RECORD NO. 19-1780

In The
United States Court of Appeals
For The Third Circuit

GERALD HOWELL,

***Appellant*,**

v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL PENNSYLVANIA,

***Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANT AND APPENDIX
VOLUME I OF III
(Pages 1 – 8)

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INTRODUCTION

Gerald Howell was sentenced to life in prison following a state court conviction for second-degree (felony) murder for the 1982 robbery and shooting of Herbert Allen on a street in Philadelphia. When Allen was killed, Howell was 18 years old. Detectives collected no physical evidence from the crime scene to identify the perpetrator, and the Commonwealth presented no forensic evidence at trial linking Howell to the shooting. Laboratory testing of his clothing revealed no gunpowder residue or blood spatter. Police did not recover the murder weapon. And police never recovered the ring allegedly stolen from Allen—the basis for the robbery conviction underlying the felony-murder conviction. Meanwhile, Howell denied even being at the crime scene when the murder occurred. He presented an alibi through testimony of himself and his mother and sister.

At trial, the Commonwealth called a group of teenagers to incriminate Howell. Three claimed to be eyewitnesses, with two seeing the fleeing gunman. Another claimed Howell told her he shot Allen and showed her the gun and ring.

Over the years, however, most of those witnesses recanted in notarized affidavits. Two of the eyewitnesses not only recanted their trial testimony incriminating Howell as the fleeing gunman; they aver that the fleeing gunman was Kenneth Parnell. They declare that they lied at trial because they were pressured to testify and feared Parnell. Moreover, the witness who testified that Howell showed

her the gun and ring and claimed responsibility for the shooting has also recanted; she avers that she lied to prevent the Commonwealth from charging her baby's father—Parnell. The Commonwealth's other eyewitness, who had known Parnell for half his life, evidently was murdered two years after the trial by one of Parnell's friends to prevent him from testifying against Parnell in a separate trial for a different murder. At that trial, Parnell was convicted for having shot a man in the chest during a burglary about eight months before Allen was shot in the chest.

Before these witnesses recanted, Parnell himself confessed to shooting Allen. He did so in a notarized affidavit and in letters to Howell's former counsel and to authorities. Parnell's affidavit says Howell is innocent. Parnell's letters explain that the shooting occurred when Parnell confronted Allen to collect drug money.

The crux of the matter on appeal concerns whether Howell can satisfy the actual-innocence gateway to overcome his untimely filing of his federal habeas petition, which the district court previously dismissed as time-barred by the limitations period in the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2244(d). Invoking intervening changes of law and the foregoing evidence of innocence, Howell moved below for relief under Rule 60(b)(6) of the Federal Rules of Civil Procedure, contending he has made a credible showing of actual innocence to overcome AEDPA's time bar—i.e., to

serve as a gateway for review of his claims on the merits. The district court denied the motion without an evidentiary hearing. No evidentiary hearing has been held to hear from the affiants.

This Court granted a certificate of appealability upon "conclud[ing] that jurists of reason could debate whether Howell has made a sufficient showing of innocence to be entitled to relief based on the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and, therefore, whether the District Court was correct in its procedural ruling. *See Satterfield v. Dist. Attorney Phila.*, 872 F.3d 152, 163–64 (3d Cir. 2017)." A7. *McQuiggin* held that a credible showing of actual innocence will overcome AEDPA's statute of limitations. And *Satterfield* abrogated lower court decisions that held that *McQuiggin* did not provide a basis for Rule 60(b)(6) relief. This Court in *Satterfield* "fail[ed] to see a set of circumstances under which [*McQuiggin*'s] change in law, paired with a petitioner's adequate showing of actual innocence, would not be sufficient to support Rule 60(b)(6) relief." 872 F.3d at 163.

Howell has made a credible showing of actual innocence. But if the Court finds that the affiants' credibility requires further assessment, it would be appropriate to remand for a hearing where they can be evaluated. After all, "the conviction of an innocent person [is] perhaps the most grievous mistake our judicial system can commit." *Id.* at 154.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. §§ 2241 and 2254. On March 13, 2019, the district court denied Petitioner Gerald Howell's Fed. R. Civ. P. 60(b)(6) motion for relief from the judgment. On March 31, 2019, Howell timely filed a notice of appeal. This Court has jurisdiction over this appeal under 28 U.S.C. §§ 1291 and 2253 because the district court's denial of the Rule 60(b)(6) motion constitutes a final decision.

STATEMENT OF THE ISSUE

This Court granted a certificate of appealability (COA) on "whether Howell has made a sufficient showing of innocence to be entitled to relief based on the Supreme Court's decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and, therefore, whether the District Court was correct in its procedural ruling. *See Satterfield v. Dist. Attorney Phila.*, 872 F.3d 152, 163-64 (3d Cir. 2017)." (The COA is at A7. The underlying Rule 60(b) motion is at A123.)

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has been before this Court at earlier stages. *See* No. 06-3928 (Mar. 23, 2007) (denying COA from dismissal of habeas petition as untimely); No. 10-3564 (Sept. 16, 2010) (denying application to file second/successive habeas petition); No. 14-3468 (June 8, 2015) (denying COA from prior denial of Rule 60(b)(6) relief). Before this Court granted the COA for this appeal, Howell had,

over the years, unsuccessfully filed a number of post-conviction petitions in state court. Counsel is aware of only one other pending proceeding concerning Howell's criminal conviction: he filed on March 19, 2019, in the Court of Common Pleas of Pennsylvania (Phila. Cty. No. CP-51-CR-0138421-1983), a motion for reconsideration of that court's November 4, 1998 order dismissing as untimely his second post-conviction-relief petition (filed on Jan. 2, 1997); his motion claims his counsel in that earlier proceeding rendered ineffective assistance by filing the petition late. Also, regarding his life-without-parole sentence, Howell evidently has a pending challenge in the Commonwealth Court of Pennsylvania (No. 340 MD 2019) to the constitutionality of 1974 legislation that subjected second-degree murder to a life-without-parole sentence. We are unaware of any other related cases or proceedings pending at this time.

STATEMENT OF THE CASE[1]

I. Gerald Howell was arrested for the murder of Herbert Allen.

Around 9:16 PM on December 24, 1982, a Philadelphia police officer responded to a radio call reporting a shooting at 11th and Huntingdon Streets.

[1] For Appendix pages we cite "A" followed by the page number. For district court docket entries not in the Appendix, we cite to the ECF number below. On January 29, 2020, Appellant filed in this Court an unopposed motion (still pending) to take judicial notice of, or to modify this Court's record to include, two additional pretrial state court records not already on file with this Court: the January 27, 1983 preliminary hearing transcript and trial counsel's October 1983 motion to continue the trial. Those items also appear in a separate Appendix volume—Volume III.

A191–92. The officer found a man lying face down on the north side of Huntingdon between two parked cars. A193. Rescue services took the man—Herbert Allen, age 43—to the hospital, where he was pronounced dead at 9:49 PM from a gunshot wound to the chest. A194, A275–76. Aside from a "red stain" on the sidewalk near where Allen fell, detectives recovered no physical evidence from the crime scene. A196, A200–01.

On January 12, 1983, Philadelphia police arrested 18-year-old Gerald Howell for the shooting. A343. At a preliminary hearing two weeks later, the Commonwealth called only one witness—teenager Kenneth Parnell. A385–A403. Based on his testimony, the court found sufficient evidence to send the case to trial. A402. Howell was arraigned two weeks later on charges of murder, robbery, and having possessed an instrument of a crime. *See* A406.

The District Attorney's office gave notice that, upon a conviction for first-degree murder, the Commonwealth intended to seek the death penalty. *See* A406–07 ¶ 4. Howell's family was concerned that his court-appointed lawyer evidently had never tried a homicide case, and so they sought to hire private counsel. A407 ¶ 5. After saving money for months to do so, the family spoke with attorney Hugh Clark on October 3, 1983, about replacing appointed counsel. *Id.* ¶¶ 5–6. Three days later, the family retained Clark, and the court permitted appointed counsel to withdraw. *Id.* Clark sought a continuance of the trial, which was set to begin only

11 days after he was retained and met Howell for the first time. *See generally* A404–14. Clark urged the court that, without a continuance, he would not have time to sufficiently investigate and otherwise prepare for trial. A407–11 ¶¶ 7–24.

The trial judge, however, refused to continue the trial, and it began, as scheduled, with jury selection on October 17, 1983. According to Clark, neither the court nor the DA's office offered any reason why a continuance would be improper or prejudicial. A410 ¶ 22.[2]

II. The Trial

After jury selection, the trial lasted four days, from October 19–24, 1983.

A. The prosecution called five teenagers to incriminate Howell.

The prosecution relied on five teenagers to implicate Howell in Allen's murder: Karla Hearst, Darryl Workman, Arlene Williams, Cheryl Jones (rebuttal), and Warren Wright (rebuttal). Kenneth Parnell did not testify. The five teenagers lived close to each other, east of Broad Street in Philadelphia.[3] Howell lived about a half a mile away, on the other side of Broad Street. *See* A291 (address).

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[2] Clark also unsuccessfully sought a continuance of the suppression hearing, for which the Commonwealth called witnesses on October 6, 1983, the day Clark was retained. A171–72. The court said that the matter would proceed, that the trial would start on October 17, and that Clark had 11 days "to get prepared." A172.

[3] Hearst and Jones were neighbors. A207. Wright lived on their block. *See* A186 (addresses). Williams lived around the corner, *see id.*, as did Workman, *see id.*

1. Karla Hearst and Cheryl Jones

The Commonwealth's first lay witness was Karla Hearst—an eyewitness. Hearst, 18 years old at the time of the trial, lived about a half-block south of Huntingdon on Sartain Street. A206–07. On December 24, 1982, Hearst was outside of her house with others when she heard a gunshot around 9:15 PM. A207, A214. She ran to the corner of Sartain and Huntingdon, where she saw a man running west on Huntingdon toward 12th Street, gun in hand. A209–11. This was the same block of Huntingdon where Allen's body lay. *See* A195, A197–98. Hearst testified that the fleeing gunman was Howell. A209–11. She testified that she had met Howell a month before the incident and saw him twice a week. A213. But on cross-examination, she admitted that she previously told the police she had seen Howell only about twice before in the neighborhood. A219–20.

