurant to order some food and then helping Mr. Freeman fix his car, before leaving him at around 1:30 a.m. *Id.* at 1635-1636. Jeffrey McNamara, an employee of Elias Brothers, confirmed that he saw both Mr. De Mars and Mr. Freeman at the restaurant shortly after midnight and took carry-out orders from them. *Id.* at 1658.

Kathleen Dyer, a registered nurse and an advanced Tae Kwon Do student, had just finished giving a lesson to Mark Sherman at a martial arts studio in Escanaba at noon on November 5, 1986 (three hours after Mr. Macklem was shot more than 400 miles away in Port Huron), when she saw Mr. Freeman speaking to John Manalli, the studio's owner. *Id.* at 1538. She then had a brief conversation herself with Mr. Freeman. *Id.* She was certain of the date: she only attended the class on Mondays and Wednesdays, but had not gone that particular Monday, and she had attended a sociology lecture at a community college earlier that Wednesday. She also remembered that Mark Sherman left the lesson early that

day to attend a school conference. *Id*. at 1536-1539, 1541, 1611. On cross-examination, Ms. Dyer reaffirmed that she was "absolutely" positive that she remembered Mr. Freeman being at the studio on November 5; it could not have been another day, and it could not have been another person. *Id.* at 1562-1563.

Mark Sherman confirmed that he had a lesson with Ms. Dyer on November 5 and had to leave early around 12:05 p.m. to attend a parent-teacher conference. *Id.* at 1573-1574. Mr. Sherman testified that he was "absolutely positive" this occurred on November 5, 1986, because he had confirmed that the parent-teacher conference was on that date. *Id.*

John Manalli, the martial arts studio owner, confirmed that he saw Mr. Sherman, Ms. Dyer, and Mr. Freeman at the studio on November 5, 1986, and he recalled a specific conversation he had with Mr. Freeman that day. *Id*. at 1610-1611. Mr. Manalli testified that he had no doubt that he spoke with Mr. Freeman shortly after noon on November 5. *Id*. at 1613.

Between 3:00 and 3:30 p.m. that same day, three high school students, Dash Diehl, Amy Creten, and Michael Olson, saw Mr. Freeman and Ms. Woodworth walking along Main Street in Escanaba. *Id*. at 1669, 1692. Mr. Diehl and Ms. Creten testified at trial and confirmed the sighting. *Id.* Mr. Diehl further testified that he stopped to have a short conversation with Mr. Freeman. *Id*. at 1670.

Mr. Freeman also presented three more witnesses and a store receipt to establish that, around 5:30 p.m. that day, he bought a fuel pump at an automotive store, returned other auto parts to a K-Mart in Escanaba, and asked permission to park his car at the K-Mart overnight because it was not working. *Id.* at 1705-1722.

6. The Prosecution's "Chartered Airplane Theory"

Faced with the testimony of multiple disinterested witnesses who placed Mr. Freeman in Escanaba less than eight hours before and only three hours after the murder in Port Huron, the prosecution used its rebuttal case to advance a new theory: perhaps Mr. Freeman chartered an airplane. The prosecution called Robert Evans, a pilot who had been retained by the prosecutor as his personal pilot. R. 19-17, Trial Tr., p. 1903; R. 27-3, Mot. to Expand the Record Ex. 17, p. 7. The prosecutor explained that "everybody in this case could be telling the truth and remembering accurately and it does not provide an alibi for Frederick Freeman" if Mr. Freeman chartered an airplane leaving Escanaba after 1:30 a.m., arriving in Port Huron before 8:00 a.m. (so Mr. Kreuger could see him lurking in the parking lot near the college), and returning to Escanaba before noon. R. 19-17, Trial Tr., p. 2014. Mr. Evans testified that Mr. Freeman could have made this round trip without leaving any flight records by simply going to the airport, speaking with "a

social group [of private pilots] hanging around," and paying cash, leaving no records of his travels. *Id*. at 1920, 1921.

The prosecution presented no evidence of Mr. Freeman boarding a plane, paying for a flight, or soliciting a pilot for a roundtrip flight between Escanaba and Port Huron. The prosecution, having hypothesized that Mr. Freeman found someone "hanging around" the Escanaba airport to fly him to Port Huron and back without filing a flight plan, apparently never bothered to speak to these pilots who supposedly "hang around" the airport to see if any such flight took place on November 5, 1986. In short, the prosecution never introduced any evidence of any kind that such a flight ever occurred.

D. Additional Factual Record for the Claims in this Appeal

1. Joplin's Recantations

In 1990, Mr. Freeman submitted an affidavit from Philip Joplin to the trial court in which Mr. Joplin admitted the government had given him assurances of leniency in exchange for his testimony against Mr. Freeman. R. 19-20, Mot. New Trial 9/04/90, pp. 53-54. At an evidentiary hearing in 1990, Mr. Joplin testified that he met with Assistant Prosecutor Houlahan and Detective Bowns at a restaurant before Mr. Freeman's trial and that Mr. Houlahan left the table so that Detective Bowns could say "that [Joplin] could pretty well count on the fact that

[he] wasn't going back" to prison.. R. 19-20, Mot. New Trial 9/04/90, pp. 33-34, 40-41. Mr. Joplin also testified about another meeting in Mr. Houlahan's office prior to the trial in which the prosecutors stepped out of the room so that Parole Agent Berro could tell Mr. Joplin that "something was going to be done for [him]." *Id*. at 42.

Mr. Joplin met with Allen Woodside, a private investigator for Mr. Freeman three times in 1993-1994. R. 1-5, Pet. Ex. J, p. 1. On the second visit, Mr. Woodside conducted the interview with Bill Proctor, an investigative reporter for Channel 7 News in Detroit. *Id.* A professional video technician recorded the interview, a DVD of which was submitted to the district court and admitted as an expansion of the record. R. 29, Order Granting Mot. Expand Record, p. 13; R. 27-9, Mot. to Expand Record Ex. 29. Mr. Woodside submitted an affidavit in which he summarized the contents of his interviews with Joplin. R. 1-5, Pet. Ex. J, pp. 1-2.

During the interviews, Mr. Joplin stated that Mr. Freeman had repeatedly professed his innocence during the conversation they had in the holding cell. *Id.* at 3. Despite this, Mr. Joplin admitted sending a letter to the prosecutor claiming that Mr. Freeman had confessed in an effort to obtain a reduction in his sentence. *Id.* Shortly afterwards, Assistant Prosecutor Houlahan and Detective Bowns contacted him. *Id.* at 4. He was asked to write a formal statement, and he used information he had learned in conversations with Assistant Prosecutors Houlahan and Lord and

Detective Bowns in the statement. *Id.* at 6. He was promised that Mr. Houlahan would arrange for him to be released after the Freeman trial if he testified. *Id.* at 7. As the trial neared, Mr. Joplin became uncomfortable and attempted to withdraw as a witness. *Id.* at 9-12. Mr. Joplin said that the prosecution made it clear to him that he would be sent back to prison if he did not cooperate. *Id.* at 12. After the trial, Mr. Joplin was released but was told to "maintain a low profile," so as to not alert the media of his release. *Id.* at 12-13. When Mr. Joplin testified at the hearing on the 1990 motion for new trial, he did not admit that Mr. Freeman had never confessed because the prosecution warned him that a change in his original testimony would lead to him being charged with perjury. *Id.* at 14.

Mr. Joplin was, at the time of his last interview, suffering from liver cirrhosis, hepatitis C, and pneumonia, and had been told that he had less than a year to live. *Id.* at 16. He expressed the desire to clear his conscience before his death and stated that he was no longer afraid to tell the truth about the Freeman case. *Id.* at 17.

2. Defense Counsel's Failure to Call Michelle Woodworth

Michelle Woodworth has sworn that she was with Mr. Freeman at their home near Escanaba at the exact time of Mr. Macklem's murder. R. 1-5, Pet. Ex. G, Woodworth's Aff., pp. 2, 5. Ms. Woodworth also indicated that she was in

constant contact with Mr. Freeman's counsel, David Dean, throughout his trial preparations and was in the Port Huron area at the time of trial expecting to testify. *Id.* at 4-5. However, even after the prosecution advanced the "chartered airplane theory" in rebuttal, thus making it crucial to prove that Mr. Freeman was in Escanaba at the exact time of the murder, Mr. Freeman's trial attorney never called Ms. Woodworth to testify.

After the verdict, Mr. Dean moved for a new trial and attempted to present Ms. Woodworth's testimony as "newly discovered evidence," explaining that he had wished to call Ms. Woodworth during trial, but that she was "in hiding" and uncooperative at the time. R 19-19, Mot. New Trial 6/15/87, pp. 5, 16. Mr. Dean also said that he was "sure" he had listed Woodworth on his second alibi notice; however, the prosecution quickly corrected him and noted that he had not listed her name on either alibi notice, and that Mr. Dean had not expressed any difficulty in securing Ms. Woodworth as a witness in any pretrial proceedings. *Id.* at 9, 14. The trial court noted that if Ms. Woodworth "claims that she was with him at 9:00 in the morning there could be no evidence that is more critical to his defense," but rejected Mr. Dean's excuse for not calling her, finding that it was "very clear to the Court that reasonable diligence was not exercised." *Id.* at 14-15.

Despite this finding from the trial court, appellate counsel on direct appeal never raised a claim that Mr. Dean was ineffective for failing to list or call Ms.

