**IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| **CHANNEN RAY OZELL SMITH,** | ) | |
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| Petitioner, | ) | |
| | ) | |
| **v.** | ) | **Case No. 24-CV-0077-SEH-MTS** |
| | ) | |
| **MARGARET GREEN, Warden,** | ) | |
| | ) | |
| Respondent. | ) | |

**RESPONDENT'S MOTION TO RECONSIDER PETITIONER'S ACTUAL INNOCENCE CLAIM**

Respondent, by and through the Attorney General of the State of Oklahoma, Gentner F. Drummond, respectfully moves this Court to reconsider its previous finding of actual innocence. (Doc. 23). For the reasons set forth herein, this Court should reconsider its previous analysis, deny that claim either on the papers submitted or after an evidentiary hearing, and dismiss the petition as untimely.

Principally, Petitioner should not have been found actually innocent based upon affidavits alone. At most, this Court should have called an evidentiary hearing, and Respondent's investigation since illustrates why. After this Court issued its April 3, 2025, opinion and order ("April Opinion") declaring Petitioner actually innocent, the Office of the Attorney General ("OAG") investigated the truth of Petitioner's claims. Having concluded that investigation, OAG has found strong evidence that the affidavits submitted to this Court were the product of a coordinated effort to fabricate reasonable doubt and subvert a lawful conviction and sentence.

Respondent respectfully submits that the grounds discussed below warrant reconsideration on the record as it stands. But if this Court will not reconsider its previous findings on the filings

on the extant record, the strong interest of justice calls for this Court to hear the evidence for itself before settling on its conclusion that a guilty man is in fact innocent.

## PETITIONER IS NOT ACTUALLY INNOCENT

In its April Opinion, this Court analyzed Petitioner's assertion of actual innocence to excuse the procedural bars that would have otherwise foreclosed consideration of his federal claims. At the Court's invitation, Respondent's prior briefing focused on what she viewed as dispositive procedural bars to the petition. (Doc. 5 at 1). As a result, the Court's analysis did not have the benefit of Respondent's substantive briefing on the merits and, as set forth herein and in the accompanying merits response, erred in several respects. For the reasons set forth in this motion to reconsider and accompanying merits response: (1) Petitioner is not an innocent man; and (2) Petitioner's claims do not warrant relief because he has not met his burden to show that (a) the trial prosecutor violated *Napue*, (b) his appellate counsel was constitutionally ineffective, or (c) the trial prosecutor violated *Brady*. Further, if this Court is not persuaded to reconsider Petitioner's claim of actual innocence based merely on this motion for reconsideration or its attachments, it should hold an evidentiary hearing to assess the credibility of Petitioner's witnesses against the evidence upon which a Tulsa County jury relied to convict Petitioner. At such a hearing, Respondent would show that the jury that heard this case was correct, and Petitioner's claims that Arrlan Young shot the victims in this case are not credible.

## PROCEDURAL HISTORY

A Tulsa County jury convicted Petitioner of (Count One) first degree murder, in violation of OKLA. STAT. tit. 21, § 701.7(A) (Supp. 2009); (Count Two) shooting with intent to kill, in violation of OKLA. STAT. tit. 21, § 652(A) (Supp. 2007); (Count Three) possession of a firearm after former conviction of a felony, in violation of OKLA. STAT. tit. 21, § 1283 (Supp. 2009); and

(Count Four) discharging a weapon into a dwelling, in violation of OKLA. STAT. tit. 21, § 1289.17A (2001). (Doc. 14-1). Petitioner appealed. (Doc. 14-1). The Oklahoma Court of Criminal Appeals ("OCCA") denied his propositions and affirmed Petitioner's convictions and sentences. (Doc. 14-1). Petitioner's case went silent for the next eight years. (Doc. 14-3 at 31-33).[1]

Petitioner, with the assistance of counsel, filed an application for post-conviction relief in the Tulsa County District Court, claiming that he was actually innocent, that his appellate counsel was ineffective, and that the State had suppressed favorable evidence in contravention of *Brady*.[2] (Docs. 14-4, 14-15). Petitioner sought to prove his actual innocence claims with four affidavits and never produced anything in support of his *Brady* claim. (Docs. 14-4, 14-5). The Honorable Dawn Moody, District Judge, rejected Petitioner's actual innocence claim on its face. (Doc. 14-6 at 10). Judge Moody found Petitioner's theory of innocence, naming a dead man as the shooter, "highly suspicious," found that none of it effectively undermined the credibility of the State's witnesses, and concluded "the jury would have disregarded it as a concocted story just like the jury trial evidence of Petitioner's purported alibi." (Doc. 14-16 at 10). Petitioner appealed. (Doc. 14-7). The OCCA agreed and affirmed the denial of post-conviction relief. (Doc. 14-8 at 2-4). Like Judge Moody, the OCCA found Petitioner's affidavits were not credible, particularly in light of the strong evidence of Petitioner's guilt:

> Two eye-witnesses testified at his jury trial that Petitioner shot and killed the victim in this case. A third witness testified that while sharing a jail cell with him, Petitioner confessed to him that he committed this murder. At trial Petitioner presented an alibi that was rejected by the jury. Nothing in appellant's new affidavits casts any doubt or does anything to impeach the testimony at Petitioner's jury trial.

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[1] Where possible, Respondent cites using the CM/ECF headers for documents already filed with this Court.

[2] *Brady v. Maryland*, 373 U.S. 83 (1963).

(Doc. 14-7 at 4).[3]

Petitioner filed a pro se petition in this Court, largely reiterating his post-conviction claims. (Doc. 1). Aside from his new jurisdictional claim, Petitioner simply incorporated by reference the documents his attorney had filed in the state-court post-conviction action. (Doc. 1 at 5-10). He consequently went without any challenge to the correctness of the state courts' factual or legal determinations. (Doc. 1). Respondent moved to dismiss the petition as untimely. (Docs. 13, 14).

This Court issued a 108-page opinion and order excusing the untimeliness of Petitioner's claims by finding him actually innocent. (Doc. 23 at 106-107). As the State will show, with respect, this Court did not afford appropriate deference to the presumption of correctness owed to the state courts' findings of fact or sufficient weight to the State's evidence, engaged in its own extensive review of the evidence, and afforded undue credit to Petitioner's affidavits. (Doc. 23 at 23-106). Strong evidence from trial below, along with the OAG's more recent investigation, require this Court to reconsider its finding that Petitioner is actually innocent.[4]

**THE POST-DECISION INVESTIGATION CONFIRMS PETITIONER'S GUILT**

Oklahoma's courts correctly rejected Petitioner's actual innocence claim on its face, and his proffered evidence is an effort to manufacture reasonable doubt after the fact. Nevertheless, after this Court made its "truly extraordinary" finding of actual innocence, *Schlup v. Delo*, 513

[3] Admittedly, the OCCA's summary of the evidence seems to confuse Mr. Savage with a "third witness" who spoke with Petitioner in his jail cell. (Doc. 14-7 at 4; Doc. 23 at 71-73). This minor discrepancy should not, however, obfuscate the reality that Petitioner's statements to Mr. Savage were tantamount to a confession.

[4] In Respondent's separately filed merits response, she notes that this Court also improperly afforded liberal construction to documents filed by Petitioner's post-conviction attorney to recast his freestanding state-law actual innocence claim as a *Napue* violation. (Doc. 23 at 14-15). *See Napue v. Illinois*, 360 U.S. 264, 269 (1959).

U.S. 298, 327 (1995). Respondent, through the OAG, investigated the truth of Petitioner's actual innocence claim to ensure that justice was served.[5]

OAG's investigation has uncovered what can only be described as fraud on the courts.[6] The investigation, broadly, sought to evaluate three areas relating to Petitioner's actual innocence claim: (1) meeting with Petitioner's affiants to learn more about what they stated in their affidavits to better learn the truth; (2) asking the State's witnesses to revisit their trial testimony; and (3) investigating the circumstances surrounding Arrlan Young's death to independently evaluate the truth of Petitioner's affidavits. At every turn, OAG has only found further evidence that Judge Moody's view of the affidavits was correct.[7] Respondent believes Petitioner has lied to this Court.