According to Hearst's trial testimony, Howell came within perhaps five to eight feet and locked eyes with her as he ran west on Huntingdon. A209–11. After he ran by, she walked east on Huntingdon toward Jessup, viewed Allen's body, and ran to the nearby home of Allen's father to report the shooting. A211–12. Hearst was crying when she did so. *See* A266 (Sanders). But she did not go to the police; she said she did not want to get involved. A223.

Hearst also testified that when she heard the gunshot, she was outside her house with her neighbor, Cheryl Jones, A207–08, who followed her to the corner.

A215. The Commonwealth called Jones in rebuttal. She was 16 years old. A353. She testified that upon hearing a gunshot, she (like Hearst) went to the corner of Sartain and Huntingdon and saw a fleeing man holding a gun. A354–55. Jones testified she did not know who the man was but provided a description and corroborated Hearst's testimony (at A213) that he was wearing a beige jacket. A354. Jones added that he was wearing black-and-white Adidas sneakers. *Id.*

2. Darryl Workman

With Hearst providing eyewitness testimony that Howell was the gunman fleeing from Allen's body, the Commonwealth next called Darryl Workman as an eyewitness for events leading up to that point. At the time of trial, he was 17 years old, A225, and facing prosecution in a criminal case, A235–36.

Workman testified that on the evening of December 24, 1982, he encountered Parnell and Howell. A226–27. Workman had known Parnell for "eight or nine years"—half his life—but said he had known Howell for about six months. A234. He said the three of them smoked a joint, headed north for an errand, and then returned south down Jessup Street. A227, A230. At the corner of Jessup and Huntingdon, they "seen a man by his car." A227. According to Workman, Howell said, "I'm going to get him," and Parnell responded "No." *Id.* Workman and Parnell continued walking east, but Howell crossed Huntingdon and approached the man—Herbert Allen. A231, A239, A243. Workman saw Howell

and Allen "wrestling," heard a shot, and saw Allen clutch his chest. A227, A241. Allen then ran across to the north side of Huntingdon, crossed Jessup, hit a pole, and fell between two parked cars at the sidewalk on the north side of Huntingdon. A227. On direct-examination, Workman testified that Howell followed the man and "went in his pockets." A227. But on cross-examination, Workman admitted he could not see what Howell was doing as he bent over the man on the sidewalk because the two parked cars blocked his view. A246–47.

Workman said that, after bending over the body, Howell fled west on Huntingdon. A227. Workman and Parnell then walked west on Huntingdon, past Allen's body, and came across Howell a couple of blocks later, where they told him he killed the man. *See* A228. Howell responded: "I know. Ain't no thing." *Id.* Then Howell left. *Id.* Workman and Parnell later got together with Arlene Williams; the three smoked marijuana by Williams's house. A229.

When asked on cross-examination about discrepancies with his statement to the police during his interview a week after the shooting, Workman said he lied to the police. A237. He initially told the police he was walking alone on Huntingdon that night and heading west ("from the Chinese Place at Germantown and Huntingdon") when he heard the gunshot, that Parnell was on the opposite side of the street from him when the shooting occurred, and that he did not know the identity of the shooter and did not see a gun. A237–38, A250. During the

interview, Workman changed his story, eventually stating he was walking eastward with Parnell and Howell and naming Howell as the perpetrator. A251–52.

On redirect at trial, Workman claimed that when he and Parnell encountered Howell after the shooting, Howell showed them a ring he took off of the victim and said it was a "Mason ring." A248. But on cross-examination, Workman acknowledged that he did not tell this to the police. A254–55. Nor did Workman mention the ring when describing this encounter in his suppression-hearing testimony, *id.*, or on direct examination at trial.

Workman also testified at trial that Howell showed him a gun. A248. But on cross-examination, Workman admitted that in his police statement he said he never saw a gun. A238.

3. Arlene Williams

Arlene Williams was 18 years old when she testified at trial. A256. She said that after the shooting, she visited the crime scene and saw Allen's body there, but she did not see Howell. A256–57, A259.

But Williams, who had known Howell for about two months, A256, claimed that on the morning after the shooting—Christmas morning—Howell came to her house and, unprompted, told her "he had shot some man on Huntingdon Street" and "showed [her] the gun that he shot him with," A257, A260–61. Williams testified that the gun was "[a] .22." A257. Williams then asked Howell if he got

"anything off" the victim; Howell replied, "just a ring," a "Mason" ring. A257–58. Though she testified that Howell showed her the ring, on cross-examination she could not describe what it looked like or what color it was. A261–62.

4. Warren Wright

Warren Wright, also a teenager, was called in rebuttal. A346–47. He knew Williams and Parnell. *See* A349, A351. Wright claimed he knew of Howell from having seen him "around the neighborhood." A347. According to Wright, after the shooting, he saw Howell outside a party at 13th and Oakdale around 10:45 PM; Howell asked him if the police were "still hot around" Jessup and Huntingdon; Wright said yes, and Howell responded, "I just got a dead body." A348.

When the prosecutor asked if Wright was at Huntingdon and Jessup (the crime scene) "at the time of the killing" (9:15 PM), Wright answered "Yes." A347. He was later asked: "Before going to that party [at 10:45 PM] were you in the area of Jessup and Huntingdon," and he said no. *Id.* Wright did not testify to seeing Howell earlier that evening before arriving at the party.

B. The other prosecution witnesses

The prosecution called a police officer (John Spellman) who briefly described responding to the radio call after the shooting, and a detective (Roy Land) who briefly described a crime-scene investigation which turned up no physical evidence beyond a blood stain. *See* A192–93, A197–98, A201–02.

The final witness, Detective Alan Twyman, seized Howell's clothing—a beige jacket and Adidas sneakers—on the day of his arrest and sent the clothing to the lab for analysis. A357. The lab tested the jacket for gunpowder residue and examined the sneakers for blood. A358–60. Both tests were negative. A357–60.

The prosecution also called the medical examiner, Dr. Segal, who performed Allen's autopsy and opined that the cause of death was a gunshot wound to the chest. A270–87. The bullet tore Allen's aorta and passed through his right lung. A278. Dr. Segal opined that the "muzzle of the gun was relatively close to the target," roughly 1 to 3 inches away. A280, A285. A hole in Allen's clothing was surrounded by a 1.25-inch ring of gunpowder. A280.

The remaining witnesses, Herbert Baker and Nathaniel Sanders, resided with Allen. *See* A265, A267. Baker (Allen's father) testified that Allen belonged to a Masonic organization and had a ring with a symbol on it. A268. Neither Baker nor Sanders testified to observing the shooting or the perpetrator.

The prosecution offered no ballistics expert.[4] And the prosecution offered no evidence that detectives recovered a murder weapon or stolen property from a search of Howell. Nor did the prosecution offer evidence that Howell knew Allen.

[4] Dr. Segal estimated on direct examination that the bullet recovered from Allen's muscle was "approximately a .22 caliber," A278, but he was tendered and accepted only as an expert in forensic pathology, i.e., autopsies and tissue analysis to determine cause of death, A270–75.

C. The defense presented an alibi.

Three alibi witnesses testified: Howell's mother (Virginia Howell), his sister (Beverly Howell), and Howell himself. They testified that in the early evening of December 24, 1982, Beverly and Howell left Virginia's house to go to Toys "R" Us across town. A290, A304, A320–21. Beverly needed diapers for her child, and Howell went with her to get a Pac-Man toy for his niece for Christmas. A290, A304–06. They traveled by public transportation. A304. Beverly estimated they were at the store for 40 minutes because of heavy crowds; they left the store between 8:00–8:15 PM, after the doors had closed. A306. She and Howell then walked to a nearby diner and spent 30–40 minutes eating. A307, A321. They then walked back to the bus stop, waited 15 minutes, took the bus and then the subway, and ultimately arrived back at their mother's house between 10:15 and 10:30 PM. A308, A321. Howell testified that after arriving at his mother's house, he left to attend a party at 13th and Oakdale. A323–24. He saw Parnell, *id.*, whom he had met a few days earlier, A332. Parnell told him about a better party elsewhere, and they went there together. A324. After that party, Howell returned home. *Id.*

Howell denied being with Parnell and Workman at 11th and Huntingdon that evening, denied carrying a gun, denied shooting anyone, and denied Williams's account about Christmas morning. A322–23. He testified that he did not know Wright but had met Workman earlier that Christmas break. A333.

III. Howell was convicted of felony murder and sentenced to life in prison.

On October 24, 1983, the jury convicted Howell of robbery, second-degree (felony) murder based on robbery, and possession of an instrument of a crime (the never-recovered gun). A384. The robbery and felony-murder convictions were based on the never-recovered ring mentioned above. *See* A364. Howell was sentenced on June 25, 1984, to life imprisonment for second-degree murder, with concurrent terms of 10 to 20 years for robbery and 2.5 to 5 years for possession of an instrument of the crime. *See* A112.

IV. Over the years, Parnell signed an affidavit confessing to the murder, and three of the teenaged trial witnesses recanted their trial testimony, including eyewitnesses who now incriminate Parnell.

A. Parnell confessed in a notarized affidavit and in letters.

In a June 1999 letter, Parnell wrote to Howell's former post-conviction counsel (Norris Gelman), to a judge on the Court of Common Pleas, and to others, confessing to the murder. A162–65. At the time, Parnell (who was at the same institution as Howell) was imprisoned for first-degree murder. A119. Parnell's letters explained that he had attempted to collect drug money from Allen; Parnell and his "best friend at the time w[ere] high and things got ugly" when Parnell shot Allen. A162, A163. Parnell then "made up a story" to pin the murder on Howell and had "friends verify it." A162.

Parnell signed a notarized affidavit on July 12, 1999, stating that he shot Allen and that he was willing to testify under oath. A166–67. The affidavit said Howell was innocent. *Id.*[5]

B. Arlene Williams signed a notarized affidavit recanting her testimony and explaining she lied to protect Parnell, the father of her baby.

Arlene Williams signed a notarized affidavit in August 2009 recanting her testimony and stating she lied to police and at trial. A161. Her affidavit avers that Howell did not visit her on Christmas morning, did not confess, and did not show her a gun or a ring. *Id.* She lied because police told her if she did not provide information, they would charge her baby's father for the murder. *Id.* Her baby's father was Parnell. *Id.*[6]

C. Karla Heart and Cheryl Jones signed notarized affidavits recanting their testimony; they aver that the fleeing gunman they saw was Parnell and that they lied because they feared Parnell.

Cheryl Jones and Karla Hearst signed notarized affidavits on July 19, 2014, and July 26, 2014, respectively, to recant their testimony. A159–60. Although they testified at trial that they saw the fleeing gunman heading west on Huntingdon

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[5] No evidentiary hearing has been held regarding Parnell's confession or the recanting trial witnesses described below. In the Appendix, we have redacted personal identifying information from their affidavits.