Woodworth as an alibi witness. Mr. Freeman therefore first raised the issue of ineffective assistance of counsel for failure to call Ms. Woodworth in his 2004 Motion for Relief from Judgment. The state trial court rejected the claim on the ground that "both Judge Corden and the Court of Appeals have considered [trial counsel's] representation in light of the errors alleged by Defendant's appellate attorney." R. 19-24, Op. Denying Mot. for Relief, p. 6.[3]

3. Right to Testify

Mr. Freeman has consistently stated that he wanted to testify at trial and that Mr. Dean refused to let him. In 1988, Mr. Freeman sent a letter to the Attorney Grievance Commission (AGC), complaining about Mr. Dean's refusal to allow him to testify, which the district court admitted. R. 27-5, Mot. to Expand the Record Ex. 31, Letter to Attorney Grievance Commission, p. 4. Mr. Freeman explained that he filed the complaint to the AGC as soon as he learned about his constitutional right to testify. R. 27, Mot. to Expand the Record, pp. 32-44. Later, in an affidavit filed with his 2004 Motion for Relief from Judgment, Mr. Freeman stated that defense counsel "threatened to withdraw from the case when affiant

[3] In fact, since appellate counsel never raised an ineffective assistance claim for trial counsel's failure to call Ms. Woodworth (which was one of the grounds for which Mr. Freeman alleged appellate counsel was ineffective in his motion for relief from judgment), the prior rulings to which the state trial court referred involved different claims of ineffective assistance.

demanded to be allowed to tell the court that he wanted to testify." R. 1-4, Pet. Ex. D, p. 6.

4. Trial Counsel's Drug Use

The district court found that it was undisputed that trial counsel David Dean had a substance abuse problem at the time he represented Mr. Freeman and that he was found to be ineffective in a subsequent case. R. 41, Op. Granting Writ, p. 9. According to Mr. Freeman's affidavit, trial counsel often appeared confused and unable to concentrate during trial. R. 1-4, Pet. Ex. D, ¶44. The trial record confirms that Mr. Dean occasionally lapsed into incomprehensible speech or behavior. During cross-examination of Rene Gobeyn, for example, Mr. Dean attempted to impeach Mr. Gobeyn by demonstrating that a car traveling 10 miles per hour would be traveling at 880 feet per second. R. 19-12, pp. 1025-1028. Both the witness and judge attempted to correct defense counsel's erroneous math without success. *Id.* at 1028.

After the trial, Mr. Freeman was able to obtain Mr. Dean's trial notes, which consisted mostly of bizarre musings such as: "My ass is a wind instrument & a fart is a whole note;" "Law of lethal injection – have to dip the needle in alcohol;" "Dept. of Int(erior) is in charge of running the outdoors;" and "We're from a civilization that been here longer then plumbing." R. 1-4, Pet. Ex. E.

As with Mr. Freeman's other ineffective assistance of trial counsel claim, the state trial court did not address this issue in its opinion denying Mr. Freeman's Motion for Relief from Judgment filed in 2004. R. 19-24, Op. Denying Mot. for Relief, p. 6.

STANDARD OF REVIEW

In an appeal of a habeas corpus decision, an appellate court reviews the district court's decisions *de novo*. *Fleming v. Metrish*, 556 F.3d 520 (6th Cir. 2009).

A judge's decision on whether to recuse herself is reviewed for abuse of discretion. *Buell v. Mitchell*, 274 F.3d 337, 345 (6th Cir. 2001).

SUMMARY OF THE ARGUMENT

The district court correctly concluded that Petitioner Fredrick Freeman presented a compelling case of actual innocence and that his claims therefore should be considered despite procedural default and statute of limitations bars. The evidence of Mr. Freeman's guilt at his trial was exceedingly weak and consisted of a jailhouse informant, who was contradicted by the only other man in the cell, and two eyewitnesses, one of whom identified Mr. Freeman only after being hypnotized and turned out to be wrong on other key details and the other of whom picked out another man from the live lineup.

The evidence of Mr. Freeman's innocence at trial was extremely strong, consisting of some ten disinterested witnesses who all positively confirmed that they saw and spoke with Mr. Freeman in Escanaba within a few hours of when the shooting occurred in Port Huron, more than 400 miles away. This evidence of innocence was so strong that the prosecution was forced to advance a theory in rebuttal, that perhaps Mr. Freeman chartered an airplane, without any evidence to support it.

Mr. Freeman presented new evidence, including: (1) sworn testimony and videotaped statements from the jailhouse informant admitting that he lied at trial both when he claimed he had received no assurances of leniency for his testimony and when he claimed Mr. Freeman confessed to the murder; and (2) sworn

affidavits from Michelle Woodworth, Mr. Freeman's ex-girlfriend, who confirmed she was with Mr. Freeman near Escanaba at the precise time the murder occurred in Port Huron and was ready to so testify at trial. Given the weakness of the original case, the district court correctly found that no reasonable juror would convict Mr. Freeman in light of the new evidence.

The district court correctly granted the writ on the ground that Mr. Freeman's due process rights were violated when the prosecution allowed the jailhouse informant to falsely tell the jury that he received no assurances of leniency for his testimony and that he had not even discussed his testimony with police or prosecutors beforehand. The informant's subsequent testimony and recorded interviews confirm that detectives and other state actors involved in the case had given him assurances of leniency, which he subsequently received, and had helped prepare his testimony.

The district court also correctly found that trial counsel was ineffective for failing to present Mr. Freeman's ex-girlfriend to confirm that Mr. Freeman was with her in Escanaba at the moment the murder occurred over 400 miles away, thus rebutting the prosecution's "chartered airplane theory." Appellate counsel was also ineffective for failing to litigate trial counsel's ineffectiveness even after the state trial judge found that the missing witness' testimony would have been critical and that trial counsel had failed to use due diligence to present that testimony.

The district court was also correct to hold that trial counsel was ineffective for obstructing Mr. Freeman's right to testify. Contrary to Respondent's assertions, Mr. Freeman has complained of this obstruction for more than twenty years.

Respondent has failed to advance any colorable argument as to why the district judge should have recused herself. That another district judge prosecuted this case decades ago is, standing alone, insufficient to require recusal.

The district court should also have granted habeas relief because trial counsel's drug and alcohol addiction rendered him ineffective. The record demonstrates that trial counsel was sometimes incoherent and that he often failed to object to obviously incompetent evidence used to prejudice his client.

The district court similarly should have granted relief because Mr. Freeman was repeatedly displayed to the jury in jail clothing and shackles. No justification was ever given for displaying Mr. Freeman to the jury in restraints, and the effect was highly prejudicial, especially given the weakness of the prosecution's case.

Finally, the cumulative effect of all of the errors in this case denied Mr. Freeman a fair trial. Given the weak evidence of guilt and the powerful evidence of innocence, the errors taken together would merit relief even if individual errors would not.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY FOUND THAT PETITIONER MADE A SHOWING OF ACTUAL INNOCENCE SUFFICIENT TO OVERCOME THE PROCEDURAL DEFAULT AND STATUTE OF LIMITATIONS BARS TO REVIEWING THE MERITS OF HIS CLAIMS.

The district court correctly concluded that Mr. Freeman is entitled to review on the merits of his constitutional claims because his showing of actual innocence equitably tolled the AEDPA statute of limitations, *see Souter v. Jones*, 395 F.3d 577, 600-601 (6th Cir. 2005) (recognizing that showing of actual innocence can overcome statute of limitations), and excused any procedural defaults, *House v. Bell*, 547 U.S. 518, 538 (2006). The standard for demonstrating "actual innocence" at the gateway stage is whether "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." *Schlup v. Delo*, 513 U.S. 298, 327 (1995); *see also House*, 547 U.S. at 538 (framing issue as whether it is "more likely than not any reasonable juror would have reasonable doubt").

In determining whether, in light of the new evidence, any reasonable juror would have reasonable doubt, a habeas court does not consider the new evidence in a vacuum. Although "a gateway claim requires 'new reliable evidence-whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence-that was not presented at trial,' the habeas court's analysis is not

limited to such evidence." *House*, 547 U.S. at 537 (quoting *Schlup*, 513 U.S. at 324). Rather, "the habeas court must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *Id.* at 538 (citing *Schlup*, 513 U.S. at 327-328 (internal citations omitted)).

A. The Weakness of the Case At Trial

1. The Evidence of Guilt At Trial

The actual innocence inquiry requires a close look at the strength of the evidence presented at trial. At Mr. Freeman's trial, no physical evidence was ever produced to link him to the murder. No fingerprint or biological evidence matching Mr. Freeman was ever found at the scene. On the contrary, fingerprints found on a box of shotgun shells at the scene did not match Mr. Freeman. R. 19-11, Trial Tr., p. 823. No ballistic evidence linked the ammunition used to murder Mr. Macklem with any firearms possessed by Mr. Freeman. Contrary to Respondent's contentions, Mr. Freeman had no motive to kill Scott Macklem, since Mr. Freeman had no contact with Ms. Merrill since he broke up with her months before the

murder and had moved in with Ms. Woodworth, his new girlfriend, near Escanaba. Nor did Mr. Freeman ever make any "damaging admissions" to Ms. Merrill.[4]

The evidence from which a rational jury could have convicted Mr. Freeman was extraordinarily weak. That evidence consisted of two eyewitnesses, neither of whom saw the shooting and neither of whom knew Mr. Freeman, and a jailhouse informant who was contradicted by the only other man in the cell and who falsely claimed that he was expecting nothing for his testimony. The actual evidence of Mr. Freeman's guilt was so weak that the prosecution spent much of the trial introducing evidence of his alleged bad character in an apparently successful effort to distract the jury from the lack of evidence.[5]

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[4] There is no support for Respondent's claim to the contrary. During Mr. Freeman's phone conversation with Ms. Merrill prior to his arrest he tried to find out about what happened to Mr. Macklem and why she was pointing the finger at him. R. 19-13, Trial Tr., 1248; R. 19-14, 1283, 1284. At no point did he make any incriminating statements.