First, OAG's investigators attempted to contact Petitioner's affiants. (Exhibit 1, Affidavit of Laura Piera). With the exception of Tiffany Tanner, who could not be found despite the exercise of due diligence, all of Petitioner's affiants refused contact or actively evaded OAG's investigators.

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[5] Had this investigation supported the Petitioner's arguments, the OAG would not have hesitated to revisit its position in this case. *See, e.g.*, *Glossip v. Oklahoma*, 145 S. Ct. 612, 618 (2025) (recounting the OAG's confession of error and request that Glossip's murder conviction and death sentence be vacated in light of newly disclosed evidence that established a *Napue* error).

[6] There is no singular definition of "fraud on the court" within the parameters of FED. R. CIV. P. 60(b)(3). *See* 11 C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2870 (3d ed.) (West) ("Several definitions have been attempted."). Respondent recognizes that several jurisdictions hold that perjury by a witness alone is insufficient to obtain relief under the rule. *See*, *e.g.*, *LinkCo, Inc. v. Akikusa*, 615 F.Supp.2d 130, 135 (S.D.N.Y. 2009). This includes the Tenth Circuit. *See Knight v. Mooring Capital Fund, LLC*, 749 F.3d 1180, 1187-88 (10th Cir. 2014) (citing *Bulloch v. United States*, 763 F.2d 1115, 1121 (10th Cir. 1985) (en banc)). While Respondent therefore omits any argument sounding in Rule 60(b)(3), she nevertheless believes it appropriate to describe Petitioner's conduct as fraud upon the court in a broader sense. *See* Wright at § 2870 ("Any fraud connected with the presentation of a case to a court is a fraud upon the court, in a broad sense.").

[7] In the course of OAG's investigation, Respondent has learned of no reason to believe that Petitioner's post-conviction attorney took part in the fabrication of the affidavits or was otherwise aware of their falsehood.

Start with Tomique Thomas. Ms. Thomas stated in her affidavit that her cousin "Arlen Young," told her that he was the one who murdered Dominique Jasper. (Doc. 14-4 at 9-10). She says that he told her while they were grocery shopping "[l]iterally one week before [Mr. Young] died. . ." (Doc. 14-4 at 9). Ms. Thomas also stated that Mr. Young took her to where he hid the murder weapon, and that she could go to where she was taken. (Doc. 14-4 at 10). Understandably, such information would be essential to corroborating or disproving Ms. Thomas' account. But, while initially agreeing to speak with investigators, Ms. Thomas failed to appear at the scheduled meeting and thereafter refused to communicate with OAG's investigators. (Exhibit 1). OAG's investigators had no better luck with Henderson Porter. Mr. Porter stated in his affidavit that he participated in the fight at Comanche Park Apartments prior to the shooting and offered details suggesting Mr. Young murdered Mr. Jasper. (Doc. 14-4 at 14-15). Further information would be helpful to corroborate or disprove his account. But Mr. Porter hung up on OAG's investigators after they explained why they were calling, and he never responded to any of the investigators' calls thereafter. (Exhibit 1). And Freddie Smith—Petitioner's cousin and getaway driver—actively evaded OAG's investigators in their attempts to meet with him to discuss his affidavit. (Exhibit 1). Freddie Smith initially agreed to meet with investigators, failed to appear, set up another time and place, and was absent when OAG's investigators arrived at the agreed time and location. (Exhibit 1). Investigators were unable to find and contact Tiffany Tanner, despite their diligent efforts. (Exhibit 1). The upshot is that Petitioner's affiants were, nearly to a person, wholly unwilling to assist OAG's attempts to determine the truth.

Second, OAG's investigators reinterviewed the State's chief witnesses, Carlameisha Jefferson and Brandon Savage. Both witnesses reaffirmed the truthfulness of their trial testimony. (Exhibit 2, Affidavit of Carlameisha Jefferson; Exhibit 3, Affidavit of Brandon Savage). Ms.

Jefferson and Mr. Savage—in contrast to Petitioner's affiants who allegedly possess information showing an innocent man is in prison and yet refuse to speak to the State—fully cooperated in the State's investigation. And, for his part, Brandon Savage—currently in the custody of the Oklahoma Department of Corrections ("DOC")—told OAG's investigators that Petitioner, through his interlocutors in DOC, offered him money to change his testimony. (Exhibit 3).[8] Based upon OAG's investigation, Respondent has good reason to believe that Petitioner has actively attempted to subvert the truth by paying people to lie.

And third, OAG's investigation looked to the circumstances of Mr. Arrlan Young's death. Medical records obtained by OAG reveal that Mr. Young was in the hospital a week before he died. (Exhibit 4, Excerpts from Arrlan Young's Medical Records). Moreover, Raven Smith, Mr. Young's adoptive niece and caretaker in the final weeks of his life, has stated that Mr. Young was in no condition to go grocery shopping and had no knowledge of him doing so. (Exhibit 5, Affidavit of Raven Smith). So, Ms. Thomas' story about Mr. Young telling her about the murder while they were grocery shopping was false. (Doc. 14-4). Finally, Ms. Smith was with Mr. Young the day he died, and reports that Ms. Tanner was not with them. (Exhibit 5). All this evidence contradicts what Petitioner's affiants have said.

Petitioner's affidavits cannot be relied upon to find him actually innocent. Medical records and the statements of those closest to Mr. Young when he died, taken with the affiants' evasion of

[8] After Mr. Savage told investigators about Petitioner's interlocutors offering him money to change his testimony, OAG's investigators returned for him to sign the affidavit now before this Court. He is slated for transfer to federal custody in July pursuant to an order of revocation in *United States v. Savage*, Case No. 11-CR-098-001-JHP (N.D. Okla.). Recognizing Mr. Savage's legitimate safety concerns for once again cooperating truthfully with law enforcement in this case, OAG has asked the Bureau of Prisons, through communication with the United States Attorney for the Northern District of Oklahoma, to make housing decisions for Mr. Savage's upcoming transfer commensurate with his safety concerns in exchange for his willingness to sign an affidavit memorializing his earlier statements.

OAG's investigators and Mr. Savage's statement that he had been offered money to change his testimony, all lead to one conclusion: Petitioner has fabricated a third-party perpetrator defense.

## ARGUMENT AND AUTHORITY

This Court should reconsider its finding of actual innocence. (Doc. 23 at 106). While "[t]he Federal Rules of Civil Procedure do not expressly provide for motions for reconsideration[,]" a district court always has the power to reconsider its nonfinal orders. *See Rodeman v. Foster*, 767 F.Supp.2d 1176, 1188 (D. Colo. 2011) (citing *Hatfield v. Bd. of County Comm'rs for Converse County*, 52 F.3d 858, 861 (10th Cir. 1995)); *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1224 n. 2 (10th Cir. 2008); *United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, Case No. 06–cv–00037–PAB–CBS, 2010 WL 420046, *3 (D. Colo. February 1, 2010) (unpublished); FED. R. CIV. P. 54(b)). *See also Barber v. Sutmiller*, No. CIV-15-78-C, 2017 WL 3128227, at *1 (W.D. Okla. June 6, 2017), *report and recommendation adopted*, No. CIV-15-78-C, 2017 WL 3128818 (W.D. Okla. July 21, 2017) (unpublished).[9] Among the reasons why a district court may revisit a non-final order is that it "misapprehended the facts, a party's position, or the controlling law." *Rodeman*, 767 F.Supp.2d at 1189. For the reasons discussed below, this Court should revisit its determination that Petitioner met his heavy burden to show actual innocence, as it is belied by the facts and the law.

This Court should reconsider its previous finding of actual innocence for four reasons. First, this Court did not hold Petitioner to his burden to present clear and convincing evidence rebutting the presumption of correctness afforded to the state courts' findings of fact under 28 U.S.C. § 2254(e)(1). Second, this Court's analysis appears to include the consideration of extra-

[9] Respondent cites to these unpublished decisions for persuasive value only, pursuant to Fed. R. App. P. 32.1 and Tenth Circuit Court of Appeals Rule 32.1.

record evidence presented by a nonparty. Third, this Court misapprehended key facts, misstated the appropriate standard for determining actual innocence, and did not apply the presumption of guilt attendant to a petitioner seeking habeas relief. And fourth and finally, this Court failed to hold an evidentiary hearing and instead improvidently answered difficult questions bearing on credibility in favor of Petitioner on affidavits alone. As credibility determinations are dispositive in this case, finding Petitioner actually innocent on the papers alone misapprehended the facts, and was an abuse of discretion. This Court should have, at the very least, called an evidentiary hearing before finding Petitioner actually innocent. Respondent thusly submits that, if this Court is unwilling to entirely reconsider its previous finding of actual innocence on the first three grounds stated above, it should at least call the case for hearing and try the parties' evidence.