[6] The prosecutor's closing argument to the jury contended that Williams had no motive to lie. A365 ("Why would she come in here and lie if he didn't say that? Was it ever demonstrated to you any motive whatsoever for her lying?"). The jury was never told that Williams had a baby with Parnell; Williams was never asked.

by Sartain (about a half a block from where Allen's body lay on Huntingdon), their affidavits state that the fleeing gunman they witnessed was *Parnell*. *Id.*

Their affidavits state that they lied at trial because they feared Parnell and because police threatened to arrest them unless they testified. *Id.*

V. Howell's federal habeas petition was dismissed as untimely, and the district court denied his Rule 60(b)(6) request to reopen that judgment.

On Howell's direct appeal, the Superior Court of Pennsylvania affirmed his convictions on May 31, 1985, and the Pennsylvania Supreme Court denied Howell's petition for the allowance of an appeal on December 17, 1986. *See id.* Subsequently Howell sought post-conviction relief in state court several times, to no avail. *See* A113. This included a petition filed in 1999 under the Post Conviction Relief Act ("PCRA"), in which he submitted Parnell's affidavit, but the petition was deemed untimely under the PCRA. *See* A114–15. That matter ended on September 21, 2004, with an order by the Pennsylvania Supreme Court dismissing its allowance of an appeal as improvidently granted. *See* A115.

Within a year of that dismissal order, Howell filed a *pro se* federal habeas petition on June 15, 2005. A15.[7] His petition attached Parnell's confession. A45–47. On August 7, 2006, the district court dismissed the petition as time-barred

[7] For whatever reason, about half the pages from his memorandum in support of his habeas petition are missing from the June 15, 2005 PACER filing. A third of the missing pages appear at the back of that filing, after exhibits, and some other missing pages appear in a later filing at ECF No. 26 (at pp. 50–69).

because it was filed outside AEDPA's one-year limitations period in 28 U.S.C. § 2244(d). A111–120 (opinion and order). The court ruled that equitable tolling was unavailable, adding that it deemed Parnell's affidavit unreliable because he was "a life-sentenced felon, facing no consequences for lying," noting he was imprisoned at the same institution as Howell at the time. A117–19. This Court denied a COA on March 23, 2007, in an order agreeing that the habeas petition was untimely and that equitable tolling would not be proper (appeal No. 06-3928).

On May 28, 2013, the Supreme Court decided *McQuiggin v. Perkins*, 569 U.S. 383 (2013), holding that a gateway showing of actual innocence will overcome AEDPA's statute of limitations. The Supreme Court emphasized that this was not about equitable tolling, but instead an "equitable *exception*" to the statutory limitations period. *Id.* at 392. Within a year of *McQuiggin*, on May 19, 2014, Howell filed in the district court a *pro se* motion under Rule 60(b)(6) along with Arlene Williams's affidavit. *See* ECF No. 26 (E.D. Pa. May 19, 2014). He invoked *McQuiggin* as a change in law to warrant relief under Rule 60(b)(6) from the judgment dismissing his habeas petition as time-barred. *Id.* at 7–10.

The district court, however, denied the motion. A121. Citing a "consensus" view from which the court saw no "basis to depart," the court held that *McQuiggin*'s change in decisional law "does not provide the extraordinary circumstance necessary to afford relief under Rule 60(b)." *Id.* As support for the

consensus view, the court cited cases reasoning that *Gonzalez v. Crosby*, 545 U.S. 524 (2005), foreclosed a change in habeas law from serving as an extraordinary circumstance to justify Rule 60(b)(6) relief. A121. Having held that Rule 60(b)(6) relief could not be predicated on *McQuiggin*, the court said that "[e]ven if" Rule 60(b)(6) relief could be predicated on *McQuiggin*, Howell's motion should be denied because recantations historically have been viewed with suspicion, that Williams's "affidavit is not exculpatory because she was not an eyewitness to the crime," and that Parnell had "nothing to lose by confessing to another murder." A122. This Court denied a COA in April 2015 (No. 14-3468).

About two and a half years later, this Court decided *Satterfield v. Dist. Attorney Phila.*, 872 F.3d 152 (3d Cir. 2017), which held—contrary to the "consensus" view invoked by the district court in denying Howell's Rule 60(b)(6) motion—that "if a petitioner can make a showing of actual innocence, *McQuiggin*'s change in law is almost certainly an exceptional circumstance" for purposes of Rule 60(b)(6). *Id.* at 163. *Satterfield* rejected the argument that *Gonzalez* forecloses relief. *Id.* at 160–61 & n.9. *Satterfield* observed that *McQuiggin* was not merely a change in procedural law, as in *Gonzalez*, but instead concerned an equitable exception reflecting the "injustice of incarcerating an innocent individual," *id.* at 162 (quoting *McQuiggin*, 569 U.S. at 392), an injustice that strikes "at the core of our criminal justice system," *id.* (quoting *Schlup v. Delo*,

513 U.S. 298, 325 (1995)). That risk of injustice along with "the risk of undermining the public's confidence in the judicial process" are "two factors of the Rule 60(b) analysis." *Id.* at 163 (internal quotation marks omitted). *Satterfield* further ruled that "a proper demonstration of actual innocence by [the petitioner] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Id.*

Within six months of *Satterfield*, on March 15, 2018, Howell again moved *pro se* under Rule 60(b)(6), contending that under *Satterfield* and thus *McQuiggin*, Rule 60(b)(6) relief is warranted. ECF No. 34, at 11–18 (E.D. Pa. Mar. 15, 2018). His innocence evidence now included (in addition to Parnell's confession and Williams's recantation) the recantation affidavits of Karla Hearst and Cheryl Jones (signed in July 2014 and received by him in August 2014). *See id.* at 10; ECF No. 34-1, pp. 8–11.[8]

Counsel Norris Gelman then entered an appearance below for Howell, and the district court permitted him to file an amended Rule 60(b)(6) motion, *see* A13 (docket nos. 35–37), which he filed on July 9, 2018. *See* A123 (amended motion). The motion invoked *McQuiggin* and *Satterfield*. A129–30, A133–36. The motion

[8] As noted below in Part I.A.3 of the Argument, a month after Howell received those affidavits, he had his former post-conviction counsel Norris Gelman submit them in state court in support of a *pro se* PCRA petition that had been pending since 2011. That PCRA matter was pending for seven years without a decision before Howell withdrew it in 2018.

also alerted the court that as a result of *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which postdated the court's prior Rule 60 order, a Pennsylvania court had recently granted Parnell a new sentence on October 17, 2017, because he was a juvenile (17 years old) when he committed the murder for which he was sentenced. A133, A145–46.[9] The Rule 60(b)(6) motion thus contended that Parnell does have something to lose by reaffirming his confession at an evidentiary hearing in the district court. A146.

The district court denied the Rule 60(b)(6) motion. A3–A6. The court deemed the motion timely "because Howell brought his motion within one year of the *Satterfield* decision." A5. But the court considered Parnell's affidavit unreliable because he had nothing to lose when he executed it, and the court also deemed the other affidavits unreliable, writing that they "are nothing more than highly suspect recantation evidence." A6. Thus, the court held that Howell "fail[ed] to meet the threshold requirement of making a credible showing of actual innocence." *Id.* Consequently the court said it "need not further analyze" the matter. *Id.*

From that order, this Court granted the COA referenced above.

[9] *Montgomery* held that *Miller v. Alabama*, 567 U.S. 460 (2012)—prohibiting, under the Eighth Amendment, mandatory life sentences without parole for juvenile offenders—was retroactively applicable on collateral review. As noted below, public records show that Parnell was released from prison on September 6, 2019.

SUMMARY OF ARGUMENT

I. Howell submitted new reliable evidence of actual innocence. The district court erred in deeming the affidavits unreliable. Although recantation evidence is generally viewed with suspicion, recantations can be reliable evidence to support a gateway showing of actual innocence, and multiple factors establish that the affidavits in this case are reliable. Because most of the Commonwealth's lay witnesses have recanted, including eyewitnesses who now incriminate the same man who confessed to the murder—Parnell—the affidavits corroborate each other. They are neither contradicted by physical evidence nor otherwise implausible. The affiants also gave convincing reasons for why they were untruthful at trial, and there is no evidence of undue influence. And Howell did not unduly delay presenting the affidavits to a court so as to render the affidavits unreliable.

This Court should accept the affidavits as sufficiently reliable to proceed to the next step in the gateway innocence inquiry. But if the Court finds that credibility requires further assessment, it would be appropriate to remand for an evidentiary hearing where the affiants can be evaluated.

II. Considering all the evidence together, old and new, it is likely that any reasonable juror would have reasonable doubt about Howell's guilt. To start, the Commonwealth's case was far from airtight. The Commonwealth found no crime-scene evidence linking Howell to the crime and recovered no murder weapon or

stolen property from him. Prosecution witnesses were inconsistent on various points and had credibility issues. Workman's credibility was repeatedly impeached. Moreover, other evidence at trial weighs in Howell's favor: forensic testing of Howell's clothing yielded no positive results; and Howell had an alibi.

The recantations severely undermine the Commonwealth's already weak case. They do more than erase critical testimony against Howell—they exonerate Howell by incriminating someone else altogether: Parnell. And a reasonable juror crediting the Jones and Hearst recantations would find that Workman was lying because—contrary to their affidavits—Workman testified that Howell was the fleeing gunman heading west on Huntingdon. Although Parnell did not testify at trial and Howell can satisfy the actual-innocence standard without his confession, Parnell's confession should not be ignored; it is consistent with multiple affidavits.

III. A proper demonstration of actual innocence should permit Rule 60(b)(6) relief unless the totality of equitable circumstances weigh heavily against it. They do not weigh against granting relief to Howell—they favor relief. But the matter should be remanded for the district court to weigh the totality of equitable factors, because it is the district court's task to do so in the first instance. The district court did not do so below because it rejected Howell's motion at the threshold by erroneously concluding he did not make a sufficient showing of actual innocence.