[5] The prosecution used Mr. Freeman's interest in martial arts, despite its utter lack of bearing on the instant case, in order to depict Mr. Freeman as a violent and unstable person. During direct examination of Crystal Merrill the prosecution presented martial arts swords and knives that were not the property of Mr. Freeman, but were intended to illustrate the "kind of thing that was going on with her." R. 19-9, p. 381. On cross-examination of Mark Sherman, a student at the Escanaba Tae Kwon Do studio, the prosecutor produced magazines that did not belong to any party involved and asked the witness about advertisements for weapons and listening devices, presumably to inform the jury about different types of "ninja weapons" and suggest the means by which such items could be obtained. R. 19-15, pp. 1586-1587. This practice of presenting inflammatory and prejudicial props that did not belong to Mr. Freeman was pervasive throughout the trial. According to

The testimony of both eyewitnesses to identify Mr. Freeman was extremely problematic, to put it mildly. Rene Gobeyn *was hypnotized* before he picked Mr. Freeman out of a photographic array as the man he briefly glimpsed through the windshield of a moving car. R. 19-2, Prelim. Exam., pp. 156-157*; see Rock v. Arkansas*, 483 U.S. 44, 57-58 & nn. 14, 16 (1987) (citing cases from 18 states that "have decided that hypnotically enhanced testimony should be excluded at trial on the ground that it tends to be unreliable"). At trial, the "hypnotically-refreshed" Mr. Gobeyn claimed to be able to identify Mr. Freeman as the driver of a car he saw leaving the parking lot even though the car was moving and Mr. Gobeyn could see the driver for only a few seconds. R. 19-12, Trial Tr., p. 1022. He also claimed to remember the license plate number, but that number turned out to belong to a jeweler who owned a completely different type of car than the one Mr. Gobeyn described. *Id.* at 1057-1058. Mr. Gobeyn also admitted that he told the police that he "saw a person that resembled the driver" in a light-colored, "rust bucket" car in with a Florida license plate in the same parking lot. *Id.* at 1033-1034.

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trial counsel's secretary Jan Barnum Britts, the prosecution had a table displaying shotguns, nunchucks, pornography, and throwing stars - none of which belonged to Mr. Freeman. R. 1-5, Pet. Ex. F, Copus Investigation.

Richard Kreuger, the other eyewitness to identify Mr. Freeman,[6] was even worse. He saw a man an hour *before* the shooting at a *different* parking lot in Port Huron and claimed that he could identify that man as Mr. Freeman. R. 19-13, Trial Tr., p. 1122. But Mr. Kreuger picked a different man out of a live lineup. *Id.* at 1139.

Mr. Freeman finally discovered in 2008 that Mr. Gobeyn and Mr. Kreuger had first picked him out of a highly suggestive photographic array in which Mr. Freeman's photo was markedly different than the other four men in the array (he wore a placard from Pleasant Ridge while the other men had Port Huron placards; he had a striped background while the other men had a plain background; his photo was sharp and glossy while the others were dull and faded; his profile shot faced the opposite direction from the others). R. 27-2, Mot. to Expand Record Ex. 5, p.1. At trial, the jury saw an altered version of the photo array, Exhibit 26, in which the photos were cropped to eliminate the placards and the profile shots. *Id.*

The strongest evidence of guilt the prosecution presented at trial was the testimony, later recanted, of jailhouse informant Philip Joplin. Mr. Joplin claimed that Mr. Freeman gave a full confession to Mr. Macklem's murder in a holding cell.

[6] Another witness, Cathleen Ballard, who had identified a man named James Loxton in a physical lineup, admitted at trial that she could not identify Mr. Freeman as the driver of the car she saw leaving the parking lot. R. 19-13, Trial Tr., pp.1079, 1081, 1083, 1086, 1091-92, 1095-96.

Mr. Joplin assured the court he had not received any assurances of leniency and had not even discussed his testimony with police or prosecutors before trial. R. 19-14, Trial Tr., pp. 1353-1354. All of that testimony turned out to be false. Still, it was the strongest evidence the jury heard, even though the only other person in the holding cell, Booker Brown, testified at trial that Mr. Freeman insisted that he did not commit the murder. R. 19-16, Trial Tr., pp. 1817-1819.

2. The Evidence of Innocence At Trial

In contrast, the evidence of Mr. Freeman's innocence at trial was extremely strong. Mr. Freeman presented ten disinterested witnesses who confirmed he was in Escanaba the day of the murder, including two who saw and spoke with him at 1:30 a.m., two who saw and spoke with him at noon (just three hours after Mr. Macklem was shot more than 400 miles away in Port Huron), and two more who saw and spoke with him at 3:30 p.m.

The testimony of Kathleen Dyer and John Manalli, the two witnesses who saw Mr. Freeman at noon at Mr. Manalli's martial arts studio in Escanaba, was particularly devastating to the prosecution's case. Ms. Dyer saw Mr. Freeman speaking to Mr. Manalli just after Ms. Dyer gave a lesson to Mark Sherman. R. 19-15, Trial Tr., p. 1538. She then had a brief conversation herself with Mr. Freeman. *Id.* Ms. Dyer was "absolutely" positive of the date for multiple reasons, including

the fact that she had attended a sociology class that morning at a community college and because that was the morning she taught Mark Sherman, who had to leave the lesson early that day to attend a school conference. *Id*. at 1536-1539, 1541, 1562-1563, 1611. Mark Sherman testified that he was "absolutely positive" that the lesson Ms. Dyer described occurred on November 5, 1986, having checked his records to confirm he had cut short his lesson at 12:05 p.m. that day to attend a parent-teacher conference. *Id.* at 1573-1574.

John Manalli, the karate studio owner, confirmed that he saw Mr. Sherman, Ms. Dyer, and Mr. Freeman on November 5, 1986, at the studio, and he recalled a specific conversation he had with Mr. Freeman that day. *Id*. at 1610-1611. Mr. Manalli testified that he had no doubt that he spoke with Mr. Freeman shortly after noon on November 5. *Id*. at 1613.

Two other witnesses, including a restaurant employee, spoke with Mr. Freeman at a restaurant in Escanaba between midnight and 1:30 a.m. on November 5, 1986, just six and a half hours before Mr. Kreuger supposedly saw Mr. Freeman lurking in a parking lot in Port Huron. R. 19-15, Trial Tr., pp. 1634-1636, 1658. Two more witnesses testified that they spoke with Mr. Freeman on Main Street in Escanaba at 3:30 p.m., just six and a half hours after the shooting in Port Huron. *Id*. at 1669-1670, 1692.

Faced with this powerful testimony from these disinterested alibi witnesses, all of whom spoke with Mr. Freeman just a few hours before and a few hours after the murder in a town more than 400 miles from the crime scene, the prosecution was forced to admit that these witnesses may well have been correct: "everybody in this case could be telling the truth and remembering accurately and it does not provide an alibi for Frederick Freeman." R. 19-17, Trial Tr., p. 2014. Instead of admitting that they were prosecuting the wrong man, the prosecution came up with a bizarre and surprise rebuttal theory that Mr. Freeman must have chartered an airplane from Escanaba to Port Huron and back, a theory unsupported by any evidence whatsoever.

B. The New Evidence of Innocence

Given the extreme weakness of the incriminating evidence and the strength of the evidence of innocence at trial, the new evidence presented by Mr. Freeman in his habeas petition would certainly have led to a different outcome had it been submitted at trial. Following Mr. Freeman's conviction, two critical pieces of new evidence came to light.

First, Philip Joplin, the jailhouse informant who testified that Mr. Freeman confessed to him while they shared a holding cell, admitted in a 1993 videotaped interview that Mr. Freeman never confessed. R. 1-5, Pet. Ex. J, p. 1; R. 29-5, Mot.

to Expand Record Ex. 29. Mr. Joplin also admitted, contrary to his trial testimony, that he contacted the prosecution with a deal in mind; that he was thoroughly coached by prosecutors and law enforcement in preparation for his trial testimony; and that he was threatened with an extended prison sentence and perjury charges if he failed to cooperate. *Id.* In addition to his videotaped recantation, Mr. Joplin testified at an evidentiary hearing in 1990 and admitted at that time many of the facts concerning his assurances of leniency and contacts with police and prosecutors. R. 19-20, Mot. New Trial 9/4/90, pp. 32-33, 41-44.

Philip Joplin's admission that his trial testimony was false eviscerates the most damaging evidence the prosecution had at trial. In sworn affidavits and testimony and in a videotaped statement, Mr. Joplin confirmed both that he never heard Mr. Freeman admit to the Macklem murder and that his claim that he had no incentive to falsely implicate Mr. Freeman was an outright lie.

Second, Michelle Woodworth, Mr. Freeman's girlfriend at the time of Mr. Macklem's murder, has sworn that Mr. Freeman was with her in Escanaba at the exact time the crime occurred in Port Huron, thus rebutting the prosecution's "chartered airplane theory." R. 1-5, Pet. Ex. G, Woodworth's Aff., pp. 2, 5. Ms. Woodworth explained that she did not testify at trial because Mr. Freeman's trial counsel never called her as a witness. *Id.* at 4-5.

The new evidence from Michelle Woodworth completely destroys the prosecution's "chartered airplane theory" by establishing that Mr. Freeman was not only in Escanaba a few hours before and a few hours after the murder in Port Huron; he was in Escanaba at the exact time of the murder. As the trial court put it, if Ms. Woodworth "claims that she was with him at 9:00 in the morning there could be no evidence that is more critical to his defense." R 19-19, Mot. New Trial 6/15/87, pp. 14-15.

In *House*, the Supreme Court found that the "actual innocence" threshold was satisfied after new evidence demonstrated that the victim's blood found on the defendant's pants was likely the result of contamination, that the victim's husband was the source of the semen stains on her nightgown, and that the husband had drunkenly confessed to the murder. *House*, 547 U.S. at 540, 547, 549-550. Notably, the circumstantial evidence against Mr. House was considerably stronger than that against Mr. Freeman. Mr. House was seen near the embankment where the victim's body was discovered, and he answered a number of the police's questions untruthfully, including his account of his whereabouts the night of the murder. *Id.* at 524, 526. After interviewing Mr. House's girlfriend, police learned that he had gone for a walk at 10:30 p.m., the time frame during which the victim disappeared, and returned with cuts and scrapes on his hands and without his shirt and shoes. *Id.*

at 527. Nonetheless, despite this incriminating evidence, the Court found that any reasonable juror would have reasonable doubt given the new evidence. *Id.* at 554.

