No. ___

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Antiterrorism and Effective Death Penalty Act of 1996, a state prisoner must file his or her federal habeas petition within one year of one of four triggering events. 28 U.S.C. § 2244(d)(1). However, to prevent a "fundamental miscarriage of justice," an untimely petition alleging constitutional error is not barred when the petitioner presents "new reliable evidence" of actual innocence. *Schlup* v. *Delo*, 513 U.S. 298, 324, 327 (1995); *McQuiggin* v. *Perkins*, 569 U.S. 383, 386 (2013). The question presented is:

Whether evidence that was available but not presented at trial constitutes "new" evidence for purposes of the "actual-innocence" gateway that permits review of an untimely petition for habeas corpus.

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Jamal Martinez Hancock respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a) is reported at 906 F.3d 387. The order of the district court (App. 8a) is unpublished.

JURISDICTION

The court of appeals entered judgment on October 23, 2018. On November 15, 2018, the court of appeals notified Mr. Hancock that it would take no action on his *pro se* petition for rehearing *en banc* on the ground that it was not timely filed. App. 19a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Antiterrorism and Effective Death Penalty Act of 1996 provides, in relevant part:

> (d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> > (A) the date on which the judgment became final by the conclusion of direct review or the

> expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
>
> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

STATEMENT

The Fifth Circuit's decision in this case deepens an entrenched conflict among the courts of appeals concerning what constitutes "new" evidence of actual innocence that permits review of procedurally barred petitions for habeas corpus. In *Schlup* v. *Delo*, 513 U.S. 298 (1995), this Court held that, to prevent a "fundamental miscarriage of justice," a federal court may review a procedurally defaulted habeas petition where the petitioner comes forward with "new reliable evidence * * * that was not presented at trial," *id.* at 324, and demonstrates that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence," *id.* at 327. Under *Schlup*, the petitioner's claim of actual innocence is not itself a basis for relief; rather, it serves as a "gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Id.* at 315 (quoting *Herrera* v. *Collins*, 506 U.S. 390, 404 (1993)); see also *McQuiggin* v. *Perkins*, 569 U.S. 383, 386 (2013) (holding that the *Schlup* actual-innocence gateway is available with respect to petitions that are untimely under the one-year statute of limitations provided by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2244(d)(1)). The question at issue here is whether evidence that was available but not presented at trial can constitute "new" evidence for purposes of the *Schlup* actual-innocence gateway.

1. In 2002, petitioner Jamal Martinez Hancock was convicted by a Texas jury of the murder of

Brandon Naill and sentenced to ninety-nine years of imprisonment. App. 9a.[1] Mr. Naill was fatally shot while leaving the parking lot of a Houston nightclub in his jeep on the night of May 2, 2002. The sole witness to identify Mr. Hancock as the shooter was Randy Gene Deimart, a cab driver who was parked in the club's parking lot at the time of the shooting. App. 10a-15a. Mr. Deimart testified that he pulled into the parking lot at approximately 1:00 am. After he parked, he observed a verbal altercation between a "white" man (Mr. Naill) and a "short" man, whom he later identified as Mr. Hancock. From his vantage point approximately 40 to 50 feet away, Mr. Deimart observed the short man run toward the club, then go back to the vicinity of the club's entrance on Rankin Road and shoot at an SUV as it left the parking lot onto Rankin Road. The short man then raised his shirt, put something in his pants, dropped his shirt, and ran back toward the front of the club. Mr. Deimart acknowledged that he had been unable to identify Mr. Hancock in a pretrial photographic array, but nonetheless positively identified Mr. Hancock as the shooter at trial and testified that he had no doubt that the shooter was the same person who had argued with the white man outside the club. App. 12a-13a.