Respondent discusses these stated reasons more fully below.

## I. This Court misapprehended the law by not affording the presumption of correctness to the state courts' factual findings without sufficient justification.

Respondent respectfully submits that this Court should reconsider its prior finding of actual innocence because it did not provide sufficient deference to the state courts' findings of fact. In doing so, it erred in two ways. First, this Court failed to acknowledge Petitioner's burden to overcome the presumption of correctness afforded by 28 U.S.C. § 2254(e)(1). This Court's finding that the presumption had been rebutted based upon its own review of the record effectively relieved Petitioner of this burden. (Doc. 23 at 26 n.16 (acknowledging § 2254(e)(1) but stating that, "[h]aving carefully reviewed the state court record, the Court finds that presumption is sufficiently rebutted because the state court decisions contain factual findings that are not supported by the trial record")). Secondly, this Court itself failed to adequately justify disposing of § 2254(e)(1)'s presumption of correctness. (Doc. 23 at 26 n.16).

As an initial matter, it bears repeating that the state courts here did not simply silently reject Petitioner's actual innocence claim or fail to engage with his proffered affidavits. Rather, Judge Moody found Petitioner's theory of innocence, naming a dead man as the shooter, "highly suspicious," found that none of the new evidence effectively undermined the credibility of the State's witnesses, and concluded "the jury would have disregarded it as a concocted story just like the jury trial evidence of Petitioner's purported alibi." (Doc. 14-16 at 10). The OCCA agreed:

> Two eye-witnesses testified at his jury trial that Petitioner shot and killed the victim in this case. A third witness testified that while sharing a jail cell with him, Petitioner confessed to him that he committed this murder. At trial Petitioner presented an alibi that was rejected by the jury. ***Nothing in appellant's new affidavits casts any doubt or does anything to impeach the testimony at Petitioner's jury trial.***

(Doc. 14-7 at 4 (emphasis added)). These state court determinations of factual issues are "presumed to be correct" unless overcome by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1) ("In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."); *Sharpe v. Bell*, 593 F.3d 372, 379 (4th Cir. 2010) ("Where a state court looks at the same body of relevant evidence and applies essentially the same legal standard to that evidence that the federal court does under *Schlup*, Section 2254(e)(1) requires that the state court's findings of fact not be casually cast aside.").[10]

[10] To be clear, state courts are permitted to make credibility determinations without holding an evidentiary hearing, and such credibility determinations are still owed deference. *See Smith v. Aldridge*, 904 F.3d 874, 883 (10th Cir. 2018) (concluding that a "state court's decision not to hold an evidentiary hearing only renders its factual findings unreasonable in this context if all reasonable minds agree that the state court needed to hold a hearing in order to make those factual determinations"; that "*most of the time* . . . it will be reasonable for a state court to make factual determinations based on the evidence before it without holding a hearing"; and that in the case at bar the OCCA reasonably made credibility determinations without a hearing based on the record

With this backdrop in mind, Respondent turns to this Court's determination that the state courts' findings would not be presumed correct.

**A. Petitioner's burden.**

Petitioner had to rebut the presumption of corrections through the presentation of clear and convincing evidence. "Clear and convincing is an intermediate standard of proof . . . satisfied by evidence that would place in the ultimate factfinder an abiding conviction that the truth of its factual contentions are highly probable[.]" *Fontenot*, 4 F.4th at 1018. (internal quotes and citations removed). "In the § 2254(e)(1) context, this standard is demanding but not insatiable." *Id*. (quoting *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)). Rebutting the state-court record should not be easy.

Courts have uniformly held that the burden of overcoming the presumption lies with the petitioner. *See*, *e.g.*, *Patton v. Boyd*, ___ F.4th ___, 2025 WL 1670360, *5 (8th Cir. 2025); *Jimenez v. Guerrero*, 133 F.4th 483, 492 (5th Cir. 2025); *Davis v. Commissioner, Alabama Department of Corrections*, 120 F.4th 768, 789 (11th Cir. 2024); *Cortez-Lazcano v. Whitten*, 81 F.4th 1074, 1082 (10th Cir. 2023); *Smith v. Duckworth*, 824 F.3d 1233, 1241 (10th Cir. 2016). *See also Smith v. Crow*, No. 22-5087, 2024 WL 470550, *3 (10th Cir. February 7, 2024) (unpublished) ("In addition, under § 2254 (e)(1), we must presume a state court's factual determinations are correct, and Mr. Smith bears the burden of rebutting that presumption by clear and convincing evidence."); *Ewalt v. Workman*, 05-5024, 174 F. App'x 423, 425 (10th Cir. March 16, 2006) (unpublished) ("The

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despite the petitioner's presentation of multiple affidavits that "contain[ed] serious charges" and had some "credibility" (emphasis added)); *Sharpe*, 593 F.3d at 378 ("AEDPA does not make deference to state court fact-finding dependent on the adequacy of the procedures followed by the state court."); *Strong v. Johnson*, 495 F.3d 134, 139 (4th Cir. 2007) ("[C]redibility determinations may sometimes be made on a written record without live testimony. Specifically, there is no prohibition against a [state] court making credibility determinations based on competing affidavits in certain circumstances.").

habeas petitioner bears the burden of rebutting that presumption by clear and convincing evidence."). It is up to Petitioner to set out evidence sufficient to rebut § 2254(e)(1)'s presumption.

Here, Petitioner never met his burden of rebutting § 2254(e)(1)'s presumption because he never tried to. His petition simply incorporated his attorney's post-conviction filings by reference. (Doc. 1 at 5-10). And Petitioner never challenged the correctness of the district court's findings in his post-conviction appeal. Rather, it was his contention then that he was improperly denied a post-conviction hearing because he believed there to be a material issue of fact that called for one, or, at least, "further investigation." (Exhibit 6, Petitioner's Brief on PCR Appeal, 7-10, 14, 16-18). "To rebut this presumption, a petitioner must assert something more than a mere contrary inference." *Santana v. Cowen*, 361 F.Supp.3d 115, 124 (D. Mass. 2019) (internal quotes and cites removed). Other courts have similarly held that conclusory challenges that the state court's determination of facts was unreasonable is not enough to counter the presumption. *See Massenburg v. Davis*, 704 F.Supp.3d 540, 567 n.40 (D.N.J. 2023) (collecting cases). It cannot be reasonably disputed that the Antiterrorism and Effective Death Penalty Act ("AEDPA") puts the burden on the petitioner to overcome the presumption of correctness under § 2254(e)(1) and inaction simply does not cut it. *Cf. Grant v. Royal*, 886 F.3d 874, 914 (10th Cir. 2018) ("But Mr. Grant would be hard-pressed to satisfy it here because he makes no effort to take up the cudgel by making specific arguments under § 2254(e)(1)'s framework to rebut the presumption of correctness."). So, Petitioner's failure to set out even the most perfunctory attempt to challenge the state court's findings of fact ought to have left § 2254(e)(1)'s presumption intact.

This Court's independent determination that § 2254(e)(1)'s presumption had been rebutted improperly relieved Petitioner of his burden. That this Court did so without adequate justification by Petitioner is told in its syntax: "Having carefully reviewed the state court record, the Court finds

that the presumption is sufficiently rebutted . . .” (Doc. 23 at 26 n.16). One can fairly intuit from this language that it did not find Petitioner had set out clear and convincing evidence to overcome § 2254(e)(1)’s presumption. Yet, it still found the presumption rebutted. In so finding, this Court appears to have appointed itself to the role of an independent auditor, scrutinizing nearly every aspect of the state court record against Petitioner’s affidavits, down to the most remote minutia.[11] (Doc. 23 at 27-106). Even still, Respondent fails to find sufficient justification. (Doc. 23).