Based on the *total record*, a reviewing court's function is to make "a probabilistic determination about what reasonable, properly instructed jurors would do." *Souter*, 395 F.3d at 596. In order to make this determination, the court must necessarily make credibility assessments in determining the probable reliability of that evidence. *See, e.g., Schlup*, 513 U.S. at 299-300; *see also House*, 547 U.S. at 538-539. Philip Joplin and Michelle Woodworth's testimony is new evidence that a reasonable juror would find reliable.

A reasonable juror would find Philip Joplin's recantations to be credible because an abundance of secondary evidence supports his version of events. First, although Mr. Joplin testified at trial that he did not receive a deal for his testimony, he was quickly moved to a more desirable facility and then released from prison early. R. 19-20, Mot. New Trial 9/4/90, pp. 42-43. Second, at trial, Joplin's account was contradicted by the only other person in the cell, Booker Brown, who recounted that Mr. Freeman told him and Mr. Joplin that he did not commit the murder. R. 19-16, pp. 1817-1819. Moreover, throughout over twenty-four years of incarceration Mr. Freeman has consistently and vehemently maintained his innocence. The suggestion that he unburdened himself upon a total stranger in a fleeting encounter while sharing a holding cell is highly improbable. It is not

uncommon for prisoners to fabricate confessions in order to seek leniency for themselves.[7] Finally, unlike when he testified at trial and could benefit from a deal, Mr. Joplin had no motive to lie during his post-trial admissions.

Respondent's quarrel with the private investigator's affidavit is beside the point. Mr. Woodside's affidavit was not intended to vouch for the credibility of Mr. Joplin's recantation, but to swear that his written description of Mr. Joplin's actual words – memorialized on the videotape also submitted to the Court and part of the record – were accurate. The Court may rely directly on the video, or may refer to Mr. Woodside's affidavit as an effective transcript; either way, the impact of Mr. Joplin's recantation is the same. Furthermore, as explicitly stated in *House*, in evaluating actual innocence a court should consider any and all new evidence, whether or not it could be admitted under the rules of evidence applicable at trial. *House*, 547 U.S. at 538.

As for Ms. Woodworth, Respondent attempts to discount her evidence by arguing that her relationship with Mr. Freeman would have made her an interested and unreliable witness. This was plainly not the case in 2002 when Ms. Woodworth executed an affidavit and passed a polygraph test. After Mr. Freeman

[7] "In more than 15% of cases of wrongful conviction overturned by DNA testing, an informant or jailhouse snitch testified against the defendant." The Innocence Project – Understand the Causes: Informants, *available at* http://www.innocenceproject.org/understand/Snitches-Informants.php.

was taken into custody, his relationship with Ms. Woodworth quickly deteriorated. R. 19-19, Mot. New Trial 6/15/87, p. 5. By the close of trial (when she would have testified), they had ended their relationship, and in 2002, at time of her affidavit and polygraph, they were no longer on speaking terms. *Id.* Since 1987, Ms. Woodworth has had no reason to lie for Mr. Freeman's benefit, yet she continues to actively affirm Mr. Freeman's innocence. Furthermore, Ms. Woodworth has never wavered on the fact that Mr. Freeman was with her near Escanaba on the morning of November 5, 1986. A reasonable juror would find her testimony credible and relevant.

It bears repeating that the actual innocence inquiry "requires a holistic judgment about all the evidence" and its likely effect on reasonable jurors applying the reasonable-doubt standard. *Schlup*, 513 U.S. at 327-28 (internal citations omitted). The purpose of the actual innocence exception is to prevent manifest injustice and permit review of constitutional issues otherwise procedurally defaulted and/or barred by the statute of limitations in exceptional cases. *Schlup*, 513 U.S. at 327.

Mr. Freeman's case is exactly the extraordinary kind of case the *Schlup* court anticipated. The district court was correct to conclude that Mr. Freeman has established actual innocence.

II. THE DISTRICT COURT CORRECTLY HELD THAT PETITIONER'S DUE PROCESS RIGHTS WERE VIOLATED BY THE ADMISSION OF JAILHOUSE INFORMANT PHILIP JOPLIN'S FALSE TRIAL TESTIMONY.

The district court correctly held that Mr. Freeman's due process rights were violated when the prosecution introduced jailhouse informant Philip Joplin's false testimony at trial and failed to disclose that his testimony was false. *See Brady v. Maryland*, 373 U.S. 83 (1963) (failure to disclose exculpatory evidence); *Napue v. Illinois*, 360 U.S. 264 (1959) (knowing presentation of perjured testimony).

Mr. Joplin's trial testimony consisted of two essential assertions, both of which turned out to be false: (1) that Mr. Joplin had received no assurances of any kind that he would receive lenient treatment in exchange for his testimony against Mr. Freeman nor had he even discussed his testimony with the police or prosecution; and (2) that Mr. Freeman had admitted to Mr. Joplin that he killed Mr. Macklem. Since the evidence shows that the government knew that Mr. Joplin testified falsely when he claimed that he had received no assurances of leniency and had not discussed his testimony with the police or prosecution and since Mr. Joplin's testimony was crucial to the outcome of this case, the district court's decision to grant the writ on this ground should be affirmed.

A. Mr. Joplin's Trial Testimony

Philip Joplin testified at trial that Mr. Freeman confessed to the murder of Scott Macklem while the two men briefly shared a holding cell shortly before Mr. Freeman's trial began. R. 19-14, Trial Tr. pp. 1341-1342, 1347-1350. Mr. Joplin testified that he had received no assurances of any leniency in exchange for his testimony against Mr. Freeman, and he also testified that he never discussed Mr. Freeman's case with any prosecutors or any police officers at any point during his plea negotiations. *Id.* at 1354. He also testified that at no point was he ever briefed by police on any details of Mr. Freeman's case. *Id*. at 1338. The prosecution never corrected any of Mr. Freeman's testimony.

Mr. Joplin's testimony was contradicted at trial by the only other person in that holding cell, Booker Brown, who recounted that Mr. Freeman told him and Mr. Joplin that he did not commit the murder. R. 19-16, pp. 1817-1819. But the jury evidently found Mr. Joplin more credible than Mr. Brown.

B. Mr. Joplin's 1990 Evidentiary Hearing Testimony

Contrary to Respondent's repeated assertions, Mr. Joplin has repeatedly admitted, *under oath*, that he had lied about never being approached by the police and offered an inducement to testify. R. 19-20, Mot. New Trial 9/04/90, p. 40. Mr. Joplin first admitted his perjury at a 1990 evidentiary hearing. *Id.*

As discussed above, Mr. Joplin clearly and unequivocally claimed at trial that his testimony against Mr. Freeman was not influenced by a sentencing agreement. R. 19-14, Trial Tr., p. 1354. However, as the district court found, Mr. Joplin admitted at an evidentiary hearing on Mr. Freeman's motion for a new trial, on September 4, 1990, "Joplin stated that he *did* receive consideration for his testimony in the form of not being required to return to prison. Joplin stated that his parole agent made the promise regarding his shortened prison term." R. 41, Op. Granting Writ, p. 30 (emphasis added). Although, at the time, Mr. Joplin claimed that "no one from *the prosecutor's office* offered any inducements," *id.* (emphasis added), Mr. Joplin's testimony could not have been any clearer that *police officers* did offer exactly such inducements.

Specifically, Mr. Joplin testified that Assistant Prosecutor Houlahan and Detective Bowns took him to a restaurant for a meal during his transfer from Jackson to Macomb County prior to Mr. Freeman's trial. R. 19-20, Mot. New Trial 9/04/90, pp. 33-34. During this meal, Mr. Houlahan left the table so that Detective Bowns could say "that [Joplin] could pretty well count on the fact that [he] wasn't going back" to prison. *Id*. at 40-41. Mr. Joplin also testified that, during a meeting in Mr. Houlahan's office prior to Mr. Freeman's trial, Mr. Houlahan and Mr. Cleland stepped out of the room so that Parole Agent Berro could tell Mr. Joplin that "something was going to be done for [him]." *Id*. at 42. And the authorities kept

their end of the bargain: "Joplin was in fact released from prison early." R. 41, Op. Granting Writ, p. 30.

Mr. Joplin's sworn testimony at the 1990 evidentiary hearing established that, exactly as in *Napue*, he committed perjury at trial when he claimed he had not been given any assurances in exchange for his testimony and when he claimed he had not discussed his testimony with government agents. As in *Napue*, government agents involved in the case against Mr. Freeman knew that Mr. Joplin's testimony was false. It makes no difference that the prosecutors who actually prosecuted Mr. Freeman may have stepped out of the room so as to avoid hearing the assurances. *See Giglio v. United States*, 405 U.S. 150, 154 (1972) (holding government fully accountable for non-disclosed assurances to government witnesses even if trial prosecutor was unaware of assurances).

Thus, the district court's decision could be and should be affirmed simply on the basis of Mr. Joplin's sworn testimony from 1990.

C. Mr. Joplin's 1993 Video Interview and 1994 Statement to Mr. Woodside

Mr. Joplin's subsequent statements confirm that the government knew that he committed perjury at Mr. Freeman's trial. These statements thus provide additional support, beyond Mr. Joplin's 1990 evidentiary hearing testimony, for the district court's decision to grant the writ.

First and most important is a videotape, dated June 29, 1993, in which private investigator Allen Woodside and Channel 7 investigative reporter Bill Proctor interviewed Mr. Joplin about his involvement in Mr. Freeman's case. R. 1-5, Pet. Ex. J, p. 1. The video was then submitted to and accepted by the district court as part of Mr. Freeman's Rule 7(a) Motion to Expand the Record. R. 29, Order Granting Mot. to Expand Record, p. 13.