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[1] Because the district court dismissed Mr. Hancock's *pro se* petition *sua sponte*, the state court record is not part of the record on appeal. Accordingly, we rely, as did the district court, on the facts as set forth by the Court of Appeals of Texas, Houston (1st Dist.), in Mr. Hancock's direct appeal. See *Hancock* v. *State*, No. 01-02-01186-CR, 2004 WL 253272 (Tex. App. Feb. 12, 2004).

Moises Reyes, a valet at the club, and Brandon Gurie, a friend of Mr. Naill's who had accompanied him that evening and was in the jeep with Mr. Naill during the shooting, both identified Mr. Hancock as the man who argued with Mr. Naill outside the club. However, neither man observed the shooter. App. 10a-11a. Juan Carlos Gravina, a security guard at the club, also testified that he observed a confrontation between a black man and two white men near the valet station, and that he saw the same black man enter the club shortly after shots were fired. Mr. Gravina was not asked to identify Mr. Hancock at trial. App. 13a.

Patrick Martinez, a friend of Mr. Hancock, testified that Mr. Hancock left the club shortly after 1:00 am, apparently to talk on his cell phone. Mr. Hancock then came back inside and told Mr. Martinez that someone was shooting outside. Mr. Martinez testified that Mr. Hancock told him he had "gotten into it" with two white men, but that he had backed off when the white men approached him to fight. App. 14a-15a.

Victor Stone Butts, another cab driver, testified that he saw a black man leave the club, heard three shots fired, then saw the same man holding a gun and firing six more shots in the direction of Rankin Road. Mr. Butts could not identify the shooter from a photographic array and was not asked to identify Mr. Hancock at trial. App. 13a-14a. Dottie Winters, a clerk at the club, testified that she saw a short man with dark skin and a bald head walk outside the club, then heard gunshots. Afterwards, the man reentered

the club and met Mr. Martinez. Ms. Winters could not identify Mr. Hancock at trial. App. 14a.

Mr. Hancock testified in his own defense. He testified that, after arriving at the club, he had one drink, then walked outside to answer his cell phone. He then went to Mr. Martinez's car to retrieve cigarettes and noticed people arguing as he walked back toward the club. Mr. Hancock testified that Mr. Naill and Mr. Gurie approached him, but he backed up and headed for the club. As he neared the valet area, he heard gunshots and jumped down between a row of parked cars. After the shooting was over, he ran inside the club and told Mr. Martinez that a shooting had taken place outside. App. 15a.

Mr. Naill died as a result of a gunshot wound to the back of the head. App. 16a.

On February 12, 2004, a Texas appellate court affirmed Mr. Hancock's conviction, and Mr. Hancock did not seek discretionary review by the Texas Court of Criminal Appeals ("TCCA").

2. In 2014, Mr. Hancock filed a *pro se* application for post-conviction relief in the TCCA, asserting various claims, including that his counsel was ineffective for failing to object to the suggestive in-court procedure that led Mr. Diemart to identify him as the shooter. The TCCA denied relief without written order in 2015.

3. a. On August 4, 2016, Mr. Hancock filed a *pro se* petition for habeas corpus in the United States District Court for the Southern District of Texas pursuant to 28 U.S.C. § 2254, raising the same claims. Mr. Hancock acknowledged that the petition was not filed within AEDPA's one-year statute of

limitations, but argued that he was entitled to pass through the *Schlup* actual-innocence gateway. In support of that argument, he attached affidavits obtained by law enforcement shortly after the murder from Mr. Deimart, Mr. Reyes, Mr. Gurie, and Mr. Gravina.

Mr. Hancock contended that these "newly presented" affidavits contradicted the witnesses' testimony at trial. Most significantly, Mr. Hancock argued that the description of the shooter in Mr. Diemart's affidavit—a "black male" in his "mid 20's," with "lighter complexion," standing "5'7 or 5'8," and of "medium build"—was inconsistent with Mr. Hancock's appearance at the time, as he was in his early 30s, dark-skinned, and "portly" at 5'3 and 170 pounds. Memorandum in Support of Habeas Corpus Petition at 7-8, *Hancock* v. *Davis*, No. 4:16-cv-02388, Docket No. 2 (S.D. Tex. Aug. 4, 2016); App. 16a. Mr. Hancock further contended that the State allowed Mr. Diemart to confer with the State's other witnesses before giving testimony to align his description of the shooter with theirs. Mr. Hancock argued that, in light of those newly presented affidavits, no reasonable juror would have voted to convict him. App. 16a.