With respect, it was error for this Court to have done Petitioner’s work for him. It is true enough that “[a] pro se litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991). *See also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972). But such construction, of course, does not extend to filings drafted by attorneys. *Cf. Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) (declining liberal construction to pro se filing by licensed attorney). And even liberal construction does not entail rewriting “a petition to include claims that were never presented.” *Childers v. Crow*, 1 F.4th 792, 798 (10th Cir. 2021) (internal quotes and citation omitted). Again, Petitioner never set out any specific argument challenging the correctness of the state courts’ findings of fact. (Doc. 1). And with the exception of his previously dismissed jurisdictional claim, all of Petitioner’s grounds for relief simply incorporate by reference his attorney’s post-conviction filings. (Doc. 1 at 5-10). To the extent this Court might have looked to those filings as a basis for discerning a challenge to the state district court’s findings of fact, liberal

[11] Thoroughness, certainly, is no vice. But, certainly, some evidence is more important than others. This Court devotes roughly as much consideration to Detective Aschoff’s testimony about evidence cone number ten, marking a nail or tack, as it does to the significance of Ms. Jasper’s testimony relating Mr. Jasper’s identification of Petitioner as the shooter. (Doc. 23 at 63 n.46; Doc. 23 at 105).

construction is unavailable, and even the most liberal construction fails to come up with a specific challenge to the correctness of those findings. (Exhibit 6 at 7-10, 14, 16-18).

This Court's decision to look past Petitioner's burden and overcome § 2254(e)(1)'s presumption for him also crosses the boundaries of party presentation. *See also United States v. Sineneng-Smith*, 590 U.S. 371, 375-76 (2020) (discussing principle of party-presentation); *Greenlaw v. United States*, 554 U.S. 237, 243-44 (2008) (same). To be sure, there are "circumstances in which a modest initiating role for a court is appropriate." *Sineneng-Smith*, 590 U.S. at 376. "But this case scarcely fits that bill." *Id*. As this Court's extensive review of the old facts against the new shows, this Court essentially took over the petition. (Doc. 23 at 27-106). Its sole critique to the state court's treatment of the facts bears no analogue in any of Petitioner's filings. (Doc. 23 at 75 n.50). Given the total absence of argument from Petitioner with respect to the correctness of the State court's findings, any attempt to support a conclusion that the presumption had been rebutted necessarily entailed this Court going well beyond liberal construction and placing itself into the position of advocate for Petitioner's cause.

**B. Section 2254(e)(1) has not been rebutted.**

This Court's decision that § 2254(e)(1)'s presumption had been overcome is, with all respect, inadequately justified. This Court's rationale for casting aside the state courts' findings was that "[t]he state court decisions contain factual findings that are not supported by the trial record." (Doc. 23 at 26 n.16). This Court did not elaborate further. But when it comes to matters of credibility—the primary issue here—federal courts may not abandon the state court's findings of fact unless the error is "stark and clear." *Sharpe*, 593 F.3d at 378-79. Beyond a single footnote observing the state district court incorrectly referred to Mr. Jasper's statement to his mother as a "dying declaration," Respondent finds no specific instance where this Court identified a factual

error by the state courts.[12] (Doc. 23 at 75 n.50). With respect, this is insufficient to dispossess the state courts' findings of their presumption of correctness. *See Sharpe*, 593 F.3d at 379 (federal district court erred in not presuming the correctness of the state court's finding that the petitioner's actual innocence evidence was not credible, "not[ing]" the state court's ruling only "in passing," and making its own determination that the evidence was credible). "[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 18 (2013). To the extent that this Court's independent treatment of the evidence was meant to justify its departure from the presumption of correctness, the fact this Court would have drawn a different conclusion than Judge Moody or the OCCA is insufficient.

Section 2254(e)(1)'s presumption of correctness is animated by a central tenet of the AEDPA: comity. As the Tenth Circuit observed in *Grant*, the presumption "is intended to effectuate federalism principles by "giv[ing] great weight to the considered conclusions of a coequal state judiciary. . ." *Grant*, 886 F.3d at 913 (alterations in original, internal quotes and citation omitted). Respondent is entitled to that presumption of correctness unless and until Petitioner rebuts the state courts' findings of fact with clear and convincing evidence. While Respondent respects the reality that this Court views the facts differently, that perspective does not warrant stepping in on Petitioner's behalf and finding § 2254(e)(1)'s presumption satisfied based

[12] While Mr. Jasper's out-of-court statement to his mother about Petitioner shooting him was admitted under the excited utterance exception to the rule against hearsay, Judge Moody's description of the statement as a dying declaration was not entirely inapt. Mr. Jasper had just been shot and was, as this Court noted, deeply emotional from having been shot. (Doc. 23 at 74). One could easily infer that Mr. Jasper's emotional state reflected a fear that he would soon die of those wounds. Such are the makings of a dying declaration. *See* OKLA. STAT. tit. 12, § 2804(B)(2). In any event, Judge Moody's characterization of the statement as a dying declaration is immaterial given that the admissibility of the statement has never had any bearing on the threshold finding of actual innocence. (Docs. 1, 23).

upon its own independent review of the record. Much less can that course be justified upon a conclusory assertion that "the state court decisions contain factual findings that are not supported by the trial record." (Doc. 23 at 26 n.16).

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This Court's analysis reflects its own independent review of the record, which respectfully ultimately amounts to improper second-guessing of the same credibility questions posed to the state courts. That is precisely what it cannot do. *Titlow*, 571 U.S. at 18. This Court did so without acknowledging Petitioner's burden of showing as much, much less does it appear that this Court held him to that burden. With all respect, Respondent believes this Court's analysis reflects a misapplication of the law governing § 2254(e)(1) analysis, went well beyond what liberal construction could reasonably afford, and crossed the boundaries of party presentation to arrive at an unwarranted conclusion. For these reasons, Respondent respectfully asks this Court to reconsider its finding of actual innocence. *See Rodeman*, 767 F.Supp.2d at 1189

**II. This Court misapprehended the facts and law in its treatment of the facts.**

Phylis Jasper, the mother of Dominique Jasper, was with her son before he died from his gunshot wounds. (Exhibit 7, J. Tr. III, 83). Years later, she would tell a jury what her son had said in his final minutes:

> Momma, Cross shot me. Momma, Cross shot me. Momma, Cross shot me.

(Exhibit 7, J. Tr. III, 90). To this day, Ms. Jasper has never recanted that testimony. Nor has Petitioner ever explained to any court why Ms. Jasper would lie. Ms. Jefferson and Mr. Savage maintain that their trial testimony was truthful. (Exhibits 2, 3). Petitioner has never offered any reason, beyond that which was already before his jury, explaining why either Ms. Jefferson or Mr. Savage would lie. He only offers affidavits setting out a factual theory that simply conflicts with

Ms. Jefferson and Mr. Savage's testimony. And it is axiomatic that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive . . ." *Blackledge v. Allison*, 431 U.S. 63, 81 n.25 (1977) (internal quotes and cites omitted). This Court nevertheless found Petitioner actually innocent on affidavits previously rejected by the State's courts as a "suspicious," "convenient," and apparently "concocted" story blaming a dead man. (Doc. 14-6 at 10). For the reasons below, Respondent respectfully asserts that this Court misapprehended the facts and the law in its evaluation of Petitioner's actual innocence claims.

