No. 18-940

In the Supreme Court of the United States

JAMAL MARTINEZ HANCOCK

Petitioner,

v.

LORIE DAVIS, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondent concedes that there is a circuit split on the definition of "new" evidence that may be used to support a gateway claim of actual innocence under *Schlup* v. *Delo*, 513 U.S. 298 (1995). And Respondent does not dispute that the question on which the lower courts are divided is squarely and cleanly presented in this case. Rather, Respondent attempts to diminish the circuit split by misconstruing the holdings of several circuits and relying on the unpublished decisions of others. Respondent also argues extensively that the rule adopted by the court of appeals below is correct.

This Court's review is warranted. Respondent's misguided effort to contend that the split is "resolving itself" only underscores the extent of the disarray in the courts of appeals regarding what constitutes "new" evidence in the habeas context. And Respondent's merits arguments—which are, in any event, erroneous—provide no basis for denying review. Only this Court can resolve the entrenched conflict among the courts of appeals regarding the important and recurring question presented here, and this case is a superior vehicle for doing so.

A. This Court's review is needed to resolve the deep and persistent circuit split.

Respondent acknowledges—as have numerous courts of appeals, including the Fifth Circuit below—that there is a circuit split regarding the meaning of "new" evidence for purposes of the *Schlup* actual-innocence gateway. See Pet. 11. Respondent's efforts

to minimize that split only confirm the extensive divisions among the circuits.

1. Respondent acknowledges that the Seventh and Ninth Circuits have squarely held that evidence supporting a gateway actual-innocence claim need only be newly presented, not newly discovered. Opp. 6. Respondent contends that the Ninth Circuit has since "modified" its position, but cites only a single, unpublished panel disposition, which, of course, cannot overturn a prior precedential opinion or serve as precedent in future cases. See Opp. 6 (citing *Chestang* v. *Sisto*, 522 F. App'x 389, 391 (9th Cir. 2013) (unpublished)); but see Ninth Circuit Rule 36-3(a) ("Unpublished dispositions and orders of this Court are not precedent"); *United States* v. *Kim*, 806 F.3d 1161, 1174 n.9 (9th Cir. 2015) (three-judge panel cannot reverse prior panel opinion).

In any event, *Chestang* is consistent with the Ninth Circuit's rule that "new" evidence of actual innocence need not have been unavailable at the time of trial. See *Griffin* v. *Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). While *Chestang* did note that the petitioner's proffered evidence was known to him when he pled guilty, the court did so in the context of evaluating the weight of the evidence under *McQuiggin* v. *Perkins*, 569 U.S. 383 (2013), in which this Court held that "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." *Chestang*, 522 F. App'x at 391 (quoting *McQuiggin*, 569 U.S. at 399). *Chestang* concluded that, in light of petitioner's guilty plea and unexplained ten-year delay in asserting that he was not the perpetrator of the crime, he failed to

demonstrate that a reasonable factfinder would have reached a different result based on the "newly supplemented record." *Id.* (quoting *Lee* v. *Lampert*, 653 F.3d 929, 945 (9th Cir. 2011)). Thus, *Chestang* does not call into question the Ninth Circuit's prior holding in *Griffin*.

Respondent also claims that what constitutes "new" evidence is unclear in the First, Second, and Sixth Circuit. Opp. 6-7. But both the Second and Sixth Circuits have allowed a petitioner to pass through the *Schlup* gateway based, at least in part, on "new" evidence that was available but not presented at trial. As Respondent acknowledges, the Second Circuit in *Rivas* v. *Fischer*, 687 F.3d 514 (2d Cir. 2012), defined "new" evidence as "evidence not heard by the jury." *Id.* at 543. That statement is not, as Respondent contends (Opp. 6), an ambiguous one. The court squarely held that the primary "new" evidence on which the petitioner relied was known to him at the time of trial. 687 F.3d at 536 (concluding that with reasonable diligence, petitioner could have learned prior to trial that the state's testifying medical examiner was under criminal investigation, and further concluding that the facts underlying petitioner's "new" forensic evidence were known at the time of trial). *Ibid.* And although petitioner alleged that the state had withheld other, nonscientific evidence, the court concluded that the withheld evidence would not, alone, satisfy the *Schlup* standard. *Id.* at 545-546. Thus, *Rivas* unambiguously held that a petitioner may pass through the *Schlup* gateway based on "evidence not heard by the jury," *id.* at 543, even though the

evidence in question was within the reach of reasonable investigation at the time of trial.