In this video, Mr. Joplin described his conversation with Mr. Freeman during their time in the shared holding cell. Mr. Joplin noted that Mr. Freeman said he was in Escanaba at a karate studio the day of the murder and that it was "physically impossible" for him to have committed the crime because "he didn't do it." Mr. Joplin said that Mr. Freeman told him that he was innocent, and that he had deliberately falsified information in his letter to the prosecution so that he could see if he could "get himself out." When asked why he would implicate an innocent person in a murder, Mr. Joplin said, "I guess at the time, I didn't really care." Mr. Joplin said he was told by the prosecutor's office to say that Mr. Freeman told him that he had shot Mr. Macklem with a shotgun, and to look directly at the jury as he said those words. Mr. Joplin stated that he "wanted to back out" after the preliminary hearing, but that the prosecutor's office "got pretty mad" when he expressed his desire to withdraw his testimony, and that they used his parole officer to pressure him to testify. Mr. Joplin said that he was telling the

truth for two reasons: first, that "[Mr. Freeman] shouldn't be in there for something I said," and secondly, that he "didn't have that long" due to his failing health.

Mr. Joplin's 1993 video interview is highly credible and corroborated. First, Mr. Joplin's revelations that he was coached and received assurances of lenient treatment in exchange for his testimony are consistent with prior testimony he gave at the 1990 hearing on Mr. Freeman's motion for new trial, discussed above. Second, as Respondent has conceded previously, "Joplin was suffering from a series of illnesses that caused him to want to clear his conscience," a motivation that is at least as (if not more) significant than the motivation he claimed at trial - "to change his 'prison mentality.'" R. 49, Response to Mot. to Set Bail, p. 12; R. 19-14, Trial Tr., p. 1354. More to the point, the district court noted that, "Joplin was suffering from a series of illnesses which resulted in a terminal prognosis" at the time he gave the videotaped interview. R. 41, Op. Granting Writ, p. 32. "He was suffering from liver cirrhosis, hepatitis C, Agent Orange poisoning and a double abdominal hernia, and was given 6 -12 months to live." *Id*. While the statement would not qualify as a dying declaration (because the statement did not concern the cause or circumstances of Mr. Joplin's impending death), the district court correctly recognized that Mr. Joplin's failing health made the statement more reliable; courts have long recognized that dying persons contemplating their mortality have an interest in making truthful statements.

Respondent also stresses that Mr. Joplin's videotaped statement was hearsay. But the statement would be admissible at a retrial as a statement against interest, Mich. R. Evid. 804(b)(3), as Mr. Joplin admitted that he had committed perjury and thus exposed himself to criminal liability.

Respondent seeks to discount the district court's reference to the affidavit of Allen Woodside as "Joplin's 1994 affidavit. . . put together by Allen B. Woodside." R. 41, Op. Granting Writ, p. 32; Respondent's Br. 37. But paragraphs A, B, C, J, and T of Mr. Woodside's affidavit effectively serve as a transcription of Mr. Joplin's June 29 statement. The district court simply referred to this portion of the affidavit as a shorthand way to recount Mr. Joplin's videotaped statement itself.

Respondent is correct that the portions of Mr. Woodside's affidavit recounting other statements Mr. Joplin made are hearsay. But Mr. Woodside's testimony as to those statements would be admissible at a retrial as Mr. Joplin's statements admitting perjury were against his penal interest and Mr. Joplin, having died, is no longer available to testify himself. Mich. R. Evid. 804(b)(3).

Respondent also complains that it does not understand "how the prosecution should have known of the alleged falsity of Joplin's testimony," arguing that Mr. Joplin's recantation "is a far cry from evidence establishing that the prosecutor knew or should have known that Joplin's testimony was false. There was no

credible basis on which to believe that the prosecution and police were somehow implicated in any possible perjury." Respondent's Br. 67.

In making this argument, Respondent avoids the most important part of Mr. Joplin's admissions: Mr. Joplin stated plainly both in his 1990 testimony and in his videotaped statement of June 29, 1993, that he was assured on several occasions before his trial testimony that the prosecution would arrange his early release from prison in exchange for his testimony. R. 1-5, Pet. Ex. J, pp. 4, 5; R. 27-5, Mot. to Expand Record Ex. 29. Whether Detective Bowns was aware of the falsity of Mr. Joplin's substantive testimony regarding Mr. Freeman's alleged confession, he certainly would have been aware that Mr. Joplin was lying when he responded "No" to the question, "has anything of any kind been promised to you as a reward for testifying, as an inducement for testifying in any fashion?" at trial. R.19-24, Trial Tr., p. 1354. As the prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police," *Kyles v. Whitley*, 514 U.S. 419, 437 (1995), it does not matter whether the trial prosecutor personally knew of the promises made in exchange for testimony.

Mr. Joplin was also asked at trial if anyone had helped him prepare for testifying. R. 19-14, Trial Tr., p. 1338. Although such preparation would not have been misconduct itself, the fact that Mr. Joplin *denied* any preparation would have been known to be false by Detective Bowns, Mr. Houlahan, and Assistant

Prosecutor Kenneth Lord, R. 1-5, Pet. Ex. J, pp. 5, 9-11; R. 27-9, Mot. to Expand Record Ex. 29. The falsity of this statement again constituted perjury, and the failure of prosecutors to disclose this to defense counsel or the court was a violation of Mr. Freeman's due process rights. *See Giglio*, 405 U.S. at 154.

D. The Violation Requires a New Trial.

The standard for granting habeas relief because of a constitutional violation is whether the error had a substantial and injurious effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Mr. Freeman agrees with Respondent that newspaper accounts of a juror's comments regarding the importance of Mr. Joplin's testimony to the jury's decision are irrelevant to this analysis, but the failure to correct Mr. Joplin's perjured testimony easily meets the *Brecht* standard.

To put it simply, any rational jury would have disregarded Mr. Joplin's claim that Mr. Freeman confessed to him in the holding cell if it had known that Mr. Joplin was lying about his claim that he had received no assurances of leniency and his claim that he had not discussed his testimony with anyone from the government. Aside from Mr. Joplin's testimony, the only other evidence that would support the verdict was the testimony of two eyewitnesses, Rene Gobeyn and Richard Kreuger. That testimony was extremely unreliable and of limited

value, for the reasons discussed in Issue I, *supra*. By contrast, Mr. Freeman presented multiple disinterested eyewitnesses who placed him in Escanaba a few hours before and a few hours after the shooting in Port Huron, some 400 miles away. Given the weakness of the eyewitnesses and that the prosecution was forced, in the face of the remarkably strong alibi testimony, to resort to an absurd and wholly unsupported theory that perhaps Mr. Freeman chartered an airplane to commit the killing, it is impossible to conclude that Mr. Joplin's perjured testimony did not have a substantial and injurious effect on the verdict.

The perjury had a substantial and injurious effect on the verdict, and the district court's decision should be affirmed.[8]

[8] Respondent confuses the standard for habeas relief on this issue with the standard required to establish actual innocence. Respondent's Brief 34. The standard for actual innocence, set forth in *Schlup* and discussed in Argument I, *supra*, is necessary to overcome procedural default and a statute of limitations bar. To meet that standard, this Court must review the entire record, not one claim of error. Once that standard is met, then the procedural default and statute of limitations barriers fall and this Court must review each claim under the *Brecht* standard.

III. TRIAL AND APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO CALL MICHELLE WOODWORTH, WHO WOULD HAVE CONFIRMED THAT PETITIONER WAS IN THE ESCANABA AREA AT THE EXACT TIME THE MURDER OCCURRED IN PORT HURON.

The district court correctly concluded trial counsel provided ineffective assistance, in violation of Mr. Freeman's Sixth and Fourteenth Amendment rights, for failing to call witness Michelle Woodworth, and appellate counsel was ineffective, in violation of Mr. Freeman's Fourteenth Amendment rights, for failing to litigate trial counsel's ineffectiveness. The absence of Ms. Woodworth's testimony denied Mr. Freeman an alibi for the exact time of the crime, and thus was highly prejudicial.[9]

[9] Respondent's argument that Mr. Freeman's ineffective assistance claim is procedurally defaulted is both incorrect and irrelevant. In 2004, Mr. Freeman filed a motion for relief from judgment, which included the claim that his appellate counsel was ineffective for failing to litigate trial counsel's ineffectiveness for failing to call Ms. Woodworth at trial. R. 19-21, Mot. for Relief. Since Mr. Freeman could not litigate appellate counsel's ineffectiveness on direct appeal, his motion for relief from judgment was the first opportunity to litigate appellate counsel's ineffectiveness, and the issue is therefore not procedurally defaulted. In any event, as discussed in Issue I, *supra*, the evidence of Mr. Freeman's actual innocence overcomes not only procedural default, if any, but also the AEDPA statute of limitations.

A. Trial Counsel's Failure to Call Ms. Woodworth and Appellate Counsel's Failure to Litigate the Issue on Direct Appeal Amounted to Deficient Performance.

Trial counsel himself attempted to litigate the absence of Ms. Woodworth's testimony from the trial by filing a motion for new trial after the verdict. But since trial counsel could not litigate his own ineffectiveness, he raised it as a newly discovered evidence claim, which the state trial court denied on June 15, 1987. R. 19-19, Mot. New Trial 6/15/87, pp. 9, 15. As the state trial court ruled:

> Well, I am not satisfied that the purported evidence the defense wants to elicit from this witness is newly discovered. Whatever the young lady knew she knew from the outset. From the trial it was clear to me that the parties had had an ongoing and close relationship. *If, as it appears from Defendant's Counsel's argument now, that her testimony was so critical, and obviously if she claims that she was with him at 9:00 in the morning there could be no evidence that is more critical to his defense, every effort should have been made by the defense to preserve that witness and preserve that testimony*.
>
> As Mr. Cleland has pointed out, there are ways with the assistance of the Court that testimony can be preserved or material witnesses can be held to account. None of those things were done in this case. *Because the Court feels the evidence in question was not newly discovered and because it is very clear to the Court that reasonable diligence was not exercised in securing the attendance of that witness or in some way preserving her testimony*, a motion for a new trial must be denied.