STANDARD OF REVIEW

This Court reviews the denial of a Rule 60(b)(6) motion for an abuse of discretion. *Satterfield v. Dist. Attorney of Phila.*, 872 F.3d 152, 158 (3d Cir. 2017). But on a gateway claim of actual innocence, this Court exercises plenary review on whether the petitioner satisfies the actual-innocence standard. *Munchinski v. Wilson*, 694 F.3d 308, 335, 337 (3d Cir. 2012); *Sweger v. Chesney*, 294 F.3d 506, 522 (3d Cir. 2002). Plenary review extends to assessing whether new evidence of actual innocence is sufficiently reliable when the district court did not hold an evidentiary hearing to evaluate that evidence. *Munchinski*, 694 F.3d at 337 ("We review *de novo* whether a petitioner's evidence is sufficient to satisfy *Schlup*."); *Houck v. Stickman*, 625 F.3d 88, 93–97 (3d Cir. 2010) (assessing the sufficiency of *Schlup* evidence de novo because "without an evidentiary hearing . . . [the district court] was in no better position to consider the newly presented evidence").

ARGUMENT

"[T]he conviction of an innocent person [is] perhaps the most grievous mistake our judicial system can commit." *Satterfield v. Dist. Attorney of Phila.*, 872 F.3d 152, 154 (3d Cir. 2017). Given the "gravity of such an affront to liberty," *id.*, the Supreme Court has recognized that a sufficient showing of actual innocence will allow a petitioner to overcome procedural bars that would otherwise foreclose federal review of his defaulted constitutional claims. *See Schlup v. Delo*,

513 U.S. 298, 320–21 (1995). This actual-innocence gateway to federal review is grounded in equity, providing an exception to avoid a "fundamental miscarriage of justice." *Id.* To account for finality and comity, the gateway is available only when new reliable evidence supports a credible assertion of actual innocence. *Id.* at 324.

In 2013, in *McQuiggin v. Perkins*, the Supreme Court held that this "fundamental miscarriage of justice exception" also provides a gateway to overcome AEDPA's statute of limitations. 569 U.S. 383, 392 (2013). Four years later, this Court held in *Satterfield* that "if a petitioner can make a showing of actual innocence, *McQuiggin*'s change in law is almost certainly an exceptional circumstance" to permit relief under Rule 60(b)(6) to reopen a time-barred habeas petition. 872 F.3d at 163.[10] Thus, "a proper demonstration of actual innocence by [petitioner] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Id.*

A petitioner passes through the actual-innocence gateway if: (1) he presents "new reliable evidence" of actual innocence, *Schlup*, 513 U.S. at 324; and (2) "it is more likely than not that no reasonable juror would have convicted him" when

[10] "Rule 60(b)(6) is a catch-all provision," *Cox v. Horn*, 757 F.3d 113, 120 (3d Cir. 2014), allowing relief from a "final judgment, order, or proceeding for . . . any other reason that justifies relief," Fed. R. Civ. P. 60(b)(6). Courts may grant such relief only in "'extraordinary circumstances where, without such relief, an extreme and unexpected hardship would occur.'" *Cox*, 757 F.3d at 115 (citation omitted).

considering "'all the evidence,'" including evidence that was not presented at trial, *id.* at 327–28; *accord House v. Bell*, 547 U.S. 518, 538 (2006) ("Because a *Schlup* claim involves evidence the trial jury did not have before it, the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record.").

The district court denied Howell's Rule 60(b)(6) motion at the threshold, concluding that his innocence evidence was not reliable. This was error. At the very least, his gateway innocence claim should not be rejected without an evidentiary hearing to assess reliability. And considering all the evidence, including both new and old, it is more likely than not that no reasonable juror would have convicted him.

I. Howell presented new reliable evidence of innocence.

To establish a credible claim of actual innocence, the petitioner must present "new reliable evidence" of innocence. *Schlup*, 513 U.S. at 324. This Court recently recognized that this circuit "has not yet resolved the meaning of new evidence in the actual innocence context." *Reeves v. Fayette SCI*, 897 F.3d 154, 163 (3d Cir. 2018), *cert. denied*, 139 S. Ct. 2713 (2019). Other circuit courts have divided over what constitutes "new" evidence—specifically whether "it is sufficient that the evidence was not presented to the fact-finder at trial." *Id.* at 161. Several circuits have held that evidence is "new" if it is "newly presented." *Id.* at

161–62. One circuit has held that the evidence must also be "newly discovered." *Id.* at 161.[11]

Under either conception, Howell presented new evidence. As multiple courts have recognized, recantations can qualify as new evidence for gateway innocence claims.[12] Here, for example, the recantation affidavits from eyewitnesses Karla Hearst and Cheryl Jones are new evidence because they assert that they witnessed *Parnell* fleeing the murder scene with gun in hand. That evidence was not presented at trial. Nor was it truly available then, because when

[11] *Reeves* adopted the more lenient standard—i.e., the evidence was new because it was not heard by Reeves's jury—under the circumstances presented there: "when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway." *Reeves*, 897 F.3d at 164. Howell's habeas petition similarly raises a constitutional claim concerning an impediment implicating counsel's investigation: the trial court denied a trial continuance even though trial counsel entered his appearance just 11 days before trial and averred that without a continuance he was unable to properly investigate.

[12] *See, e.g.*, *Hyman v. Brown*, 927 F.3d 639, 655 (2d Cir. 2019) (noting that petitioner "carried his burden through further new evidence," which included the recantation of trial testimony); *Arnold v. Dittmann*, 901 F.3d 830, 838 (7th Cir. 2018) (concluding that the affiant's recantation of trial testimony "necessarily amounts to new evidence in the sense that the recantation was not before the jury that convicted" the defendant); *Cleveland v. Bradshaw*, 693 F.3d 626, 636 (6th Cir. 2012) (concluding that a recantation affidavit contained new evidence); *Teleguz v. Pearson*, 689 F.3d 322, 330–31 & n.5 (4th Cir. 2012) (characterizing recantations as "new evidence" in a *Schlup* analysis); *cf. Schlup*, 513 U.S. at 331 ("Schlup's evidence [of innocence] includ[ed] the sworn statements of several eyewitnesses that Schlup was not involved in the crime.").

Hearst and Jones testified at trial, including on cross-examination, they did not identify the fleeing gunman as Parnell; they withheld the perpetrator's true identity by committing perjury. Thus, Howell has new evidence of innocence.[13]

A. The affidavits presented by Howell are sufficiently reliable.

Although viewed with "great suspicion," *Landano v. Rafferty*, 856 F.2d 569, 572 (3d Cir. 1988), recantations can be reliable evidence to support a gateway showing of actual innocence. *See, e.g.*, *Hyman*, 927 F.3d at 661–62 (agreeing that a critical portion of the recantation testimony was credible); *Arnold*, 901 F.3d at 838–39 (remanding for an evidentiary hearing to determine a recantation's reliability); *Cleveland*, 693 F.3d at 638–40 (crediting a witness's recantation as sufficiently reliable); *Teleguz*, 689 F.3d at 331–32 (remanding for consideration of an actual-innocence claim based on new evidence, including recantation affidavits); *Bryant v. Thomas*, 274 F. Supp. 3d 166, 186–88 (S.D.N.Y. 2017) (ruling that the petitioner established a credible innocence claim based in part on eyewitness recantation), *aff'd*, 725 F. App'x 72, 73 (2d Cir. 2018).

Numerous factors may affect reliability, including: whether a recantation is corroborated; its plausibility; the witness's reason for previously giving untruthful

[13] Although it suffices that the recantations of trial testimony constitute new evidence, we note that Parnell's confession, too, qualifies as new evidence: that he would confess to the crime was not known by or available to Howell at trial. Indeed, as Howell stated in his memorandum in support of his habeas petition, he did not even know at trial that Parnell was in fact the perpetrator. *See* A31.

testimony; whether the recantation resulted from undue influence or bias that would provide a motive to lie now (such as bribery, coercion, intimidation, or a close relationship to the petitioner); and delay in presenting the recantation to a court. *See, e.g.*, *Hyman*, 927 F.3d at 660–61 (providing a non-exhaustive list of factors); *Reeves*, 897 F.3d at 161 ("[T]he court 'may consider how the timing of [the petitioner's] submission and the likely credibility of the [witnesses] bear on the probable reliability of that evidence,' as well as the circumstances surrounding the evidence and any supporting corroboration." (alteration in original) (quoting *House*, 547 U.S. at 537)); *Cleveland*, 693 F.3d at 638–40 (examining whether an affidavit was internally inconsistent and discussing motives); *Teleguz*, 689 F.3d at 331 (noting that courts should consider whether the recantation was the "result of coercion, bribery or misdealing" (quoting *Wolfe v. Johnson*, 565 F.3d 140, 169 (4th Cir. 2009)).

1. The recantations are corroborated, not contradicted by physical evidence, and not otherwise implausible.

Collectively, most of the Commonwealth's teenaged witnesses have recanted, including eyewitnesses who now incriminate the same man who confessed to the murder: Parnell. The recantations are corroborated in several ways, enhancing their reliability. The Hearst and Jones recantations corroborate each other: both assert that they saw Parnell fleeing the crime scene with a gun. A159–60. Moreover, this evidence is consistent with their trial testimony insofar

as they testified that upon hearing the gunshot, they went to the intersection and saw a fleeing gunman. A207–11. These affidavits are also consistent with trial testimony that Parnell was in the immediate vicinity of the murder, A217, meaning the recantations do not implausibly inculpate a man who could not have been there. Additionally, their recantations are consistent with Williams's affidavit insofar as they describe police pressure to testify. *See* A159 (Hearst); A160 (Jones); A161 (Williams relating that police told her if she "did not tell them something, they were going to charge" Parnell for Allen's murder). Of course, the recantations are also corroborated by Parnell's affidavit confessing that *he* shot Allen and averring that Howell is innocent. A166–67.

Further, the affidavits are not contradicted by physical evidence, which strengthens their reliability.

2. The witnesses gave convincing reasons for why they were untruthful at trial, and there is no evidence of undue influence.

A recanting witness's credibility can be bolstered when the witness provides a convincing reason why she lied at trial. *See Cleveland*, 693 F.3d at 639–40 (deeming it significant that, along with other indicia, the recanting witness stated he had lied at trial to protect his father—who had privately confessed to the crime—and out of fear of death threats from his father); *Fairman v. Anderson*, 188 F.3d 635, 646–47 (5th Cir. 1999) (observing that, to the district court's satisfaction, the witness "proffered a convincing reason for his recanting affidavit: the

prosecution coerced him to lie at Fairman's trial by threatening to charge him with murdering Jones").