Similarly, in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit ruled that the petitioner met the *Schlup* standard based on exculpatory evidence that included photographs that were available, but not presented, at trial. *Id.* at 584. The court expressly rejected the State's argument that petitioner could not use the photographs to establish actual innocence because the parties knew of their existence at the time of trial. *Id.* at 595 n.9. Respondent attempts to brush off this holding as merely "not[ing]" that "the *Schlup* standard was different from the Michigan standard for a new trial," Opp. 7, but that distinction is precisely the issue here. The Sixth Circuit concluded that, whereas Michigan law requires that the new evidence "must have been discovered *after the trial*," the *Schlup* standard requires only that the evidence "was *not presented at trial*." *Souter*, 395 F.3d at 595 n.9 (emphasis in original) (internal quotation marks and citations omitted). Necessary to the court's holding was the conclusion that, even if the photographs were available at the time of trial, they constituted "new evidence in support of [petitioner's] actual innocence claim under *Schlup*." *Id.* Thus, although the Sixth Circuit subsequently suggested that it need not take a side in the circuit split, see Opp. 7, *Souter*, on its face, did so.

Finally, in *Riva* v. *Ficco*, 803 F.3d 77 (1st Cir. 2015), the "newly presented evidence" consisted of the opinion of a recently retained psychiatric expert that petitioner was legally insane at the time of the murder. *Id.* at 84. That information was plainly

available to the petitioner at the time of trial. *Id.* at 84 n.7. The First Circuit considered such evidence "new" for the purposes of *Schlup* but concluded that, in light of competing trial evidence about petitioner's state of mind at the time, the new evidence did not meet *Schlup*'s separate no-reasonable-juror requirement. *Id.* at 84-85. Thus, the First Circuit, like the Second, Sixth, Seventh, and Ninth Circuits, permits habeas petitioners to support claims of actual innocence with evidence that was available but not presented at trial.

2. On the opposite side of the split are the Fifth and Eighth Circuits, which hold that for evidence to be "new" it must have been unavailable at trial.[1]

Respondent claims that other circuits have "begun to coalesce" around that standard following this Court's 2013 decision in *McQuiggin*. Opp. 7. But *McQuiggin* provides no guidance regarding the meaning of "new" evidence, because that question was not at issue in that case. The question in *McQuiggin* was whether the *Schlup* actual-innocence gateway is available when the impediment to habeas review is not a procedural bar, as in *Schlup*, but rather the expiration of AEDPA's statute of limitations. 569 U.S. at 386. The Court held that the gateway is available in that circumstance, *ibid.*, and clarified that although there is no threshold diligence requirement for raising a claim of actual innocence, the timing of petitioner's claim bears on its credibility, *id.* at 398-400. *McQuiggin*'s passing references to

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[1] Respondent does not attempt to defend the court of appeals' erroneous statement that this case does not require it to "weigh in on the circuit split." App. 5a-6a (quoting *Fratta* v. *Davis*, 889 F.3d 225, 232 (5th Cir. 2018)).

"newly discovered evidence," which are not part of its holding, are not controlling.

Not surprisingly, then, the cases that Respondent identifies do not demonstrate that the courts of appeals have changed their approach to "new" evidence following *McQuiggin*. Respondent cites unpublished orders of the Tenth and Eleventh Circuits denying certificates of appealability, Opp. 8 (citing *Johnson* v. *Medina*, 547 F. App'x 880 (10th Cir. 2013) (unpublished), and *Bembo* v. *Sec'y, Fla. Dep't of Corr.*, No. 16-16571-C, 2017 WL 5070197 (11th Cir. Mar. 30, 2017) (unpublished)), as well as an unpublished judgment of the D.C. Circuit, *ibid.* (citing *Adams* v. *Middlebrooks*, 640 F. App'x 1 (D.C. Cir. 2016) (unpublished)). Those unpublished orders are not precedential, and in any event none contains any suggestion that *McQuiggin* resolves the meaning of "new" evidence for purposes of the *Schlup* test. And even if those cases were precedential, they would only further demonstrate the depth of the circuit split.