The district court dismissed Mr. Hancock's petition *sua sponte* under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, as barred by AEDPA's statute of limitations.[2] App. 8a. The court ruled that Mr.

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[2] Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts provides, in relevant part: "If it plainly appears from the petition and any attached exhibits that the

Hancock was not entitled to pass through the *Schlup* actual-innocence gateway because the witness affidavits did not constitute "new" evidence under *Moore* v. *Quarterman*, 534 F.3d 454 (5th Cir. 2008). App. 17a. In *Moore*, the Fifth Circuit held that evidence is not "new" if "it was always within the reach of [the petitioner's] personal knowledge or reasonable investigation." *Id.* at 465. The district court concluded that Mr. Hancock failed to establish that the witness affidavits were "new" because he did not demonstrate that they "were unavailable to trial counsel at the time of trial." App. 17a.

The district court further ruled that, even if the affidavits did constitute "new" evidence, Mr. Hancock failed to show that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Id.* (quoting *Schlup*, 513 U.S. at 327). Because "the jury was presented with differing and impeached descriptions of the shooter," the court concluded, the affidavits "offer[ed] nothing more than additional differing accounts of the offense or grounds for impeaching Diemert's [*sic*] in-court testimony." App. 17a-18a.

b. The Fifth Circuit affirmed on the sole ground that the affidavits did not constitute "new" evidence. App. 6a. The court acknowledged that "[t]he Supreme Court has not explicitly defined what constitutes 'new reliable evidence' under the *Schlup* actual-innocence standard, and there is a circuit split." App. 5a. That

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petitioner is not entitled to relief in the district court, the judge must dismiss the petition and direct the clerk to notify the petitioner." 28 U.S.C. § 2254 Rule 4.

split, it explained, "centers on whether 'new reliable evidence' for the purpose of the *Schlup* actual innocence gateway must be newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial." App. 5a n.1 (citing cases). But the court concluded that Mr. Hancock's case was governed by its previous holding in *Moore* that "[e]vidence does not qualify as 'new' under the *Schlup* actual-innocence standard if 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation.'" App. 6a (quoting *Moore*, 534 F.3d at 465).[3] Thus, the court explained, "though we have not decided what affirmatively constitutes 'new' evidence, we have explained what does not." *Id.* Because Mr. Hancock "did not contend in the district court, and does not contend in this appeal, that the affidavits were unavailable to him or trial counsel at or before trial," the court concluded that had not presented "new" evidence that would allow him to pass through the *Schlup* actual-innocence gateway. *Id.*

REASONS FOR GRANTING THE PETITION

The court of appeals' holding in this case squarely takes a position on the subject of an entrenched, three-way split of authority among the federal courts

[3] The court of appeals stated that it was not required to "weigh in on the circuit split," App. 5a-6a (quoting *Fratta* v. *Davis*, 889 F.3d 225, 232 (5th Cir. 2018), *cert. denied*, __ S. Ct. __, 2019 WL 113270 (2019))—but it applied *Moore*, which does indeed take a position on one side of that split.

of appeals: whether "new" evidence for the purpose of the *Schlup* actual-innocence gateway must be newly discovered, previously unavailable evidence, or whether it includes evidence that was available but not presented at trial. Five courts of appeals have held that evidence is "new" if it was not presented to the jury—regardless of whether it was available at the time of trial. Two courts of appeals, including the court below, have held that evidence is "new" only if it was not available at trial and could not have been discovered at that time through reasonable investigation. And one court of appeals has charted a middle course, holding—in a decision from which there is currently a petition for certiorari pending before this Court, see *State Correctional Institution at Fayette* v. *Reeves*, No. 18-543 (cert. filed Oct. 25, 2018)—that for evidence to be "new," it must have been unavailable at the time of trial *unless* petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present the very exculpatory evidence that demonstrates the petitioner's actual innocence. Only this Court can resolve that split of authority on an important and recurring question of federal law, and this case is an excellent vehicle for doing so. The petition for a writ of certiorari should therefore be granted.