Hearst and Jones gave convincing reasons for why they lied as teenagers: fear of Parnell and police pressure. Hearst explained, "I was scared of [Parnell] and his family," and "the police said if I did not show for court they would lock me up." A159. Jones gave similar reasons: she "was afraid to say it was" Parnell, and "detectives threatened to arrest [her] if [she] did not come to court and testify, so [she] came and lied." A160. Parnell himself acknowledged that he "made up a story" about Howell killing Allen "and had a couple of friends verify it." A162.

Fear of Parnell also explains why Hearst did not go to the police after the incident, *see* A223 (testifying she did not want to get involved), even though she knew Allen, A221, went to his home to notify his father about the shooting, A211, and cried when she delivered the news, *see* A266.

Williams's affidavit, too, provides a convincing motive for why she lied: "[T]he police told me if I did not tell them something, they were going to charge my baby's father (Kenneth Parnell) for robbing and killing Herbert Allen." A161.

Finally, the record does not support a finding that the recantations were the product of threats or bribery. *Cf. Wolfe*, 565 F.3d at 169 ("This record simply does not, however, suggest any such 'coercion, bribery, or misdealing.'" (quoting *United States v. Johnson*, 487 F.2d 1278, 1279 (4th Cir. 1973))).

Nor does the record otherwise support a finding of bias. The record does not show that the recanting witnesses had relationships with the long-incarcerated Howell when they recanted. In fact, no trial evidence established that Jones even knew Howell. *See* A355–56. As for Hearst, she told the police she had seen Howell "about twice before in the neighborhood," A219–20, and she testified at trial that she had met Howell only a month before Allen's murder, A213. Similarly, Williams testified she had met Howell only about two months before the murder. A256. *Cf. Cleveland*, 693 F.3d at 641 ("Although [affiant] has known [petitioner] since childhood because they grew up in the same neighborhood, there is no evidence of any close ties between the two individuals. Therefore, [the] affidavit does not have the same risk of bias as an affidavit made by close friends or relations of [petitioner].").

3. Howell did not unduly delay presenting the affidavits in court.

While a delay in presenting new evidence may detract from reliability, *see Reeves*, 897 F.3d at 161, that is not the case here. After Parnell executed his affidavit in July 1999, Howell filed it that same month in Pennsylvania's Superior Court, where his *pro se* appeal was pending from the dismissal of a PCRA petition. *See* A113–14. In September 1999, the Superior Court told Howell he should file a new PCRA petition based on Parnell's confession. *See id.* Howell did so in October 1999, but the petition was dismissed as untimely. *See* A114–15.

When Howell later received Williams's recantation affidavit, he had another *pro se* PCRA petition pending; after the Superior Court affirmed the dismissal of that petition in April 2011, Howell swiftly filed, just three weeks later, a new *pro se* PCRA matter based on Williams's affidavit. *See* ECF No. 34, p. 9 ¶¶ 22–24, 26–27 (reciting chronology). Subsequently, Howell's former post-conviction attorney (Gelman) supplemented that petition with the Hearst and Jones affidavits in September 2014—just a month after Howell received those affidavits in August 2014. *Id.* at 10 ¶ 30 (reciting chronology).[14] So, Howell has not unduly delayed presenting the affidavits to court in a way that would undermine their reliability.

B. The district court erroneously rejected the recantations as unreliable.

Despite the foregoing case-specific reliability considerations, the district court dismissed the recantations as unreliable. Deference is unwarranted because the court decided the gateway innocence matter without an evidentiary hearing. This Court has reviewed de novo the reliability of new evidence on a gateway innocence claim. *See Munchinski*, 694 F.3d at 337.

Although courts generally view recantations with great suspicion, the district court took that cautionary advice too far. No categorical bar forecloses reliance on

[14] That PCRA matter remained pending in the trial court for years with no decision until Howell withdrew it seven years after it was filed, in April 2018. *See* A143 (Rule 60 motion stating that on April 24, 2018, "counsel was able to extricate Howell from state PCRA proceedings").

recantation evidence. *See, e.g.*, *Fairman*, 188 F.3d at 646 ("While [a person's] status as a recanting witness detracts from the credibility of his new testimony, it is not a bar to the acceptance of such testimony." (citation omitted)); *Hyman*, 927 F.3d at 660–61 (noting that while courts should "look upon . . . recantation[s] 'with the utmost suspicion,'" courts are also not "preclude[d from] finding that [a] recantation is credible" (citation omitted)); *Arnold*, 901 F.3d at 839 (noting "there are reasons to treat recantations generally with a healthy dose of skepticism," but a recantation can "by itself exonerate [a petitioner] as a factual matter"). Instead, a holistic inquiry is warranted to assess credibility. *See Hyman*, 927 F.3d at 660–61.

The district court failed to perform a proper holistic assessment. It dismissed the reliability of Williams's affidavit, not because of case-specific factors undermining her credibility, but instead on the basis that "[c]ourts have historically viewed recantation testimony with great suspicion." A122; *see also* A4. As for the Hearst and Jones affidavits, the district court again defaulted to what appeared to be a categorical sentiment of distrust, declaring that "they, like the 2009 Williams affidavit, are nothing more than highly suspect recantation evidence." A6.

The district court added that the timing of the Hearst and Jones affidavits made them "even less credible" than Williams's affidavit because they were "authored mere days after the Court's July 17, 2014" order denying Howell's

previous Rule 60 motion, and "yet, Howell took no action for approximately four years." *Id.* But the court was mistaken. As noted, just a month after Howell received those affidavits, he had counsel filed them in a then-pending *pro se* PCRA matter. *See* ECF No. 34, p. 10, ¶ 30 (Rule 60(b) motion reciting procedural history). Moreover, Howell should not be faulted for not filing the Hearst and Jones affidavits in the district court at that time; after all, the district court had just informed Howell, in denying Rule 60(b)(6) relief (pre-*Satterfield*), that he had "not established a basis to depart from [the] consensus" view against allowing Rule 60(b)(6) relief based on *McQuiggin*'s change in law. A121.

That a witness recants many years after trial does not automatically render the recantation unreliable. Here, the recanting witnesses were only 16 to 18 years old at trial, and it is certainly plausible that, as mature adults, they reflected on having given false testimony in their youth against an innocent man and wanted to rectify that injustice. *Cf. Bryant*, 274 F. Supp. 3d at 187 (crediting a recantation affidavit submitted decades later by a witness who was a minor when testifying).

The district court also seemed to fault the Hearst and Jones affidavits for being "nearly identical." A6. But, of course, they were eyewitnesses to the same event, at the same location.

* * *

In conclusion, this Court should accept the affidavits as sufficiently reliable to proceed to the next step in the gateway inquiry (see part II below).

But if the Court concludes that affiant credibility requires further assessment, it would be appropriate to remand for a hearing where the affiants can be evaluated. *See Arnold*, 901 F.3d at 838 (remanding for evidentiary hearing on recanting witness credibility); *cf. Teleguz*, 689 F.3d at 331–32 (noting that because "[t]his type of credibility determination, required for *Schlup* analysis, may be more difficult on a cold record," "an evidentiary hearing may be necessary to assess whether recantations are credible, or whether 'the circumstances surrounding the recantation[s] suggest [that they are] the result of coercion, bribery or misdealing'" (citation omitted)). After all, Howell's trial boiled down to credibility. The affiants' eyewitness testimony destroys the Commonwealth's theory of the case—they exonerate Howell by inculpating another man for the murder. Under these circumstances, where most of the witnesses who incriminated Howell have recanted and incriminated a man who has confessed, it would be a miscarriage of justice to close the innocence gateway without an evidentiary hearing.

A hearing would also allow a chance to hear from Parnell when he undoubtedly has something at stake. The district court deemed Parnell's confession unreliable because, while sentenced to life, he had "nothing to lose by confessing." A6. But now Parnell does have something to lose by reaffirming his

confession. Because he was a minor when he committed the murder that landed him in jail, he fought the constitutionality of his life sentence. *See Parnell v. Lamas*, No. 13-3276, 2013 WL 5519559, at *1 (E.D. Pa. Sept. 30, 2013). As the Rule 60(b)(6) motion states, on October 17, 2017, Parnell was resentenced to a term of 33 years to life. A146. Public records reveal he was released on September 6, 2019, after the district court ruled below, and is on parole. *See* Parolee Search Results for "Kenneth Parnell," Pa. Dep't of Corr., http://inmatelocator.cor.pa.gov/#/ParoleeSearchResults (last visited Jan. 30, 2020).

II. Considering all the evidence, including new evidence, it is likely that any reasonable juror would have reasonable doubt about Howell's guilt.

A petitioner satisfies the final step of the gateway innocence standard by showing that, "more likely than not, in light of the new evidence, no reasonable juror would find him guilty beyond a reasonable doubt," i.e., that "any reasonable juror would have reasonable doubt." *House*, 547 U.S. at 538. Courts have highlighted several facets of this inquiry.

First, the inquiry requires "a probabilistic determination about what reasonable, properly instructed jurors would do," "presum[ing] that a reasonable juror would consider fairly all of the evidence presented" and "obey the instructions of the trial court requiring proof beyond a reasonable doubt." *Schlup*, 513 U.S. at 329. "The court's function is not to make an independent factual

determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538.

Second, "the inquiry requires the federal court to assess how reasonable jurors would react to the overall, newly supplemented record." *Id*. Thus, a court considers "'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.* (quoting *Schlup*, 513 U.S. at 327–28). "If new evidence so requires, this may include consideration of 'the credibility of the witnesses presented at trial.'" *Id.* at 538–39 (quoting *Schlup*, 513 U.S. at 330).

Third, while this standard is "demanding," it is not so demanding that it "require[s] absolute certainty about the petitioner's guilt or innocence." *Id.* at 538. For example, new reliable evidence that points to a different perpetrator may tip the scales toward finding actual innocence. *See id.* at 554 (explaining that central evidence had "been called into question, and House ha[d] put forward substantial evidence pointing to a different suspect"); *Reeves*, 897 F.3d at 161 ("[N]ew, reliable evidence that undermine[s] the [trial] evidence pointing to the identity of the [perpetrator] and the motive for the [crime] can suffice to show actual innocence." (internal quotation marks omitted)).

Moreover, this evidence need not be so compelling as to rule out evidence of guilt; *Schlup*'s actual-innocence standard does not equate to establishing

insufficient evidence to sustain a verdict. *Hyman*, 927 F.3d at 658. For example, the successful petitioner in *House* did not establish "a case of conclusive exoneration," as some evidence still "support[ed] an inference of guilt." *House*, 547 U.S. at 553–54. But it was more likely than not that any "reasonable juror viewing the record as a whole" would have reasonable doubt. *Id.*

Here, after weighing all of the evidence, old and new, any reasonable juror would have reasonable doubt about Howell's guilt.