3. Finally, Respondent attempts to align the Fifth Circuit's approach with that of the Third Circuit in *Reeves* v. *Fayette SCI*, 897 F.3d 154 (3d Cir. 2018), *petition for cert. filed*, No. 18-543 (Oct. 25, 2018). Opp. 8-9. Such an alignment would not obviate the circuit split here—but, in any event, no such alignment exists.

In *Reeves*, the Third Circuit recognized a "limited" rule that allows a reviewing court to consider exculpatory evidence that was available at the time of trial but was not discovered or presented at trial due to counsel's ineffectiveness. 897 F.3d at 164. According to Respondent, the Fifth Circuit's rule that evidence must have been unavailable at trial to be

considered "new" admits of a different exception, which deems evidence of which the petitioner was not personally aware at the time of trial to be "new," even if the evidence was known to his counsel. Opp. 9. That purported exception is not coextensive with the *Reeves* rule, which focuses on counsel's ineffectiveness rather than the petitioner's personal knowledge.[2] It cannot be reconciled with the tenet that a client is deemed to "have 'notice of all facts, notice of which can be charged upon the attorney.'" *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 396-397 (1993) (quoting *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 633-634 (1962)). And, notably, Respondent's newly proffered rule is contradicted by the Fifth Circuit's opinion below, which ruled that the affidavits were not "new" because Mr. Hancock did not contend that they "were unavailable to him *or trial counsel* at or before trial." App. 6a (emphasis added).

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[2] For example, exculpatory evidence of which both the petitioner and his counsel were aware at the time of trial, but which counsel failed to present because of his constitutional ineffectiveness, would constitute "new" evidence under *Reeves* but not under Respondent's proffered standard. And it is unclear how Respondent's standard would apply when the evidence was discoverable by counsel's reasonable investigation. Under *Reeves*, such evidence would likely be considered "new" because counsel would have discovered it but for his ineffectiveness. Respondent suggests that the relevant question is whether the petitioner could have discovered the evidence on his own, Opp. 15—but that does not make sense, given that criminal defendants are often incapable of conducting any investigation independent of their counsel.

B. Respondent's merits arguments do not provide a basis for denying review.

Respondent makes various arguments for the correctness of the Fifth Circuit's rule. Opp. 10-16. Those arguments go to the merits—they do not provide a reason to leave the circuit split unresolved. In any event, Respondent's merits arguments are wrong.

1. Respondent contends that *Schlup* itself limits "new" evidence to that which was unavailable or excluded at trial. Opp. 10-11. Respondent ignores *Schlup*'s repeated references to "newly presented evidence," *Schlup*, 513 U.S. at 330, 332, focusing instead on this Court's statement that "the emphasis on 'actual innocence' allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial." Opp. 10 (quoting *Schlup*, 513 U.S. at 327-328). But the Court made that observation in the context of explaining that the focus on "actual innocence" relieves the reviewing court of the usual constraints on the evidence it may consider, emphasizing that the court is "not bound by the rules of admissibility that would govern at trial." *Schlup*, 513 U.S. at 327-328. Thus, the statement in question expands, not limits, the types of evidence on which a petitioner alleging actual innocence may rely.[3]

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[3] Respondent incorrectly describes the opinion of the Court in *Schlup* as a "plurality," and Justice O'Connor's concurrence as "controlling." Opp. 10. Justice O'Connor joined the majority opinion in full, and that opinion, not her concurrence, controls. *Schlup*, 513 U.S. at 300-301. In any event, although Justice O'Connor referred in passing to "newly discovered evidence of innocence," *id*. at 332, she wrote separately to address unrelated

Respondent also argues that allowing a petitioner to present evidence that was available but not presented at trial would render superfluous the requirement that it be "new." Opp. 11. But *Schlup*'s requirement that the evidence be "not presented at trial" defines what it means for evidence to be "new" in this context. *Schlup*, 513 U.S. at 324. It is Respondent's position that would create superfluity. If "new" means "unavailable at trial," the Court need not have specified that the evidence must have been "not presented at trial." *Id.*

Respondent next attempts to reconcile the Fifth Circuit's rule with *Schlup* by arguing that the evidence in *Schlup* would qualify as "new" under Respondent's newly minted exception for evidence that was not within the petitioner's *personal* knowledge. Opp. 15. But this Court made no mention of whether the evidence was personally known to Schlup, because that has never been the standard. See pp. 6-7, *supra*.[4] Instead, this Court treated the evidence as "new" because it was not presented at

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issues, and did not suggest any disagreement with the Court's definition of "new" as encompassing evidence that was "not presented at trial." *Id.* at 324.