**A. Factual misapprehensions.**

To begin with, this Court states, "having carefully reviewed the trial record, the Court finds that the State's theory, or rather the State's struggle to identify a coherent one, demonstrates the weakness of its case against Smith." (Doc. 23 at 97). To the contrary, as discussed at length in the brief in support of her motion, the trial evidence showed that Petitioner had accused Ms. Jefferson of being a snitch. (Doc. 14 at 16). While Respondent does not believe it properly before this Court, this Court appears to have relied upon extra-record evidence submitted by a nonparty which supports the theory that Ms. Jefferson identified Freddie Smith to police as the shooter at the Comanche Park Apartments. (Doc. 23 at 36 n.27). It also does not appear to be in dispute that there was something of a love triangle between Ms. Jefferson, Ms. Schrader, and Petitioner. (Doc. 23 at 90). That Petitioner would seek to confront Ms. Jefferson on the belief that she spoke to police about Freddie Smith, and that he harbored animosity towards her due to her relationship with Ms. Schrader, is a perfectly coherent theory. Respondent would also respectfully remind this Court that twelve jurors carefully listened to all this evidence through live testimony at trial and found Petitioner guilty beyond a reasonable doubt. And, with respect, this Court also misapprehended the facts in assessing credibility. This Court acknowledged caselaw providing that, to credit an

actual innocence claim, the petitioner must set out "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." (Doc. 23 at 23) (quoting *Fontenot*, 4 F.4th at 1029-30) (internal quotes and citation omitted). That caselaw used words like "reliable" and "trustworthy" to characterize the sort of evidence necessary to prove up an actual innocence claim. To be sure, this Court made credibility determinations contrary to those of the state courts. But, as Respondent will explain, this Court's analysis of the new evidence against the old repeatedly misapprehends the logic and effect of the evidence.

Part of this Court's misapprehension relies on an untenable inference from the trial evidence. Ms. Thomas and Ms. Tanner both expressed reluctance to come forward, notwithstanding Mr. Young's alleged express wish for them to do so. (Doc. 14-4 at 9-10, 16-17). Indeed, Ms. Thomas averred that "Mr. Young requested that I get the information out if he did not survive." (Doc. 14-4 at 9). Mr. Tanner averred that it was her "cousin's final request" for her to come forward with the truth. (Doc. 14-4 at 16-17). And Mr. Porter likewise said it was his best friend's "final wish" for him to "come forward with the truth." (Doc. 14-14 at 14-15). Their reticence and delay is wholly at odds with what they say was Mr. Young's dying wish.

This Court agreed with Respondent that the affiants' delay had to be reckoned with in analyzing their credibility. (Doc. 23 at 85). The Supreme Court observed in *Perkins* that lack of diligence, "although not an unyielding ground for dismissal of a petition, does bear on the credibility of evidence proffered to show actual innocence." *McQuiggin v. Perkins*, 569 U.S. 383, 401 (2013). *See also Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the

submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). This Court found reasons to excuse the delay.[13] (Doc. 23 at 86-89).

This Court's first reason for excusing the delay itself improperly frames the analysis in terms of Petitioner's fault. (Doc. 23 at 86-87). This Court stated: "Smith cannot be faulted for the 'inexplicable two-year gap' that Respondent homes in on . . ." (Doc. 23 at 86). It went on to describe the circumstances alleged by Petitioner and his affidavits describing how he came to learn of the facts making up his actual innocence claim. (Doc. 23 at 86-87). Were this Court analyzing the evidence under 28 U.S.C. § 2244(d), those observations may be relevant. But, as this Court noted, "no threshold diligence requirement applies to actual-innocence claims; the delay is simply a factor in the court's reliability evaluation." (Doc. 23 at 86) (quoting *Floyd v. Vannoy*, 894 F.3d 143, 156 (5th Cir. 2018)) (internal quotes omitted). Rather, the delay speaks to ascertaining the credibility of the proffered facts themselves. *See Schlup*, 513 U.S. at 332 ("[T]he court may consider how the timing of the submission and the likely credibility of the affiants bear on the probable reliability of that evidence."). This Court's apparent finding that Petitioner acted diligently upon learning of the newly alleged evidence does not make the affidavits any more credible and has no bearing on Respondent's stated concern that all his affiants waited years before coming forward to fulfill what they say was Mr. Young's dying wish.

With respect, Respondent contends this Court's second reason for excusing the delay relied on an untenable inference it drew from Mr. Savage's testimony:

> Given evidence in the trial record, advanced by the State to bolster the credibility of its own witnesses, regarding the "culture" in some Tulsa communities to avoid being ostracized or killed for "snitching" or for otherwise seeking help from the police, the Court finds these three affiants sufficiently explain their delay coming forward.

[13] While this Court stated that there were "three reasons," Respondent only finds two articulated in that section. (Doc. 23 at 86-89).

(Doc. 23 at 88). This is not a reasonable inference. There is nothing in the record to support the notion that complying with someone's dying wish constitutes "snitching" as it would be understood within the parameters described by Mr. Savage. Moreover, the permissibility of disclosing information relating to a crime is context-sensitive. *See* Clampet-Lundquist et al., *The Sliding Scale of Snitching: A Qualitative Examination of Snitching in Three Philadelphia Communities*, 30 Sociological Forum 265, 277 ("We found a range of definitions of who can be a snitch, and we found an intricate set of guidelines on when cooperating with the police was allowed."). With respect, the comparison drawn by this Court in excusing the affiants' delays are neither supported by the record nor logically tenable.

Ms. Jefferson and Mr. Savage were testifying to inculpate a living man defending himself against the charge of murder—a man who is now serving life imprisonment for murder. It is they who continue to live with the scarlet letter of having cooperated with police to put someone from their community in prison. In contrast, Petitioner's affiants stated that they did so at Mr. Young's request. (Doc. 14-4 at 10, 15, 17). In other words, they all allege Mr. Young gave them consent to inculpate him. Petitioner's affiants would have known that Mr. Young, having passed, would face no criminal liability. And it would be a bridge too far for anyone to think some stigma attached to helping free an innocent man. The record itself simply does not support the notion that the same dangers apply to those who inculpate a dead man at his request to free someone claiming his innocence. What is more, Mr. Porter's affidavit proves that the rules are different indeed when one inculpates a dead person. (Doc. 14-4 at 14-15). Mr. Porter stated that he was unwilling to tell anyone about Mr. Young's alleged involvement in the shooting because he did not want to snitch on his best friend, but was apparently willing to do so after his passing. (Doc. 14-4 at 14-15). So, with respect, this Court's willingness to excuse the affiants' considerable delays in fulfilling what

they alleged to be Mr. Young's dying wish is unsupported by the record and significantly undermined by Mr. Porter's affidavit. Respondent respectfully submits that this Court's rationale for excusing the delay in coming forward misapprehends the facts. (Doc. 23 at 88-89).

This Court also appears to have overlooked a key fact bearing on Freddie Smith's credibility. This Court largely folded its assessment of Freddie Smith's credibility into its treatment of the delay. (Doc. 23 at 88-89). It concluded: "Freddie's delay does not render his affidavit entirely untrustworthy." (Doc. 23 at 89). This Court never seems to have accounted for the strong motivation he would have had to exculpate himself through exculpating Petitioner. (Doc. 23). As this Court noted, Mr. Savage identified Freddie Smith as the getaway driver. (Doc. 23 at 89). While perhaps not sufficient on its own to warrant reconsideration, this oversight shows that—despite its length—this Court's opinion overlooks several key considerations bearing on the relative credibility of the affiants.

Similarly, this Court misapprehended the facts in crediting the relationship between the facts set out in the affidavits and the trial evidence:

> The Court recognizes that the interlocking nature of the new evidence with the old evidence simultaneously makes the new evidence credible and suspect. Anyone with access to the trial transcripts and anyone who attended Smith's trial theoretically could craft statements that conform to the trial evidence. But, as discussed next, the synergistic effect of the new evidence that corroborates and supplements the old and the manifest weakness in the State's case against Smith persuades this Court that a reasonable juror confronted with the newly supplemented record more likely than not would have reasonable doubt about Smith's guilt.

(Doc. 23 at 96). With all respect, this Court seems to have overlooked the eminently reasonable explanation that the reason why the affiants' statements fit so neatly with the record is because Petitioner, having personal knowledge of the murder, directed them to do so. "[W]hen a prisoner's life is at stake, he often can find someone new to vouch for him." *Herrera v. Collins*, 506 U.S. 390, 423 (1993) (O'Connor, J., concurring). Compounding this problem is the fact that the

substance of the affidavits set out by Ms. Thomas and Mr. Tanner are "hearsay, and [are] thus presumptively unreliable." *Bell v. Howes*, No. 14-1169, 701 F. App'x 408, 412 (6th Cir. 2017) (unpublished) (citing *Herrera*, 506 U.S. at 417). This Court is left with only a smattering of facts, apparently curated for Petitioner's sole benefit. Hence, Respondent's abiding concern that Mr. Young is permanently unavailable. (Doc. 14 at 4). That this Court overlooked this likelihood, or was simply unwilling to engage with it, marks a glaring omission in its overall evaluation of the affiants' credibility.