Id. at 15 (emphasis added).

The trial court's ruling makes it unmistakably clear that appellate counsel provided deficient representation by failing to litigate trial counsel's ineffective assistance in failing to call Ms. Woodworth at trial. *See Evitts v. Lucey*, 469 U.S.

387 (1985); *see also Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002) (finding ineffective assistance of appellate counsel "when ignored issues are clearly stronger than those presented").

The record also makes it unmistakably clear, as the district court held, that trial counsel's failure to call Ms. Woodworth was deficient performance within the meaning of *Strickland v. Washington*, 466 U.S. 668 (1984). Trial counsel's failure to call, or even prepare to call, Michelle Woodworth as an alibi witness, despite understanding the impact of her potential testimony, was objectively unreasonable and constitutionally deficient. Trial counsel called ten disinterested and unimpeached alibi witnesses who testified that Mr. Freeman was in Escanaba on November 5, 1986, the day of the murder. R. 19-15, Trial Tr., pp. 1528-1719. These witnesses were able to place Mr. Freeman in Escanaba a little after midnight (Jeffrey McNamara, *id*. at 1657-1659), and again at 1:30 am (Paul DeMars, *id.* at 1634–1636), on the morning of November 5, *before* the murder; and then later at noon (multiple witnesses, *id.* at 1540-1541, 1611-1612), and again at 3:30 p.m., (multiple witnesses, *id*. at 1669, 1712-1713), *after* the murder.

Critically, Mr. Freeman's trial counsel never called any witnesses who could testify Mr. Freeman was in the Escanaba area at precisely 9:00 a.m., when the shooting occurred in Port Huron. Although Escanaba is over 400 miles from Port Huron by road, the prosecution suggested that "everybody in this case could be

telling the truth and remembering accurately and it does not provide an alibi for Frederick Freeman." R. 19-17, Trial Tr., p. 2014. In support of this theory, the prosecutor called as a rebuttal witness a pilot to testify that it was possible to go to the Escanaba airport and find a pilot "hanging around" who would be willing to travel between the two cities for cash. *Id*. at 1920-1921.

Even after the prosecution came up with the "chartered airplane theory" to explain away the disinterested alibi witnesses who placed Mr. Freeman in Escanaba on the day of the murder, trial counsel made no effort to call the one witness who could have explained that it was impossible for Mr. Freeman to commit the murder *even if he had access to an airplane*. Michelle Woodworth, who was Mr. Freeman's girlfriend at the time of the murder but who broke up with him not long thereafter, has consistently maintained for more than twenty years that she and Mr. Freeman were together at their home in the Escanaba area at 9:00 a.m. on November 5, 1986 – the exact time of the shooting in Port Huron. R. 1-5, Pet. Ex. G, Woodworth Affidavit 9/12/02, ¶ 12.

Respondent has suggested that trial counsel's failure to present Ms. Woodworth's testimony was sound trial strategy because Ms. Woodworth was an interested witness with credibility issues. Respondent's Br. at 51. This argument is wrong in two respects. First, by the time of trial, trial counsel admitted he knew that Ms. Woodworth was no longer Mr. Freeman's girlfriend or even friendly with

him. R. 19-19, Mot. New Trial 6/15/87, p. 5**.** If anything, the fact that a disgruntled ex-girlfriend was still unequivocally supporting Mr. Freeman's alibi would have strengthened her credibility.

Second, Respondent's argument defies logic in light of the prosecution's rebuttal theory that Mr. Freeman chartered an airplane to allow him to travel from Escanaba to Port Huron in order to commit the murder. As there was no evidence, circumstantial or otherwise, that Mr. Freeman actually chartered an airplane, Ms. Woodworth's testimony would have directly repudiated such a theory. Without Ms. Woodworth's testimony, the "chartered airplane theory", however bizarre and unsubstantiated, went completely unchallenged, as none of the other alibi witnesses saw Mr. Freeman at 9:00 a.m. For any competent trial attorney, whatever credibility concerns that may have existed would have been secondary to getting this critical alibi evidence on the record.

To put it simply, even if it might initially have been sound strategy to present only the disinterested Escanaba townspeople and not Mr. Freeman's former girlfriend as alibi witnesses, that strategy became entirely unsound when the prosecution came up with the "chartered airplane theory" during the trial. At that point, trial counsel needed to present the one additional alibi witness who could destroy that theory, and that alibi witness was available and ready to testify. R. 1-5,

Pet. Ex. G, Woodworth Affidavit 9/12/02, ¶ 33. Contrary to Respondent's assertion, there was nothing cumulative about Ms. Woodworth's alibi testimony.

Additionally, Ms. Woodworth's testimony would have undermined the credibility of a key prosecution witness, Crystal Merrill, as to the supposed motive for the murder. Ms. Woodworth would have testified that Mr. Freeman was neither obsessed with Crystal Merrill nor jealous of Scott Macklem. *Id.* at ¶ 11. Quite to the contrary, Ms. Woodworth would have testified that, at the time of the murder, Mr. Freeman no longer interacted with Ms. Merrill. *Id.* at ¶ 9. This testimony would have directly rebutted the prosecution's theory of motive.

In sum, trial counsel's failure to call Ms. Woodworth to testify was deficient performance. Appellate counsel also provided deficient representation by failing to litigate the absence of Ms. Woodworth's testimony as ineffective assistance of trial counsel, especially after the trial court directly held that trial counsel's failure to list Ms. Woodworth as an alibi witness or to call her reflected a complete lack of diligence as to the most critical evidence in the case.

B. Trial Counsel's Failure to Call Ms. Woodworth and Appellate Counsel's Failure to Litigate the Issue on Direct Appeal Prejudiced Mr. Freeman.

Respondent is mistaken in contending that the absence of Ms. Woodworth's testimony was not prejudicial. In granting the writ on this issue, the district court found:

> [D]efense counsel's failure to preserve the opportunity to call Ms. Woodworth as an alibi witness constituted deficient performance. The fact that Ms. Woodworth's testimony provided Petitioner with a solid alibi – that Petitioner was with her at the time Mr. Macklem was murdered – prejudiced Petitioner's defense. The Court finds that defense counsel's error was so serious that it deprived Petitioner of a fair trial or appeal.

R. 41, Op. Granting Writ, pp. 22-23.

Similarly, *the state trial court also found the absence of Ms. Woodworth's testimony prejudicial*. In the trial court's own words: "If [Woodworth] claims she was with him at 9:00 in the morning there could be no evidence that is more critical to his defense. . . . [E]very effort should have been made by the defense to preserve that witness and preserve that testimony." R. 19-19, Mot. New Trial 6/15/87, p. 15. The trial court's decision not to grant a motion for new trial on this issue was based not on an absence of prejudice, but rather on a finding that Ms. Woodworth's testimony was not newly discovered. *Id.*

The trial court was correct. There was "no evidence. . . more critical to [Petitioner's] defense" than Ms. Woodworth's alibi witness testimony. For the

reasons discussed above, trial counsel's failure to call Ms. Woodworth was both deficient performance and highly prejudicial, especially given the overall weakness of the case against Mr. Freeman. Trial counsel's failure to call Ms. Woodworth therefore satisfies both prongs of the *Strickland* test.

Both the trial court's assessment, as well as trial counsel's admission during the state evidentiary hearing that he knew Ms. Woodworth could "confirm the fact that the Defendant was with her. . . specifically on the day of the murder and specifically at 9:00 [a.m.] when the [murder] was to have taken place," R. 19-19, Mot. New Trial 6/15/87, p. 4, were on the record for appellate counsel to review. This record therefore also establishes ineffective assistance of appellate counsel for failing to litigate ineffective assistance of trial counsel on this ground.

Respondent advances the trial court's position in the 2005 order denying Mr. Freeman's motion for a new trial that "the issues that Defendant claims were ignored by his appellate attorney are not stronger than those issues that [appellate counsel on direct appeal] presented." R. 19-24, Op. Den. Def.'s Mot. Relief, p. 6.[10] This analysis is wrong. The trial court claimed that "[a]ppellate counsel could not have possibly presented all of the issues that Defendant, with the benefit of

[10] The same judge who presided over Mr. Freeman's trial was the one who in 1987 agreed that the absence of Ms. Woodworth's testimony was critical. It was a different state trial judge who ruled in 2005 that the issue was not necessarily stronger than the other issues appellate counsel raised.

seventeen years of hindsight, has set forth in the [2004] motion." *Id*. But appellate counsel *should have been* aware of the apparent impact of Ms. Woodworth's missing testimony back in 1987 had he simply read the trial judge's remarks in denying the motion for new trial.

In short, as the original trial judge recognized back in 1987, the prejudice in failing to call Ms. Woodworth at trial was obvious. Therefore, trial counsel's failure to call Ms. Woodworth satisfies both prongs of the *Strickland* test, and appellate counsel's failure to litigate this issue was similarly ineffective. The district court was correct to grant the writ on this ground.

IV. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY REFUSED TO PERMIT HIM TO TESTIFY AND HIS APPELLATE ATTORNEY FAILED TO LITIGATE THE ISSUE ON DIRECT APPEAL.

The district court correctly found that Mr. Freeman was denied his Sixth and Fourteenth Amendment rights to effective assistance of counsel when his counsel precluded him from testifying in his own defense and when his appellate counsel failed to litigate this issue on direct appeal.