[4] Although this Court did not address Schlup's personal knowledge, Schlup did in fact know of the exculpatory evidence and asked his counsel to pursue it. See *Schlup* v. *Delo*, 11 F.3d 738, 744 (8th Cir. 1993) (Heaney, J., dissenting) ("Both Schlup and his mother begged trial counsel (and subsequent counsel) to interview inmates housed in cells near the site of the murder, but none did so."), *vacated*, 513 U.S. 298 (1995). Thus, the evidence was not "new" even under Respondent's purported exception for evidence that was not within the petitioner's personal knowledge or available to the petitioner through reasonable investigation.

trial, even though Schlup's counsel could have discovered it through reasonable investigation. *Schlup*, 513 U.S. at 313. That approach squarely conflicts with the Fifth Circuit's holding below that the affidavits were not "new" because Mr. Hancock failed to allege that they "were unavailable to him *or trial counsel* at or before trial." App. 6a (emphasis added).[5]

2. Respondent also argues that the Fifth Circuit's rule is necessary to protect "the finality of state-court judgments" and "principles of comity and federalism." Opp. 14 (quoting *Schlup*, 513 U.S. at 318). That is incorrect. In fashioning the actual-innocence gateway, this Court recognized that the State's interest in finality must give way in the rare cases "where a constitutional violation has probably resulted in the conviction of one who is actually innocent." *Schlup*, 513 U.S. at 321 (quoting *Murray* v. *Carrier*, 477 U.S. 478, 496 (1986)); see *McQuiggin*, 569 U.S. at 393 (miscarriage of justice exception reflects "[s]ensitivity to the injustice of incarcerating an innocent individual"). The interest in avoiding such miscarriages of justice is the same regardless of when the evidence of actual innocence became available. And there is no basis to conclude that a decision from this Court authorizing district courts to consider evidence that was available but not presented at trial would lead to a flood of frivolous petitions. Notably, Respondent does not contend that

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[5] Respondent also erroneously suggests that *McQuiggin* demonstrates the correctness of its view. Opp. 12. But, as discussed above, *McQuiggin* did not concern the meaning of "new" evidence in this context. See pp. 5-6, *supra*.

such a problem has arisen in the circuits that have already adopted that rule.

C. This case presents a superior vehicle to resolve the circuit split.

Respondent does not dispute that this case is an excellent vehicle to resolve the circuit split. This case squarely presents the issue that has divided the courts of appeals—and, unlike the Third Circuit's decision in *Reeves*, the Fifth Circuit's ruling below is outcome-determinative. See Brief in Opposition at 13, *State Correctional Institution at Fayette* v. *Reeves*, No. 18-543 (Feb. 15, 2019).[6] Moreover, as explained in the Petition (at 20-21), this case presents a broader question than *Reeves*, which ruled narrowly that evidence counts as "new" where the petitioner alleges ineffective assistance based on counsel's failure to discover or present the evidence that supports his claim of actual innocence. *Reeves*, 897 F.3d at 163. Indeed, this Court's resolution of this case could obviate the need for any court ever to confront the question at issue in *Reeves*. Accordingly, this Court should grant review here so that it may resolve the broader question dividing the courts of appeals.

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[6] Respondent suggests in passing that the affidavits at issue here were part of the trial record. Opp. 14. The Fifth Circuit did not consider that factual question; accordingly, the question is suitable, at best, only to be raised on remand. Notably, the cited portion of the record on appeal suggests only that the prosecutor may have read two sentences of Deimart's affidavit into the record. It does not establish that the affidavit as a whole, or even the portions on which Mr. Hancock relies, were introduced at trial (or were provided to Mr. Hancock's counsel).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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