A. The affidavits severely undermine the Commonwealth's case.

Because detectives evidently found no murder weapon, recovered no stolen property, and discovered no forensic or crime-scene evidence tying Howell to the crime, the Commonwealth had to rely on the teenagers' testimony. From their testimony, the Commonwealth built a case that Howell shot Allen, stole Allen's ring, and fled on foot westward down Huntingdon Street with the gun in his hand. But the affidavits that Howell has received since the trial destroy the Commonwealth's theory of the case. They incriminate Parnell as the perpetrator.

1. Karla Hearst and Cheryl Jones

As noted, Hearst and Jones testified at trial that they saw the gunman fleeing as they stood at the corner of Sartain and Huntingdon, less than a block from where Allen's body lay on Huntingdon. Hearst testified that the fleeing gunman was Howell, and Jones provided a corroborating description.

Their recantations do more than erase this critical testimony against Howell—they *exonerate* Howell by incriminating someone else altogether, i.e., by identifying the fleeing gunman as Parnell. *See Hyman*, 927 F.3d at 665 (highlighting how a recantation identifying another person as the perpetrator is more compelling than a simple withdrawal of testimony "because it is more likely than not that an accused did not commit a crime if someone else in fact did"). Given their explanations about why they lied—they feared Parnell, and the police threatened to arrest them if they did not go to court—the prosecutor would not have been able to assert, as he did in closing, no motive to lie. A362 ("What motive did Karla Hearst have for lying? There isn't any presented to you.").

2. Arlene Williams

Williams testified she met Howell only "[a]bout two months" before the shooting and did not know his address. A256, A259. Nevertheless, she offered eyebrow-raising testimony: a spontaneous confession by Howell at her house on Christmas morning, complete with a show-and-tell. A257–58. She testified that Howell showed her the gun, which she said was a .22 caliber pistol. A257, A260–61. And she testified that when she asked Howell if "he g[ot] anything off" Allen, Howell told her "just a ring" and showed her a "Mason" ring. A257–58, A261–62. When cross-examined about what the ring looked like, she could not recall, not even its color. A261. Yet her ring story was used to secure the robbery conviction

and thus the felony-murder conviction. *See* A364 (prosecutor's closing: "He took the ring, the only thing [Allen] had of value, other than the Christmas toys.").

In her recantation affidavit, however, Williams declares that the story was a fabrication. Howell never visited her on Christmas morning; he never confessed; and he never showed her a gun or a ring. Williams's recantation thus erases significant testimony used to implicate Howell. Williams explains that she lied because the police told her they would otherwise charge Parnell, the father of her baby. A161. In other words, her testimony was self-serving. *See Munchinski*, 694 F.3d at 336–37 (finding for the petitioner on his gateway innocence claim and discussing the importance of withheld evidence showing that police had an alternative suspect, where one of the Commonwealth's trial witnesses was the alternate suspect's ex-wife, and she and two of her acquaintances testified that the petitioner confessed to the murder—making their testimony "self-serving"). This also undermines the prosecutor's jury argument that Williams had no motive to lie. A365 ("Why would she come in here and lie if he didn't say that? Was it ever demonstrated to you any motive whatsoever for her lying?").

3. Darryl Workman

A reasonable juror crediting Jones's and Hearst's recantations would find that Workman was lying at trial. After all, he testified that *Howell* was the one with a gun who fled west on Huntingdon after the shooting. *See* A227–28.

Jurors already would have had reasons to dismiss Workman's credibility. When he testified against Howell, Workman was facing prosecution in a criminal case, A235–36, so he had a motive to curry favor with the prosecution. Moreover, he admitted lying to authorities. When he was originally interviewed by police, he told them: (1) he was walking alone when he heard the gunshot; (2) he was heading west; and (3) he did not know who shot Allen. *See* A237–38, A250. But Workman's story then changed in all three respects. A237–38, A251. Confronted with these discrepancies on cross-examination at trial, Workman said he lied when he initially spoke to the police. A237.

Additional inconsistencies plagued Workman's account. One concerned him purportedly witnessing Howell rob Allen. In Workman's police statement and at the suppression hearing, he said that after Allen fell to the ground, Howell went into Allen's pockets. A256, A181–82. Unsurprisingly, in a case charging felony murder based on robbery, the prosecutor's opening statement focused on this "pockets" story, telling the jury it would hear that Howell "rifled [Allen's] pockets[,] completing what he started." A190. On direct examination, Workman repeated his tale that Howell "went in [Allen's] pockets." A227, A231. But on cross-examination, he admitted that his view of Allen's prone body—and thus Allen's pockets—would have been blocked by two cars. A244–46. After all, Allen lay face down between two parked cars. A193. So Workman backtracked:

he did not see Howell doing anything to Allen—as he could not see Howell's hands or arms—but instead only saw Howell bending over Allen. A246–47.

Moreover, on direct examination, Workman failed to mention a ring, even when testifying that shortly after the shooting, he and Parnell encountered Howell and discussed the incident. *See* A228. Yet during *redirect*, Workman *added* that during that very encounter, Howell showed them a "ring that he took off the man" and said it was a "Mason ring." A248. Workman admitted on cross-examination that he did not tell that to the police. A253–54. Nor did Workman mention a ring when testifying at the suppression hearing. A254–55.

Workman also testified at trial that Howell showed him a gun. A228, A248. But on cross-examination, Workman admitted that when he spoke to police, he told them he never saw a gun. A238.

Unlike Hearst, Jones, and Williams, Workman cannot recant. About two years after Howell's trial, one of Parnell's friends evidently murdered Workman to prevent him from testifying against Parnell in a different murder case set for trial in 1985. *See State v. Lumumba*, 601 A.2d 1178, 1179, 1185 (N.J. Super. Ct. 1992) (reviewing a conviction for Workman's murder). Parnell was ultimately convicted for that murder, which involved shooting a man in the chest while burglarizing that man's home. *Parnell*, 2013 WL 5519559, at *1. Parnell committed that murder less than eight months *before* Allen was murdered by a shot to the chest. *See id.*

4. Warren Wright

Wright testified on rebuttal that, outside a Christmas Eve party, Howell purportedly asked him if police were still around and said, "I just got a dead body." A348. A reasonable juror would probably find it difficult to place much weight on this account. Wright did not testify to having any relationship with Howell; he had only seen Howell "around the neighborhood." A347. But Wright indicated he knew Parnell, A351, as well as Williams, A349.

5. Parnell's confession

Although Parnell did not testify at trial and Howell can satisfy *Schlup*'s actual-innocence standard without his confession, Parnell's confession should not be ignored. Upon considering eyewitness evidence that Parnell was the fleeing gunman and upon hearing that witnesses were covering for Parnell, reasonable jurors would not reject out of hand the confession of man who had committed another murder during a burglary less than eight months before Allen's murder. And Parnell provided his motive: he was trying to collect drug money from Allen but "things got ugly." A162, A163.[15] Motive is certainly important when the perpetrator's identity is in question. *See House*, 547 U.S. at 540 ("From beginning to end the case is about who committed the crime. When identity is in question, motive is key."). So, regardless of the perceived reliability of Parnell's confession

[15] Allen lived within two blocks of him. A185–86, A265 (addresses).

when it stood against a wall of eyewitness trial testimony, that wall has now crumbled, with multiple eyewitnesses (Hearst and Jones) declaring that the fleeing gunman was *Parnell*.

B. Reasonable jurors would not ignore inconsistencies in the testimony of the Commonwealth's witnesses.

Although some of the teenaged witnesses generally agreed on a core story to incriminate Howell, "the contradictions in the State's case [would] give [a reasonable juror] pause." *See Branch v. Sweeney*, 758 F.3d 226, 239–40 (3d Cir. 2014) (observing that even though the State's witnesses had "the opportunity to harmonize their testimony" in pinning the murder on the defendant, their testimony "was plagued by serious contradictions").

For example, although the prosecution harped on consistent testimony about the color of Howell's jacket, witnesses were inconsistent about the color of other clothing. Hearst testified Howell was wearing a "blue or black hat," A213, but Workman testified that Howell was wearing a "beige hat," A235. Jones testified the gunman was wearing black-and-white Adidas sneakers, A354, but Workman thought Howell was wearing "brown sneakers," A235. Adding to the inconsistency, Parnell testified at the preliminary hearing that Howell was wearing beige Rustler boots. A399. He also testified that Howell was wearing blue jeans, *id.*, while Workman testified at trial that Howell's pants were brown. A235.

Moreover, Hearst and Jones inconsistently described the behavior of the fleeing gunman. At trial, Hearst related that Howell ran by her with a gun in his hand and that they locked eyes "as he r[a]n by." A209, A211. Jones, by contrast, testified that the man "stopped at the corner of Sartain and Huntingdon with a gun in his hand." A354. At the suppression hearing, Jones estimated she stared at the stopped man for "thirty seconds" and described how "he pointed the gun toward all of us like he was going to shoot one of us." A178–79.

Howell's jury was not privy to another inconsistency: what was purportedly stolen from Allen. The Commonwealth's sole preliminary-hearing witness, Parnell, was asked at that hearing if he saw Howell take anything from Allen's pockets, and Parnell answered "[a] wallet and a watch." A389. But no such property was ever mentioned at trial. Workman never mentioned a wallet or watch at trial. And, again, Workman—who testified that he was standing "right beside" Parnell during the crime—admitted on cross-examination that parked cars blocked the view of Howell's hands and arms. A244–47. Moreover, Williams testified that she asked Howell if "he g[ot] anything off" Allen, and Howell told her "just a ring." A257. Again, no mention of a wallet or watch.

C. Other evidence weighs in Howell's favor.

Again, the Commonwealth's forensic testing favored Howell, namely the testing of his clothing for gunpowder residue and blood. And there is the alibi.

* * *

For these reasons, based on a consideration of all the evidence, Howell has credibly established his actual innocence under the governing *Schlup* standard.

III. The equitable circumstances, viewed in their totality, favor relief, but because the district court did not proceed to consider equitable circumstances, the matter should be remanded.