And where this Court seems to have overlooked facts which might have cut against Petitioner, it appears to have fixated on ancillary facts which it thought cut against the State's witnesses. This Court devoted significant attention to the timeline:

> Regarding the timeline, Savage and Jefferson both testified that the altercation with Freddie occurred after Savage, Jefferson, and Jasper drove to the apartment complex sometime after 10:00 p.m. on Friday, October 22, 2010; that the trio returned to Savage's house after the fight; that Jefferson returned to the apartment complex alone with a gun in the car; and that Jefferson was arrested, spent the night in jail, and bonded out the next morning. *See supra*, Discussion sections III.A.1.a., III.A.2.a.i. Savage and Jefferson each testified about the activities they engaged in throughout the day, after retrieving Harris's car from the apartment complex parking lot, and that they spent at least part of the evening drinking before the shooting occurred on Saturday, October 23, 2010, at roughly 2:00 a.m. *Id*. The problem with this timeline is that if the fight occurred sometime after 10:00 p.m. on Friday, October 22, 2010, Jefferson spent that night in jail and returned home the next morning, and Jefferson and Savage engaged in various activities throughout the day and evening, the shooting logically would have occurred in the early morning hours of Sunday, October 24, 2010.

(Doc. 23 at 98-99). But the discrepancy is easily explainable, and the timeline is of nominal value to considering Ms. Jefferson and Mr. Savage's credibility when it comes to the most salient facts inculpating Petitioner.

For starters, the State's evidence does not betray an inexplicable timeline. Ms. Jefferson was candid that she was not entirely sure on the exact timing of events. She testified that she was at the Comanche Park Apartments on October 22, 2010. (Exhibit 7, J. Tr. II, 81). But consider her

testimony about her departure for the Comanche Park Apartments: "Maybe between – maybe between 10:00 and 11:00, something like that. 10:00 and 12:00, something like that." (Exhibit 7, J. Tr. II, 83). That is a two-hour gap. And she had initially stated that she did not remember what time it was when she was at Comanche Park Apartments. (Exhibit 7, J. Tr II, 82). It was clear that Mr. Jefferson was not entirely sure what time they left. It is therefore perfectly reasonable to think Ms. Jefferson, Mr. Savage, and Mr. Jasper, arrived sometime in the early morning hours of October 22, 2010. She also testified that they were not there for long—perhaps half an hour. (Exhibit 7, J. Tr. II, 94). And she testified that she was only briefly at Mr. Savage's residence before heading back. (Exhibit 7, J. Tr. II, 94). But, even then, she was unsure how long she was at Savage's residence: "Maybe about ten minutes, something like that. I don't really, like, remember exact minutes or hours on that part. It was probably about ten minutes, maybe." (Exhibit 7, J. Tr. II, 94). While her recollection of the exact timeline was admittedly elastic, Ms. Jefferson's arrest in the early morning hours of October 22, 2010, being bailed out in the morning, and the remainder of her testimony are easily reconciled with the record. And, sure, Mr. Savage referred to the setting as "nighttime." (Exhibit 7, J. Tr. II, 28). But one would need to wade into the murky waters of semantics to debate whether one might accurately describe the first hours of a new day as nighttime. The bottom line is that, while neither Ms. Jefferson nor Mr. Savage was able to account for their itinerary to the minute, their description of being at Comanche Park Apartments on October 22, 2010, can be fairly reconciled with the record.

In any event, Respondent remains unsure how the accuracy of Ms. Jefferson or Mr. Savage's recollection of the precise time (1) they arrived at Comanche Park Apartment, (2) when Ms. Jefferson was arrested, and (3) when she bonded out were material to the jury's deliberations. Perhaps these inconsistencies spoke to the strength of the memory as to specific times, but

Respondent can think of no reason—and this Court supplied none—why this discrepancy would have affected their credibility as it related to the identity of the shooter. A witness' testimony cannot be cast out entirely based on inconsistencies relating to ancillary facts. *Cf. Diallo v. I.N.S.*, 232 F.3d 279, 288 ("Where an applicant's testimony is generally consistent, rational, and believable, disparities like the ones listed above need not be fatal to credibility, especially if the errors are relatively minor and isolated . . ."). And Respondent cannot see how the extra-record evidence presented by a nonparty is material to assessing Petitioner's claim. There has never been any dispute that there was a fight at the Comanche Park Apartments, that Ms. Jefferson was arrested with a gun in the car she was driving after the fight, that she bonded out, and that she was back in time at Mr. Savage's residence to be shot by Petitioner. Exhaustive consideration of the timeline has exceedingly little to do with the credibility of Ms. Jefferson and Mr. Savage's identification of Petitioner as the one who opened fire on the Savage residence.

Respondent must also point out that this Court effectively disregarded the value of Ms. Jasper without any meaningful justification:

> Other than the questionable testimony from Jefferson and Savage, the State presented Phyllis's testimony that Jasper identified "Cross," a.k.a., Smith, as the shooter at the hospital . . . This Court deals with this evidence only briefly because, even crediting Phyllis's testimony, it is not sufficiently weighty, *standing alone*, to undermine the credibility of Smith's gateway actual innocence claim.

(Doc. 23 at 105) (emphasis added).[14] With all respect, this Court never really dealt with Ms. Jasper's testimony at all. In a 108-page opinion, this Court afforded roughly a sentence to powerful corroboration for the State's other witnesses. This actual innocence inquiry not only calls upon

[14] This statement itself betrays a profound analytical flaw: the question is not whether Ms. Jasper's sworn trial testimony can undermine Petitioner's affidavits. Petitioner "comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt." *Schlup*, 513 U.S. at 326 n.42. Rather, the question is whether Petitioner's evidence can overcome that which resulted in his conviction.

this Court to actually address this evidence, but it also "requires a holistic judgment about all the evidence[.] *Fontenot*, 4 F.4th at 1032 (internal quotes and cites removed). This Court never considered Ms. Jasper's testimony as it related to the evidence and, contrary to precedent, only discussed her testimony in a vacuum. With respect, it was error for this Court to ignore the significance of Ms. Jasper's testimony.

To this day, Petitioner has offered this Court no plausible reason to think Ms. Jasper lied about what her son told her. (Doc. 1). And corroboration provided by a disinterested witness is uniquely powerful. *Cf.*, *e.g.*, *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263, 294-95 (3d Cir. 2016) (holding state court unreasonably applied *Brady* in discounting value of a disinterested witness role in corroborating petitioner's alibi); *Montgomery v. Peterson*, 846 F.2d 407, 414 (7th Cir. 1988) ("Given the standoff between two factions in this family, one group supporting Wayne Montgomery and the other group supporting the petitioner, independent corroboration by a neutral, disinterested witness would perforce be extremely significant."); *Wrenn v. Harris*, 503 F.Supp. 223, 227 (D. Mass. 1980) ("The consistency of Ms. Wrenn's story, together with its corroboration by others who are disinterested, are relevant factors to weigh in assessing her credibility.") (D. Mass. 1980). Ms. Jasper served as a persuasive disinterested witness who testified that her son identified Petitioner as the person who shot him. (Exhibit 7, J. Tr. III, 90). The bottom line was that her son was shot, and there is no evidence apparent from the record suggesting why it would have mattered much to her who did it; Petitioner has never offered a cogent explanation why Ms. Jasper would have cared to point the finger at him as opposed to someone else, or no one else. Respondent respectfully submits that, given the value of Ms. Jasper's testimony, this Court misapprehended the facts and the law by failing to consider it in relation to the other evidence of Petitioner's guilt.

**B. Legal misapprehension.**

Finally, Respondent respectfully submits that this Court misapplied the correct standards dealing with this evidence. As already noted, some of this Court's analysis reflects the premise that the State's evidence must be able to overcome Petitioner's new evidence. (Doc. 23 at 105). Petitioner "comes before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt." *Schlup*, 513 U.S. at 326 n.42. As illustrated above, this Court's misallocation of the presumption appears to have adversely affected its analysis. This Court also misstated the actual innocence standard. "To establish the requisite probability, the petitioner must show that it is more likely than not that *no reasonable juror* would have convicted him in the light of the new evidence." *Schlup*, 513 U.S. at 327.