As discussed in Argument III, *supra*, *Strickland v. Washington*, 466 U.S. 668 (1987), provides the test for evaluating claims of ineffective assistance of both trial and appellate counsel. If counsel's performance was deficient and the deficient performance prejudiced the defense, relief is warranted. *Strickland*, 466 U.S. at 687. When appellate counsel fails to raise a significant issue, that failure can amount to deficient performance. *Gray v. Greer*, 800 F.2d 644, 646 (7th Cir. 1986). "If an issue which was not raised may have resulted in a reversal of the conviction, or an order for a new trial, the failure was prejudicial." *Id.*[11]

[11] As with Issue III, Respondent argues that Petitioner is procedurally defaulted from raising this issue on habeas review. Once again, Respondent's argument is both mistaken and irrelevant. Mr. Freeman argues that his *appellate counsel* was ineffective for not litigating trial counsel's ineffectiveness for precluding Mr. Freeman from testifying. Since Mr. Freeman could not raise ineffective assistance of appellate counsel on direct appeal, he first raised the issue in his 2004 Motion for Relief from Judgment. The state trial court rejected the issue on the merits, R. 19-24, Op. Denying Def.'s Mot. Relief, and Mr. Freeman exhausted the issue

Mr. Freeman had a constitutional right to take the witness stand and testify in his own defense if he so chose. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). Mr. Freeman did not knowingly or voluntarily waive his right to testify; rather, his counsel declined to call Mr. Freeman to the stand and failed to tell him that he had a constitutional right to testify, a fact of which Mr. Freeman was unaware. R 1-4, Pet. Exhibit D, Freeman's Affidavit, ¶40. While these facts and omissions are not part of the trial record, as they normally are not, Mr. Freeman's affidavit and letter to the bar committee are uncontroverted. Furthermore, as Respondent acknowledges, many circuits recognize this dilemma and have refused to find a waiver or forfeiture solely from a defendant's silence at trial, *Chang v. United States,* 250 F.3d 79, 83 (2d Cir. 2001), especially when other evidence corroborates the claim. *See, e.g.*, *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991).

Respondent's characterization of Mr. Freeman's affidavit as a "naked affidavit" and contention that he failed to raise the claim until seventeen years after trial are incorrect. Mr. Freeman included in the habeas expansion his original letter to his trial counsel dated June 24, 1987, which includes the complaint that Mr.

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through the state appellate courts. R. 19-24, Court of Appeals Order Den. Leave to Appeal; R. 19-24, Mich. Sup. Ct. Order Den. Leave to Appeal. Therefore, the issue is not procedurally defaulted. However, as with Issue III, even if the issue were procedurally defaulted, the same showing of actual innocence that permits this Court to waive the statute of limitations bar would also excuse the procedural default. See Issue I, *supra.*

Freeman was not allowed to testify. R. 27-5, Mot. to Expand Record Ex.30, Letter to Dean 6/24/87, p.1. Mr. Freeman also provided his 1988 Attorney Grievance Commission complaint making the same allegations. R. 27-5, Mot. to Expand Record Ex.31, Letter to Attorney Grievance Commission, p. 4. This claim is further corroborated by Michelle Woodworth, who stated in her 2002 affidavit that trial counsel told her he made a mistake by not allowing Mr. Freeman to testify. R. 1-5, Pet. Ex. G., p. 5 ¶31.

It is true that "when a tactical decision is made not to have the defendant testify, the defendant's assent is presumed." *United States v. Webber*, 208 F.3d 545 (6th Cir. 2000). However, this assumption is based on the fact that "the defendant's attorney is presumed to follow the professional rules of conduct and is strongly presumed to have rendered adequate assistance." *Id*. at 551 (quotation marks and citation omitted). That presumption cannot apply here, given trial counsel's credibility issues. For example, in his response to the grievance commission complaint by Mr. Freeman, trial counsel denied the allegations of his substance abuse. However, trial counsel's substance abuse around the time of the Freeman trial is not in dispute. R. 41, Op. Granting Writ, p. 9. Indeed, trial counsel's secretary testified in an ineffective assistance hearing in another case that he was addicted to cocaine and alcohol at the time of the Freeman trial. R. 1-3, Pet. Ex. A, pp. 42, 47.

Appellate counsel should have sought an evidentiary hearing in order to expand the trial record and successfully litigate the claim. There was no strategic explanation for appellate counsel's failure to raise a claim so central to the fairness of the trial.

For these reasons, this Court should find ineffective assistance of appellate counsel and affirm the district court's grant of habeas relief on this issue. Alternatively, if the Court finds that the record is not sufficient to support such a finding because the state trial court refused to hold an evidentiary hearing on Mr. Freeman's Motion for Relief from Judgment, it should remand for an evidentiary hearing on the issue.

V. THE DISTRICT JUDGE DID NOT ABUSE HER DISCRETION IN REFUSING TO RECUSE HERSELF.

A judge is statutorily required to recuse herself in any proceeding in which her impartiality might be reasonably questioned. 28 U.S.C. § 455(a). This Court should reverse only if the district court engaged in "an abuse of discretion" in declining Respondent's suggestion for recusal. *United States v. Sammons*, 918 F.2d 592, 599 (6th Cir. 1990). The district judge did not abuse her discretion as there was no colorable basis for recusal here.

"'Partiality' does not refer to all favoritism, but only to such as is, for some reason, wrongful or inappropriate." *Liteky v. United States*, 510 U.S. 540, 552 (1994). The question on appeal is whether a "reasonable person, objective person, knowing all of the circumstances, would have questioned the judge's impartiality." *United States v. Prince*, 618 F.3d 551, 561 (6th Cir. 2010).

Respondent has presented no facts suggesting partiality apart from the indisputable facts that Judge Hood and Judge Cleland are colleagues on the district court bench and Judge Cleland was the trial prosecutor in this case. These facts alone would not lead any reasonable person to the conclusion that Judge Hood was personally predisposed to either favoring or disfavoring Respondent. "A judge need not recuse himself on the basis of prior contact with a party or a witness, as

long as the judge does not have a familial, financial, or similarly close relationship with the party or witness and as long as the judge has not received out-of-court information about the case at hand." *Johnson v. Mitchell*, 585 F.3d 923, 946 (6th Cir. 2009). Here, Judge Cleland is not a party in the habeas case but was an attorney in the underlying criminal case nearly a quarter-century ago. Nor is there any indication that Judge Cleland and Judge Hood have ever discussed this case. Indeed, this Court has previously indicated that mere acquaintanceship does not create an appearance of impartiality. *See United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 2002) (finding no obligation to recuse where judge had known owners of company defendant had allegedly defrauded for over thirty years).

A judge should not be presumed to be biased merely because she works in the same courthouse as a person who was long ago involved in a claim raised by a litigant. Respondent has failed to allege any basis for determining that a reasonable person, knowing all the circumstances about the relationship between Judge Hood and Judge Cleland, would question Judge Hood's impartiality.

Therefore, the district judge's refusal to recuse herself from this case should be affirmed.

VI. PETITIONER RECEIVED INEFFECTIVE ASSISTANCE DUE TO TRIAL COUNSEL'S ADDICTION TO COCAINE AND ALCOHOL AND HIS APPELLATE COUNSEL'S FAILURE TO LITIGATE THIS ISSUE ON APPEAL.

Mr. Freeman's Sixth Amendment rights were violated when his trial counsel, impaired by an addiction to cocaine and alcohol, was unable to engage and respond during critical moments of trial. The prejudice to Mr. Freeman is apparent from the record and denied him a fair trial. Appellate counsel, who was aware of trial counsel's substance abuse problem and the numerous examples of trial counsel's bizarre and incompetent behavior, unreasonably failed to litigate this issue in the direct appeal. Therefore, the district court erred in failing to grant Mr. Freeman relief on this issue.

The assistance of counsel is among those "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (quoting *Chapman v. California*, 368 U.S. 18, 323, (1967)). The deprivation of "the presence and assistance of [counsel], either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense" requires automatic reversal of a conviction. *Id.* (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). An attorney must subject "the prosecution's case to meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 659 (1984).

Addiction can cause an attorney to fall short of this requirement. *See, e.g., Morse v. Trippett*, 102 F.Supp.2d 392, 408 (E.D. Mich. 2000), *reversed on other grounds*, 37 Fed. Appx. 96 (6th Cir. 2002) (*Cronic*'s presumption of prejudice invoked where attorney's "admitted psychological illness and alcohol abuse, both of which covered the time during which he was appointed to represent Petitioner. . . was so egregious that Petitioner was constructively denied the right to counsel."). Even if counsel's drug addicted performance is not viewed as a *Cronic* error, *see, e.g., Burdine v. Johnson*, 262 F.3d 336, 395 (5th Cir. 2001) (*en banc*) (noting courts have generally not applied presumption of prejudice to claim of attorney impairment due to substance abuse), the specific mistakes counsel makes as a result of his drug use may still amount to ineffective assistance.

As the district court noted, "It is undisputed that defense counsel had a substance abuse problem around the time he was serving as Petitioner's defense attorney." R. 41, Op. Granting Writ, p. 9. Counsel's secretary, Janice Barnum testified in an ineffective assistance hearing in another case that at the time of Mr. Freeman's trial, trial counsel "was using substances and. . . wasn't quite the attorney [she had] thought he was" before, and that the drug abuse caused trial counsel to become "very forgetful." R. 1-3, Pet. Ex. A, pp. 42, 47.

Counsel's impairment likely played a significantly prejudicial role throughout the trial, but the prejudice it caused is most obvious in the introduction

of several days worth of prosecution "bad acts" testimony without trial counsel's objection. First, trial counsel made no objection for over three days as Crystal Merrill made allegation after allegation of "rapes," "slave behavior," and other character attacks on Mr. Freeman stemming from the brief period during which Mr. Freeman and Ms. Merrill dated in mid-1986, none of which had any conceivable relevance to the question of whether Mr. Freeman was the man who killed Mr. Macklem on November 5, 1986. The district court and the Michigan Court of Appeals found that counsel's failure to object to the three days of irrelevant character assassination was strategically designed to attempt "to portray Ms. Merrill as unstable and incredible" R. 41, Op. Granting Writ, pp.10-11, but this finding defies logic. Competent counsel would not allow the introduction of highly prejudicial character evidence just to try to undermine Ms. Merrill's credibility.