This Court in *Satterfield* "fail[ed] to see a set of circumstances under which [*McQuiggin*'s] change in law, paired with a petitioner's adequate showing of actual innocence, would not be sufficient to support Rule 60(b)(6) relief." 872 F.3d at 163. "Put another way, a proper demonstration of actual innocence by [petitioner] should permit Rule 60(b)(6) relief unless the totality of equitable circumstances ultimately weigh heavily in the other direction." *Id.*

This Court also observed that "the weighing of the equitable factors . . . belongs to the District Court in the first instance." *Id.* at 164. Here, the district court rejected Howell's motion on a threshold ruling that he could not pass through the actual-innocence gateway, so the court did not proceed to analyze equitable circumstances. That threshold ruling was incorrect, for the reasons above. It would therefore be appropriate to remand so the district court could "take the first pass at weighing the equitable factors." *Id.* at 162.

While the district court can conduct that analysis on remand, we note two points favoring Howell. First, Howell has been diligently pursuing his innocence

for decades, mostly *pro se*. *See* II.A.3, *supra* (discussing his presenting the affidavits in state court).[16]

Second, Howell's habeas petition raised serious claims about the fairness of his trial, including that the denial of his trial counsel's motion for a continuance violated due process. A12; *see also* A404–12 (continuance motion).[17] This was a potential death-penalty case, and Howell's family was concerned because appointed counsel evidently had not tried a homicide case. A406–07 ¶¶ 2, 4–5. It took the family months to scrape together enough money to retain private counsel, Clark, who replaced appointed counsel. A407 ¶¶ 5–6; A413 (withdrawal). Clark's continuance motion explained why a continuance was needed: he had only had 11 days to prepare for Howell's murder trial, which would not be enough time to conduct an investigation, interview prosecution witnesses, secure defense witnesses, and perform other required tasks. A404; A409–11 ¶¶ 19–24. Clark also revealed that in the intervening period he was "attached" by two judges to proceed with a robbery jury trial and a drunk-driving waiver trial. A408 ¶ 15. He averred

[16] Howell filed his habeas petition less than a year after his unsuccessful PCRA matter on Parnell's affidavit concluded. *See* A114–15. Howell filed his first *pro se* Rule 60(b)(6) motion (relying on *McQuiggin*) within a year after *McQuiggin* (ECF No. 34), and he filed his second *pro se* Rule 60(b)(6) motion (which also invoked *Satterfield*) less than six months after *Satterfield* (ECF No. 38).

[17] The denial of a continuance may violate due process, *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), and the touchstone in this due process analysis is arbitrariness. *See United States v. McGavitt*, 532 F. App'x 295, 299 (3d Cir. 2013).

that any prior delay in proceedings was not caused by Howell. A404. He stated that the DA's office did not offer a reason why it would be improper or prejudicial to allow a reasonable amount of time for a continuance. A410 ¶ 22.

Howell's habeas petition also took issue with the jury instructions on felony murder and robbery. A64. This is significant because the felony-murder conviction was based on robbery, and the robbery conviction was based on a theory that Howell stole Allen's ring—a ring that detectives evidently never recovered.[18] The robbery instruction did not say the Commonwealth had to prove guilt beyond a reasonable doubt. A376–377. The problem was exacerbated by the trial judge instructing, twice, that in a "homicide *case*"—not simply for a homicide *offense*—the beyond-reasonable-doubt burden attached to "*only* three essential elements. That a death occurred; two, that the death resulted from a criminal agency; and three, that the defendant is legally responsible for the death." *See* A378–79 (emphasis added); *see also* A380–81.[19] A reasonable juror listening to

[18] Jurors easily would have had doubt. As noted, Arlene Williams testified that Howell showed her a ring, but when pressed, she could not recall what it looked like or even its color. And although Darryl Workman (with his various credibility problems) testified on redirect that Howell showed him a ring and said it was a Mason ring, Workman admitted on cross-examination that he did not tell this to the police or mention it at the suppression hearing (nor did he mention it on direct examination when describing his purported post-shooting encounter with Howell).

[19] To be sure, the judge instructed that "to find a defendant guilty of murder in the second degree, you must find that the Commonwealth has established beyond a

these instructions in this "homicide case" would be forgiven for thinking that the reasonable-doubt standard did not apply to the underlying charged felony (robbery), particularly when the robbery charge omitted the reasonable-doubt standard. This was not cured by general instructions on reasonable doubt.[20]

Of course, the point here is not to litigate the merits; Howell's claims were never adjudicated on the merits because his petition was dismissed on a procedural ruling, and he is not entitled to a merits review unless he first passes through the actual-innocence gateway. Rather, the point is simply that he has a strong equitable case for Rule 60(b)(6) relief based on his showing of actual innocence, and "the totality of equitable circumstances" do not "weigh heavily in the other direction." *Satterfield*, 872 F.3d at 163. The district court can assess equitable circumstances on remand.

---

reasonable doubt that the defendant caused the death of another person and that the *killing occurred while* the defendant was engaged in the commission of a felony." A372 (emphasis added). But again, the robbery charge itself omitted the reasonable-doubt standard, so the jury could have had reasonable doubt that Howell robbed Allen while finding beyond a reasonable doubt that he was responsible for the killing.

[20] *See Francis v. Franklin*, 471 U.S. 307, 320 (1985) ("[G]eneral instructions as to the prosecution's burden and the defendant's presumption of innocence do not [necessarily] dissipate the error in the challenged portion of the instructions.").

* * *

"[C]oncern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325. This case epitomizes that very concern. Given that concern and the extraordinary nature of this case, the district court prematurely rejected Howell's Rule 60(b)(6) motion.

CONCLUSION

The district court's order denying Howell's Rule 60(b)(6) motion should be vacated, and the case should be remanded for further proceedings.

Dated: February 3, 2020

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, Sean E. Andrussier, hereby certify:

1. Pursuant to Local Rule 46.1, that Sean E. Andrussier is a member in good standing of the bar for the United States Court of Appeals for the Third Circuit.

2. That this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,500 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. That this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Office Word 2016 in 14-point Times New Roman font.

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Dated: February 3, 2020

s/ Sean E. Andrussier
Counsel for Appellant

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the Brief of Appellant was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 3, 2020

s/ Sean E. Andrussier
Counsel for Appellant

RECORD NO. 19-1780

In The
United States Court of Appeals
For The Third Circuit

GERALD HOWELL,

***Appellant*,**

v.

SUPERINTENDENT ALBION SCI; ATTORNEY GENERAL PENNSYLVANIA,

***Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF APPELLANT AND APPENDIX
VOLUME I OF III
(Pages 1 – 8)

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Appendix Page

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

GERALD HOWELL : CIVIL No. 05-2843
:
V. :
:
MARILYN S. BROOKS, SUPT., :

NOTICE OF APPEAL

Notice is hereby given that Gerald Howell, is appealing to the United States Court of Appeals For The Third Circuit, from the judgment by Juan R. Sanchez, J., fro the Order of a 60(b)(6) Motion, entered in this Action on the 13 day of March of 2019.

Gerald Howell

Gerald Howell, AY3285
SCI Benner Twp.
301 Institution Dr.
Bellefonte, PA 16823

March 31, 2019

Mr. Harold Howell, AY3285
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GERALD HOWELL : CIVIL ACTION

v. : No. 05-2843

MARILYN S. BROOKS, *SUPERINTENDENT OF THE STATE CORRECTIONAL INSTITUTION AT ALBION, PENNSYLVANIA*, et al. :

ORDER

AND NOW, this 13th day of March, 2019, it is ORDERED Petitioner Gerald Howell's Amended Motion for Relief from Judgment Pursuant to Rule 60(b) (Document 38) is DENIED.[1]

[1] Petitioner Gerald Howell is a Pennsylvania state prisoner seeking relief from the Court's August 7, 2006, Order adopting the Report and Recommendation of United States Magistrate Judge Arnold C. Rapoport and dismissing his 28 U.S.C. § 2254 habeas corpus petition as untimely. Howell was convicted in October 1983 for his involvement in the robbery and shooting of Herbert Allen. On December 24, 1982, Howell, along with Kenneth Parnell and Darryl Workman, approached Allen while he was standing by his car. Howell told Parnell and Workman that he was "going to get [Allen]." Parnell and Workman refused to participate and kept walking. Howell wrestled Allen, shot him in the chest, and searched his pockets once he had died. At trial, a jury in the Court of Common Pleas of Philadelphia County convicted Howell of second-degree murder, robbery, and possessing instruments of a crime.

Following his convictions, Howell sought habeas relief in Pennsylvania state court pursuant to Pennsylvania's Post-Conviction Hearing Act and Post-Conviction Relief Act. In June 2005, after failing to receive relief in state court, he filed a petition seeking habeas relief in federal court. On August 7, 2006, the Court dismissed his petition as untimely.

On May 19, 2014, Howell filed his first pro se motion pursuant to Federal Rule of Civil Procedure 60(b)(6) seeking relief from the Court's August 7, 2006, Order, asserting the United States Supreme Court decision in *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013), constituted an "extraordinary circumstance" warranting relief. In *McQuiggin*, the Supreme Court held that "actual innocence," if proved, permits a court to consider the merits of an otherwise time-barred habeas petition. To show actual innocence, a petitioner must demonstrate that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Schlup v. Delo*, 513 U.S. 298, 329 (1995). Howell asserted he could prove actual innocence through a 1999 affidavit and letters authored by Kenneth Parnell confessing to Allen's murder—which were authored while he and Howell were incarcerated together at State Correctional Institution at Dallas, Pennsylvania—and a 2009 affidavit from Arlene Williams—the mother of Parnell's child—recanting her trial testimony against Howell and her original statement to the police.

On July 17, 2014, the Court denied Howell's motion finding (1) the intervening change in law in *McQuiggin* did not constitute an extraordinary circumstance justifying relief under Rule 60(b)(6); and (2) even if *McQuiggin* did constitute an extraordinary circumstance, relief was not warranted under the actual innocence standard. Specifically, the Court found that the 1999 affidavit and letters from Parnell and 2009 Williams affidavit did not create a credible showing of actual innocence. The Court determined Parnell's confession was unreliable as he authored the 1999 affidavit and letters while he was serving a life sentence without the possibility of parole for first-degree murder he committed as a juvenile in an unrelated matter and had nothing to lose by confessing to Allen's murder. The Court further found that the general suspicion of recantation testimony rendered Williams's 2009 affidavit unreliable. Howell subsequently applied to the Third Circuit Court of Appeals for a certificate of appealability, but the Third Circuit denied the application.