The problem is that this Court's analysis shows that it used the wrong standard. Rather, this Court's analysis reflects the use of a much lesser yardstick:

> But, as discussed next, the synergistic effect of the new evidence that corroborates and supplements the old and the manifest weaknesses in the State's case against Smith persuades this Court that *a reasonable juror* confronted with the newly supplemented record more likely than not would have reasonable doubt about Smith's guilt.

(Doc. 23 at 95-96) (emphasis added). It later stated: "[T]he newly supplemented record more likely than not would cause *a reasonable juror* to have reasonable doubt." (Doc. 23 at 101) (emphasis added). Reasonable people can disagree. That is precisely why the Supreme Court has used the "no reasonable juror" standard in *Schlup*. Respondent notes that this Court only ever stated the correct standard in its introductory section analyzing the predicted impact on jurors. (Doc. 23 at 84). The error was manifest in this Court's actual analysis. It therefore appears that this Court, whilst initially stating the correct standard, went on to repeatedly use a much lesser standard in its evaluation of the evidence. Respondent respectfully contends that this constitutes a misapprehension of law in its treatment of the facts that warrants reconsideration.

* * * * *

For all these reasons touching on this Court's treatment of the evidence, Respondent respectfully contends that this Court should reconsider its previous finding of actual innocence. *See Rodeman*, 767 F.Supp.2d at 1189.

## III. This Court misapprehended the law by entertaining a nonparty's extra-record filings in its assessment of actual innocence.

This Court erred in considering extra-record evidence filed by a nonparty, Petitioner's fiancée, Shelly Davis. (Doc. 2).[15] This Court emphasized a police report proffered by Ms. Davis in one of her filings:

> The Court received, through a letter submitted on Smith's behalf by a non-party, what appears to be an authentic copy of a TRACIS report, specifically a Tulsa Police Department Arrest and Booking Data report, documenting that Jefferson was arrested on October 22, 2010, at 2:30 a.m. and was booked into the Tulsa County Jail at 3:51 a.m. that same morning. ECF No. 20 at 38. The report indicates that police officers looking for Freddie saw Jefferson sitting in the Intrepid, in the parking lot of Comanche Park Apartments, determined Jefferson had "warrants," and found a .32 caliber revolver in "the center console" of the Intrepid. *Id*. This appears to be the report defense counsel referred to when asking Jefferson about her arrest. Per the report, Jefferson told the arresting officers "she knows what happened with Freddie Smith." *Id*. As further discussed, *infra*, this report is supportive of, but not necessary to, the Court's conclusion that Smith's actual innocence claim is credible.

(Doc. 23 at 36 n.27). It appears this Court considered improper extra-record evidence submitted by a nonparty in rendering its finding that Petitioner was actually innocent. (Doc. 23 at 100 n.58).

In habeas proceedings, "evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. The proffered report is none of those things. And while the court may take "documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or on behalf of the same petitioner," the report does not appear to have ever been

[15] Nonparty Davis identifies herself as Petitioner's fiancée in a letter to this Court. (Doc. 2).

previously introduced. 28 U.S.C. § 2247. *Cf. Thompson v. White*, 391 F.2d 724, 726 (5th Cir. 1968) ("The police report does not constitute evidence which would justify denial of habeas corpus relief. *Cf.* 28 U.S.C. § 2246, 2247."). Nor, for that matter, did this Court ever order any expansion of the record. *See* Rule 7, *Rules Governing § 2254 Cases in the United States District Courts*. While this Court provided that, "Respondent will have the opportunity to challenge the authenticity of this report or to otherwise argue why the Court should not consider information from this report in adjudicating the petition[,]" its entertainment of the report is improper.

This Court erred in considering a nonparty's filings. In the United States Courts "the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654. So, while laypersons may represent themselves, there is no "statutory authority for lay representation of another person or a non-person entity in federal court proceedings." *United States ex rel. Rockefeller v. Westinghouse Elect. Co.*, 274 F.Supp.2d 10, 17 (D.D.C. 2003). *See also Simon v. Hartford Life, Inc.*, 546 F.3d 661, 664-65 (9th Cir. 2008) (collecting cases). This Court's local rules, too, expressly state that "a pro se party may not represent anyone else or authorize anyone to appear on their behalf. *See* LCvR17(a). Consequently, courts do not consider the filings of a nonparty acting on behalf of a party. *Cf.*, *e.g.*, *Sundby v. San Diego County Sheriff's Department*, Case No.: 3:24-cv-1535-WQH-MSB, 2025 WL 1557323, *4 (S.D. Cal. June 2, 2025) (unpublished) (collecting cases). More broadly, consideration of evidence, argument, and authority submitted by nonparties defeats the purpose of § 1654 and this Court's local rule analogue.

To be clear, nonparty Davis' filings are nothing short of an attempt at legal representation. For example, she ends one letter stating: "We have meticulously reviewed the case details and are confident that the information casts enough doubt on this conviction. If the jury had been presented

with this new information, they would likely have reached a different conclusion." (Doc. 20 at 44). Nonparty Davis also offers the legal work by someone named Jennifer West, who tells this Court that she is "a law student in South Dakota" and does "volunteer work on wrongful conviction cases from around the United States as a way to help develop [her] legal skills and legal writing." (Doc. 19 at 2). Nonparty Davis presents argument and authority relating to jurisdiction, argues that a violation of *Brady* has occurred, and presents this Court with caselaw to support Petitioner's actual innocence claim. (Doc. 19 at 3-5). The very fact this Court is considering nonparty Davis' filings in its analysis here illustrates the reality of her function as representation for Petitioner. This Court is effectively entertaining the argument and evidence of a nonparty layperson.

Because this Court improperly considered the extra-record submissions of a nonparty lay witness in its analysis, Respondent respectfully asks this Court to reconsider its previous finding of actual innocence.

## IV. This Court misapprehended the law and facts by failing to call for further factfinding prior to finding Petitioner actually innocent.

Respondent respectfully submits that this Court misapprehended the law when it found Petitioner actually innocent, largely on the basis of crediting his affiants' statements, without calling the case for an evidentiary hearing. Respondent filed her motion to dismiss with a presumption that the state court's factual determinations were correct. *See* 28 U.S.C. § 2254(e)(1). Thus, for instance, she believed—with Petitioner making no attempt to rebut the presumption of correctness—that the OCCA's finding that "[n]othing in [his] new affidavits casts any doubt or does anything to impeach the testimony at [his] jury trial," (Doc. 14-7 at 4), would be honored by this Court. She also understood that, as a consequence of his jury's verdicts, Petitioner "[came] before the habeas court with a strong—and in the vast majority of the cases conclusive—presumption of guilt." *Schlup*, 513 U.S. at 326 n.42. And, based upon her own review of the record,

she filed the motion to dismiss with a near certitude that Petitioner's claim of actual innocence was fabricated. When Respondent filed her motion to dismiss and brief in support, she had no obligation to present evidence disproving Petitioner's affidavits or to show they were fabricated.

This Court issued its 108-page opinion and order, adjudicating the relative credibility of the State's trial witnesses and the proffered statements of Petitioner's affiants, without an evidentiary hearing. (Doc. 23). It did not appear to contemplate calling one. (Doc. 23). Respondent respectfully contends that if this Court had any question whether the state court's findings of fact were entitled to the presumption of correctness under § 2254(e)(1), and it felt inclined to lend credence to Petitioner's new evidence, it should have called an evidentiary hearing. The Tenth Circuit has expressly endorsed this approach:

> [a]n offender who believes he is entitled to habeas relief must first present a claim (including his evidence) to the state courts. If the state courts reject the claim, then a federal habeas court may review that rejection on the basis of the materials considered by the state court. If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed.