The district court's explanation that counsel failed to object so as to undermine Ms. Merrill's credibility also fails to explain why trial counsel also failed to object to similarly prejudicial character and "bad acts" testimony elicited by the prosecution from Heidi Bartel, R. 19-11, Trial Tr., p. 692 ("[Crystal Merrill] looked like she had almost been strangled"), Thomas Forde, *id.* at 782-84 (testifying that Mr. Freeman possessed enough skill with ninja weapons to easily kill a person), Philip Joplin, R. 19-14, Trial Tr., p. 1355 ("[Mr. Freeman] is a frightening person"), and John Manalli, R. 19-15, Trial Tr., p. 1632 ("[Mr.

Freeman] was getting too aggressive in your class tryouts, was hitting too hard, was drawing blood on you in your sparring? Isn't that a fact?"). There can be no strategic explanation for permitting this prejudicial and irrelevant testimony without objection.

Appellate counsel's failure to litigate trial counsel's ineffectiveness stemming from his drug use was also unconstitutionally ineffective. This claim should have led to Mr. Freeman's conviction being reversed, and there was no reasonable strategy for not litigating this issue on appeal.

Therefore, the district court erred in denying relief on this claim.

VII. MR. FREEMAN'S DUE PROCESS RIGHTS WERE VIOLATED BY HIS PRESENTATION TO THE JURY IN SHACKLES AND JAIL CLOTHING.

The presentation of Mr. Freeman to the jury in jail garb and shackles violated his Fourteenth Amendment Due Process Clause right to a fair trial and the presumption of innocence. *See Drope v. Missouri*, 420 U.S. 162, 172 (1975); *Coffin v. United States*, 156 U.S. 432, 453 (1895). As the Supreme Court has expressly recognized, the presentation of a defendant in prison clothing is a constant reminder of his "accused position" and undermines the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 504-05 (1976); *see also Deck v. Missouri*, 544 U.S. 622, 626 (2005) ("The law has long forbidden routine use of visible shackles during the guilt phase [of a criminal trial]").

During the first part of Mr. Freeman's trial he was brought to the courtroom each day in shackles and jail attire in full view of the jury. While the record references Mr. Freeman wearing "jail house greens," he was also shackled, as he was changed out of the jail greens and shackles at the same time. R. 1-4, Pet. Ex. D, ¶32. The routine use of shackles during the guilt phase of a criminal trial is forbidden except for "extreme and exceptional" cases where shackles are necessary for the safety and security of the defendant and the courtroom. *Deck*, 544 U.S. at 626-627 (2005).

No such circumstances justified Mr. Freeman's repeated exposure to the jury in physical restraints. At the time of the trial Mr. Freeman was a twenty-three-year-old man with no prior history of violent crimes, and the prosecution introduced no evidence of any kind that he had behaved aggressively while incarcerated awaiting trial or that he had ever attempted to escape from custody. The absence of any findings justifying the shackling demonstrates that this case does not meet the "case-by-case determination" that due process requires before a defendant is shackled in front of the jury. *Deck*, 544 U.S. at 632; *Lakin v. Stine*, 431 F.3d 959, 963 (6th Cir. 2005).

When the state lacks adequate justification and a juror sees the restraints, "the defendant need not demonstrate actual prejudice to make out a due process violation." *Deck*, 544 U.S. at 635. Rather, the state must prove beyond a reasonable doubt that the prejudice did not contribute to the verdict. *Id*. In *Ruimveld v. Birkett*, 404 F.3d 1006, 1017 (6th Cir. 2005), this Court applied a form of harmless error analysis and found that shackling was not harmless error. The Court reasoned that the defendant had carried his burden:

> By showing the harm to the presumption of innocence that the Supreme Court has found to be inherent in indicia of guilt such as shackles, by showing that there was no good reason for the shackling, [and] by showing that his was a close case based on purely circumstantial evidence . . .

Id. at 1017-1018. Exactly the same circumstances apply here; there was no good reason for the shackling, the evidence of Mr. Freeman's guilt was exceptionally weak, and, in fact, the evidence of his innocence was exceptionally strong.

"Errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the federal writ." *Williams v. Taylor*, 529 U.S. 362, 375 (2000). The trial court deprived Mr. Freeman of the presumption of innocence and a fair trial when he was presented to the jury in visible restraints.

Therefore, the district court should have also granted the writ on this ground.

VIII. MR. FREEMAN'S DUE PROCESS RIGHTS WERE VIOLATED BY CUMULATIVE ERROR.

This Court has explicitly stated that it assumes cumulative error can form the basis for habeas relief and consequently has considered such claims. *See Getsy v. Mitchell*, 495 F.3d 295, 317 (6th Cir. 2007). An accumulation of errors can create grounds for habeas relief, even when each error does not individually deny due process, when considered together they leave no doubt that "the jury was too tainted and influenced to be able to give the petitioner a fair trial." *Derden v. McNeal*, 978 F.2d 1453, 1456 (5th Cir. 1992) (citing *Lundy v. Campbell*, 888 F.2d 467, 470 (6th Cir. 1989)). In *Lundy*, this Court explained,

> In approaching our task of evaluating the fairness of the trial, we are obligated to keep in mind that it is the whole trial that is evaluated, not simply the six isolated instances cited to us by the petitioner. As we held in *Payne v. Janasz*, 711 F.2d 1305, 1310 (6th Cir.), *cert. denied*, 464 U.S. 1019, 104 S.Ct. 552, 78 L.Ed.2d 726 (1983), to warrant habeas relief "errors must be of constitutional proportion and, *taken as a whole and within the context of the entire record*, have caused the substantial rights of the petitioner as secured by the Fourteenth Amendment to have been infringed.

Lundy, 888 F.2d at 472 (emphasis added).

A review of the whole record demonstrates that Mr. Freeman was denied the right to a fair trial. The evidence of his guilt was, as demonstrated above, exceedingly weak, and the evidence of his innocence was extraordinarily strong.

Therefore, even if some of the claims of error Mr. Freeman has presented in his petition were not sufficient, in themselves, to justify habeas relief, those errors, taken together with the weak and unsatisfactory nature of the evidence presented against him at trial, make a compelling case that Mr. Freeman's Due Process Clause rights were violated.

Therefore, the district court erred in failing to grant relief for cumulative error.

CONCLUSION

Petitioner Fredrick Freeman respectfully requests that this Court affirm the district court's judgment granting the writ of habeas corpus.

Respectfully submitted,

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Dated: August 4, 2011

ADDENDUM – DESIGNATION OF RECORD ON APPEAL

Petitioner-Appellee/Cross-Appellant, per Sixth Circuit Rule 28(c), 30(b), hereby designates the following portions of the record on appeal:

Description of Entry	**Date**	**Record Entry No.**
Petition for Writ of Habeas Corpus	01/23/07	R. 1
Petition for Writ of Habeas Corpus, Document Continuation #3	01/23/07	R. 1-3
Petition for Writ of Habeas Corpus, Document Continuation #4	01/23/07	R. 1-4
Petition for Writ of Habeas Corpus, Document Continuation #5	01/23/07	R. 1-5
Petition for Writ of Habeas Corpus, Document Continuation #6	01/23/07	R. 1-6
Notice of Filing Rule 5 Materials	09/12/08	R. 19
11-26-1986 Transcript	09/12/08	R. 19-2
04-28-1987 Transcript	09/12/08	R. 19-9
04-30-1987 Transcript	09/12/08	R. 19-10
05-01-1987 Transcript	09/12/08	R. 19-11
05-05-1987 Transcript	09/12/08	R. 19-12
05-06-1987 Transcript	09/12/08	R. 19-13
05-07-1987 Transcript	09/12/08	R. 19-14
05-12-1987 Transcript	09/12/08	R. 19-15
05-13-1987 Transcript	09/12/08	R. 19-16

05-14-1987 Transcript	09/12/08	R. 19-17
06-15-1987 Transcript	09/12/08	R. 19-19
09-04-1990 Transcript	09/12/08	R. 19-20
12-13-2004 Transcript	09/12/08	R. 19-21
Michigan Court of Appeal 260864	09/12/08	R. 19-22
Michigan Supreme Court 98074	09/12/08	R. 19-23
Michigan Supreme Court 129522	09/12/08	R. 19-24
Motion for Leave to Supplement Petition for Writ of Habeas Corpus	10/30/08	R. 22
Motion to Expand the Record	11/03/08	R. 27
Motion to Expand the Record, Document Continuation #1	11/03/08	R. 27-1
Motion to Expand the Record, Document Continuation #2	11/03/08	R. 27-2
Motion to Expand the Record, Document Continuation #5	11/03/08	R. 27-5
Order Granting Motion for Leave to Supplement Petition	03/20/09	R. 29
Opinion and Order Conditionally Granting Petition for Writ of Habeas Corpus	10/14/10	R. 41
Notice of Appeal	10/15/10	R. 44
Notice of Cross-Appeal	10/21/10	R. 47
Response to Motion to Set Bail	10/27/10	R. 49
Motion for Certificate of Appealability	11/19/10	R. 52
Order Granting in Part and Denying in Part Petitioner's Motion for Certificate of Appealability	01/07/11	R. 55

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief exceeds the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(B)(i) because this brief more than 16,500 words, as there are a total of 17,713 words, excluding the parts of the brief exempted by Fed. R. App. P. 32 (a)(7)(B)(iii). Petitioner has filed a motion to exceed the word limit by no more than 1,500 words and notes that this Court on June 10, 2011, granted Respondent's motion to exceed the word limit by 2,500 words.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style of Fed. R. App. P. 32 (1)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2003 in 14 point Times New Roman.

PROOF OF SERVICE

I certify that on August 4, 2011, the foregoing document was served on all parties or their counsel of record through CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record (designated below).

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