On March 15, 2018, Howell filed a second pro se motion pursuant to Rule 60(b)(6). On May 24, 2018, the Court granted Howell leave to amend his second Rule 60(b)(6) motion because he had recently retained counsel. On July 9, 2018, Howell filed the instant amended Rule 60(b)(6) motion through counsel. In the instant motion, Howell again argues he is entitled to relief from the Court's August 7, 2006, Order based on *McQuiggin*. Howell contends that circumstances surrounding his original argument have changed in light of *Satterfield v. District Attorney of Philadelphia*, 872 F.3d 152 (3d Cir. 2017), which held "[w]henever a petitioner bases a Rule 60(b)(6) motion on a change in decisional law, the court should evaluate the nature of the change along with all of the equitable circumstances . . . ," and *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), which made the unconstitutionality of mandatory life without parole sentences for juvenile offenders announced in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), fully retroactive.

Howell argues that *Satterfield* entitles him to relief because it held *McQuiggin* could constitute an extraordinary circumstance justifying relief under Rule 60(b)(6) and requires a Court to consider all equitable factors surrounding a petitioner's claim. He further contends that *Montgomery* moots the Court's rationale in its July 17, 2014, Order regarding its actual innocence analysis because Parnell could now be considered a credible witness as he has "in all probability" been released from custody pursuant to *Montgomery*. Am. Mot. 19. Howell also appears to assert that trial counsel was ineffective for failing to object to the state court's alibi instruction and another extraordinary circumstance exists based on three witnesses allegedly committing perjury during the trial.

In support of his motion, Howell again puts forth the 1999 Parnell affidavit and letters and 2009 Williams affidavit. In addition, Howell has attached two nearly identical affidavits authored by Karla Hearst and Cheryl Jones in July 2014, who now allegedly also wish to recant their previous statements to the police and testimony at Howell's trial identifying Howell as the person they saw holding a gun on the night of Allen's murder.

When a Rule 60(b) motion is filed in a habeas case, the district court "must initially determine whether the motion is actually a "second or successive" habeas petition within the meaning of 28 U.S.C. § 2244(b). *Gonzalez v. Crosby*, 545 U.S. 524, 529-30 (2005). If the motion advances "a basis for relief from a state court's judgment of conviction," however, it is considered a "claim" under § 2244(b) and should be treated like a second or successive petition. *Id.* at 531-32. A district court lacks jurisdiction to review a second or successive habeas petition unless and until the petitioner first seeks and receives approval to file the petition from the Court of Appeals. *See* 28 U.S.C. § 2244(b)(3)(A); *Robinson v. Johnson*, 313 F.2d 128, 139-40 (3d Cir. 2002).

At the outset, the Court may not consider Howell's claim that trial counsel was ineffective for failing to object to the state court's alibi instruction because it is considered a "claim." *See, e.g.*, *Davenport v. Brooks*, No. 06-5070, 2014 WL 1413943, at *3-4 (E.D. Pa. Apr. 14, 2014) (refusing to consider a claim of ineffective assistance of counsel raised in a Rule 60(b) motion as it was a successive petition). Thus, because the Third Circuit has not authorized him to file a second or successive petition, the Court lacks jurisdiction to review Howell's ineffective assistance of counsel claim.

Next, the Court must consider whether his Rule 60(b)(6) motion is timely. Pursuant to Rule 60(c), "[a] motion under Rule 60(b) must be made within a reasonable time. For motions pursuant to Rule 60(b)(6)—the "catchall" provision—the Third Circuit has stated that motions filed more than a year after final judgment are untimely unless "extraordinary circumstances" excuse the party's failure to proceed sooner. *See Gordon v. Monoson*, 239 F. App'x 710, 713 (3d Cir. 2007).

In this instance, the Court lacks jurisdiction to hear Howell's claim that the perjury of Williams, Hearst, and Jones constitutes a basis for relief pursuant to Rule 60(b)(6). As noted in Howell's motion, at the latest, Howell learned of the alleged perjury of all three witnesses in 2014. However, Howell has provided no explanation as to why he waited until 2018 to raise this argument. Therefore, the Court lacks jurisdiction to review this claim. *See Franks v. Gloucester Cty. Prosecutors Office*, 738 F. App'x 79, 81 (3d Cir. 2018) (affirming the denial of prisoner's Rule 60(b)(6) motion as untimely where he provided no reasonable explanation as to the delay).

Nevertheless, the Court has jurisdiction to consider Howell's motion insofar as it argues he is entitled to relief from the Court's finding that his habeas petition was time barred because he seeks relief from an allegedly incorrect procedural ruling. *See Gonzalez*, 545 U.S. at 532 (2005). Furthermore, because Howell brought his motion within one year of the *Satterfield* decision and contends it is a basis for relief, his Rule 60(b)(6) motion is timely. *See* Fed. R. Civ. P. 60(c); *Burton v. Horn*, No. 09-2435, 2018 WL 5264336, at *3 (E.D. Pa. Oct. 22, 2018) (finding Rule 60(b)(6) motion brought 78 days after the *Satterfield* decision to be timely).

Rule 60(b)(6) permits the court to relieve a party from a "final judgment, order, or proceeding" for "any . . . reason that justifies relief." To obtain relief under Rule 60(b)(6), a movant must establish "extraordinary circumstances" that justify setting aside the judgment. *See Gonzalez*, 545 U.S. at 536. In *Satterfield*, the Third Circuit considered whether "*McQuiggin* may properly serve as the basis of a Rule 60(b)(6) motion." 872 F.3d at 159-60. The Third Circuit determined:

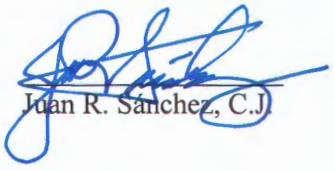
> [t]he change in law brought about by *McQuiggin* will only permit [the petitioner] to overcome his time-barred petition if he can make a *credible showing of actual innocence*—a burdensome task that requires a petitioner to 'persuade[] the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'

Id. at 163 (quoting *McQuiggin*, 133 S. Ct. at 1928) (emphasis added). Thus, *Satterfield* clarified that an extraordinary circumstance can exist based on *McQuiggin only* if there is a credible showing of actual innocence to justify relief, and once this threshold is met, the court may then consider equitable factors to determine if *McQuiggin* should apply. *Id.* at 163-64.

The Third Circuit's decision in *Satterfield* is unavailing here because Howell still cannot make a credible showing of actual innocence. At the outset, as this Court has held, and the Third Circuit has affirmed, the 1999 Parnell affidavit and letters and 2009 Williams affidavit do not

To the extent it applies, there is no ground to issue a certificate of appealability because Howell has failed to make a substantial showing of the denial of a constitutional right.

BY THE COURT:



Juan R. Sánchez, C.J.

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create a threshold showing of actual innocence because Parnell's confession was unreliable as he authored it while he was serving a life sentence without a possibility of parole and had nothing to lose by confessing, and the suspect nature of Williams's recantation affidavit. *See* Order, July 17, 2014, ECF No. 27; Order of USCA, June 8, 2015, ECF No. 33; Memorandum and Order, Aug. 7, 2006, ECF No. 19; Order of USCA, Mar. 3, 2007, ECF No. 23.

Howell's argument that Parnell's possible release pursuant to *Montgomery* bolsters the credibility of his admissions is misguided. The mere fact that *Montgomery*—a case decided seventeen years after Parnell authored the 1999 affidavit and letters—may entitle *Parnell* to relief from incarceration does not change the fact that, at the time he authored the allegedly exculpatory documents, he was serving a life sentence without the possibility of parole, with nothing to lose by confessing to another murder, while he and Howell were incarcerated at the same correctional facility. What is more, Howell has not provided any evidence that Parnell actually received relief pursuant to *Montgomery*. Even if Parnell has obtained relief, Howell has not provided an updated affidavit or correspondence from Parnell reaffirming his admission of guilt. Therefore, the decision in *Montgomery* does not affect the Court's previous finding that Parnell's confession is unreliable.

Moreover, the 2014 Hearst and Jones affidavits do not lend further support to his assertion of actual innocence as they, like the 2009 Williams affidavit, are nothing more than highly suspect recantation evidence. *See Sistrunk v. Rozum*, 674 F.3d 181, 191 (3d Cir. 2012) (collecting cases that state recantation evidence is viewed with "great suspicion"). The timing of the 2014 Hearst and Jones affidavits makes them even less credible. The nearly identical affidavits were authored mere days after the Court's July 17, 2014, Order denying Howell's first Rule 60(b) motion, yet, Howell took no action for approximately four years. Consequently, the additional 2014 Hearst and Jones affidavits do not provide any additional support for Howell's claim of actual innocence.

Because Howell fails to meet the threshold requirement of making a credible showing of actual innocence, the Court need not further analyze his claim. Accordingly, Howell's amended Rule 60(b)(6) motion is denied.

DLD-262 August 22, 2019

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. **19-1780**

GERALD HOWELL, Appellant

VS.

SUPERINTENDENT ALBION SCI; ET AL.

(E.D. Pa. Civ. No. 05-cv-02843)

Present: JORDAN, GREENAWAY, JR. and NYGAARD, Circuit Judges

Submitted is Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1)

in the above-captioned case.

Respectfully,

Clerk

ORDER

The foregoing application for a certificate of appealability is granted. To the extent Appellant's motion filed pursuant to Fed. R. Civ. P. 60(b) challenged the District Court's denial of habeas relief on procedural grounds, the motion was properly considered as a Rule 60(b) motion. See Gonzalez v.Crosby, 545 U.S. 524, 532 n.4, 533 (2005). We are satisfied that Appellant "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); see Slack v. McDaniel, 529 U.S. 473, 484 (2000). Specifically, we conclude that jurists of reason could debate whether Howell has made a sufficient showing of innocence to be entitled to relief based on the Supreme Court's decision in McQuiggin v. Perkins, 569 U.S. 383 (2013), and, therefore, whether the District Court was correct in its procedural ruling. See Satterfield v. Dist. Attorney Phila., 872 F.3d 152, 163-64 (3d Cir. 2017). To the extent Appellant's Rule 60(b) motion sought to raise a new claim, reasonable jurists would not debate that the motion was a (continued)

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second or successive habeas petition, which the District Court could not consider without prior authorization from this Court pursuant to 28 U.S.C. § 2244(b)(3)(A). Gonzalez, 545 U.S. at 531-32.

By the Court,

s/ Richard L. Nygaard
Circuit Judge

Dated: September 18, 2019
SLC/cc: Gerald Howell
Sean E. Andrussier, Esq.
Max C. Kaufman, Esq.