*Milton v. Miller*, 744 F.3d 660, 673 (10th Cir. 2014) (quoting *Cullen v. Pinholster*, 563 U.S. 170, 250 (2011) (Breyer, J., concurring in part and dissenting in part)). Credibility, the essence of the conflict between the State's trial witnesses' testimony and Petitioner's affiants, is quintessentially a question of fact. *See* 88 C.J.S. *Trial* § 360 (2025) ("Where the testimony of several witnesses is contradictory, conflicting, or inconsistent, questions of the credibility and weight thereof are questions of fact . . ."). And, again, "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive . . ." *Blackledge*, 431 U.S. at 81 n.25 (internal quotes and cites omitted). In light of this Court having deprived the state courts' findings of fact of the presumption of correctness, and the extensive review of the record that followed, Respondent

respectfully submits that this is not one of those rare cases where credibility can be resolved in a petitioner's favor on the affidavits alone.[16]

This Court was certainly permitted to call a hearing to make credibility determinations for itself. Again § 2246 provides that, "[o]n application for a writ of habeas corpus, evidence may be taken orally or by deposition or, in the discretion of the judge, by affidavit." 28 U.S.C. § 2246. *Cf. Read v. Norfolk County Superior Court*, Case No. 25-cv-10399-FDS, 2025 WL 815048, *12 (D. Mass. March 13, 2025) (unpublished) ("The general grant of factfinding authority under Sections 2243 and 2246 would seem to permit the federal court to conduct an evidentiary hearing concerning a state-court proceeding under at least some circumstances."). The Sixth Circuit has maintained that courts sitting in habeas "have the inherent authority to order an evidentiary hearing . . ." *Abdur'Rahman v. Bell*, 226 F.3d 969, 705 (6th Cir. 2000). And the plain language of § 2246 itself seems to suggest that oral testimony or deposition are presumptively appropriate whereas the presentation of affidavits requires the court to exercise its discretion.

Of course, "[f]ederal law restricts the authority of federal courts to grant evidentiary hearings in habeas cases." *Milton*, 744 F.3d at 672 (quoting *Stouffer v. Trammel*, 738 F.3d 1205, 1219 (10th Cir. 2013)) (internal quotes omitted). "AEDPA's statutory scheme is designed to strongly discourage them from doing so." *Pinholster*, 563 U.S. 186. But those restrictions reflect "Congress's view that there is no reason for a do-over in federal court when it comes to facts

[16] To be sure, this is not the same thing as saying that the OCCA was required to hold an evidentiary hearing before finding that Petitioner's affidavits were *not* credible. As Respondent discussed above, state courts are permitted to make such credibility determinations regarding late-coming evidence of "innocence" without a hearing and are still owed deference. *See, e.g.*, *Smith*, 904 F.3d at 883; *Strong*, 495 F.3d at 139. It is another thing entirely, however, for this Court to sweep away the presumption of correctness owed to the state courts and the presumption of Petitioner's guilt and find, without an evidentiary hearing, that Petitioner's affiants are more credible than the State's evidence.

already resolved by state tribunals[,]" and "respect for principles of federalism, recognizing that a decision to set aside state court factual findings intrudes on the state's interest in administering its criminal law." *Grant*, 886 F.3d at 913 (internal quotes and cites omitted). "Such intervention is also an affront to the State and its citizens who returned a verdict of guilt after considering the evidence before them." *Shinn v. Ramirez*, 596 U.S. 366, 390 (2022). Hence, 28 U.S.C. § 2254(e)(2)'s demanding requirements for courts to call evidentiary hearing on a petitioner's federal claims. But AEDPA's rationale disfavoring evidentiary hearings should not apply when the State has been deprived of § 2254(e)(1)'s presumption of correctness and Petitioner has been found actually innocent without giving Respondent an opportunity to try the facts.

With all respect, the fact that this Court engaged in a nearly eighty-page review of the evidence in divining the credibility of the affiants' statements is strong evidence that this case was ill-suited for disposition on the affidavits alone. (Doc. 23 at 27-106). While, perhaps, not legally mandated, Respondent respectfully contends that this Court misapprehended the facts and the law by failing to call the case for an evidentiary hearing. Had it done so, Respondent would have been able to present the strong evidence developed in the course of OAG's investigation showing the affidavits submitted to this Court were almost certainly fabricated.

Respondent emphasizes that she could not have reasonably anticipated this Court's decision to strip the state courts' findings of fact of their presumption of correctness—particularly where Petitioner never sought to challenge the correctness of the State courts' findings of fact in his petition and declined to do so in a reply. (Doc. 1). There was no reason for Respondent to devote time and resources gathering evidence to rebut Petitioner's affidavits when there was no apparent need to do so. And the AEDPA loathes prolonged proceedings. *See Ramirez*, 596 U.S. at 389-90. For respondents to devote the time and resources to investigate every petitioner's factual

claims on the front end, even where the factual matters have been resolved by the state courts and would ordinarily be entitled to § 2254(e)(1)'s presumption of correctness, runs contrary to the AEDPA's statutory aims.[17] To the extent that this Court believes Respondent has forfeited the opportunity to request a hearing or to present new evidence, she respectfully contends that these extraordinary circumstances warrant forgiveness of said forfeiture. *Cf. Ramirez*, 596 U.S. at 375 n.1 (noting courts have the discretion to forgive government's forfeiture).[18]

For the reasons discussed above, Respondent respectfully contends that this Court misapprehended the facts and the law by resolving Petitioner's actual innocence claim on the affidavits alone without failing to consider the possibility, much less the need, for an evidentiary hearing. It was, at best, an abuse of discretion. But even if this Court did not believe a full-blown evidentiary hearing was necessary, it still has the discretion to offer Respondent an opportunity to present additional evidence in light of its decision to strip the presumption of correctness away from the state courts' findings of fact. Respondent contends that the circumstances justify, at the very least, consideration of this new evidence.

Respondent therefore respectfully asks to reconsider its prior finding of actual innocence and order an evidentiary hearing, or—in the alternative—reconsider its prior finding of actual

[17] Even worse, it subjects habeas respondents to the sort of catch-22 that cannot have been contemplated by Congress when it enacted the AEDPA: prolong the proceedings and devote considerable time and resources to factually rebut claims already rejected by the state courts, or run the risk of a district court might cast aside the presumption of correctness afforded to the state courts' findings of fact and credit a petitioner's out-of-court affidavits without any further inquiry.

[18] While Respondent maintains that this Court's finding of actual innocence was erroneous for all the reasons stated in this motion, this Court was correct to give Respondent a further opportunity to respond on the merits of the petition. Based on that determination, Respondent knows that this Court will review all the materials now submitted by Respondent in determining whether, as Respondent has amply demonstrated, Petitioner's affiants are unworthy of belief in light of the substantial new evidence compiled by the OAG.

innocence and deny his claim based upon the affidavits now submitted to this Court. *See Rodeman*, 767 F.Supp.2d at 1189.

## CONCLUSION

Respondent respectfully urges this Court to reconsider its previous finding of actual innocence. (Doc. 23). This Court has the power to do so. *Rodeman*, 767 F.Supp.2d at 1188. And, as Respondent has shown, this Court's opinion and order finding Petitioner actually innocent reflects numerous and significant misapprehensions of law and fact. With respect, any or all of the noted misapprehensions warrant reconsideration. Not least of which being this Court's decision to answer the question in Petitioner's favor on his affidavits alone. And Respondent also comes to this Court with strong evidence that those affidavits are fabricated.

For this Court to hold fast to its prior finding of actual innocence, after Respondent has noted its misapprehensions of law and fact, and after receiving evidence that Petitioner's affidavits are fabricated, would be a manifest injustice and reward Petitioner's fraud on this Court. Respondent therefore respectfully asks this Court to reconsider its prior finding of actual innocence, deny that claim either on the papers submitted or after an evidentiary hearing, and dismiss his petition as untimely. Alternatively, Respondent asks this Court to dismiss this petition for the reasons stated in its separately filed Response to Petition for Writ of Habeas Corpus.

Respectfully submitted,

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**ATTORNEYS FOR RESPONDENT**

## CERTIFICATE OF SERVICE

**X** I hereby certify that on July 7, 2025, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing.

**X** I hereby certify that on July 7, 2025, I served the attached document electronically on the following, who is **not** a registered participant of the ECF System:

Channen R. Smith, # 569312
Mack Alford Correctional Center
P.O. Box 220
Stringtown, Oklahoma 74569-0220

s/ Randall Young