A. The circuits are in acknowledged conflict over the meaning of "new" evidence for purposes of the *Schlup* actual-innocence gateway.

The court of appeals expressly recognized that there is a conflict among the circuits regarding what constitutes "new" evidence for purposes of the *Schlup* actual-innocence gateway, App. 5a, as have numerous other courts of appeals. See, *e.g.*, *Rozzelle* v. *Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1018 n.21 (11th Cir. 2012); *Cleveland* v. *Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Houck* v. *Stickman*, 625 F.3d 88, 93-94 (3d Cir. 2010); *Wright* v. *Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006). Notwithstanding its suggestion to the contrary, the court of appeals' decision in this case squarely places the Fifth Circuit on one side of this conflict.

1. Five courts of appeals have held that *Schlup* requires only that the evidence was not presented to the jury at trial, regardless of whether the petitioner actually possessed it at the time of trial or could have discovered it at that time through reasonable investigation.

In *Gomez* v. *Jaimet*, 350 F.3d 673 (7th Cir. 2003), the petitioner supported his *Schlup* actual-innocence claim with "new" evidence that included *his own testimony*. *Id.* at 679. The respondent argued that this evidence could not be considered "new" because it was not "newly discovered, *i.e.*, [petitioner] was aware of its existence at the time of trial." *Id.* The court rejected this argument, holding that "nothing in *Schlup* indicates that there is such a strict limitation

on the sort of evidence that may be considered in the probability determination. All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial." *Id.*

The Ninth Circuit adopted the same standard in *Griffin* v. *Johnson*, 350 F.3d 956 (9th Cir. 2003), *cert. denied*, 541 U.S. 998 (2004). Seven years after pleading guilty to murder, the petitioner asserted a procedurally defaulted claim for ineffective assistance of counsel based on his counsel's failure to investigate his mental-health history and for allowing him to enter a guilty plea that was not knowing or voluntary due to his alleged incompetence. *Id.* at 960. In support of his claims, the petitioner presented psychiatric records from his childhood and adolescence, and contended that these records entitled him to pass through the *Schlup* actual-innocence gateway. *Id.* at 959-61. It was undisputed that these records were in the petitioner's possession at the time of the proceedings in the trial court. *Id.* at 963. The Ninth Circuit held that they nonetheless qualified as "new" evidence under *Schlup* because they were not presented to the trial court. *Id.*

Likewise, in *Souter* v. *Jones*, 395 F.3d 577 (6th Cir. 2005), the Sixth Circuit rejected the argument that the petitioner must demonstrate that the "new" evidence—in that case, photographs—was unavailable at the time of trial. *Id.* at 595 n.9. It held that "even if the photographs of the bloody clothes were available in 1992, there is no evidence in the record that they were ever presented to the jury and therefore, are new evidence in support of [petitioner's] actual innocence claim under *Schlup*." *Id.*

In *Rivas* v. *Fischer*, 687 F.3d 514 (2d Cir. 2012), the Second Circuit joined the Sixth, Seventh, and Ninth Circuits in defining "new evidence" as "evidence not heard by the jury." *Id.* at 543. In *Rivas*, the petitioner presented an affidavit by an expert in forensic pathology establishing that the victim died at a time when the petitioner had an unchallenged alibi. *Id.* at 544-46. The court held that this evidence was "new" even though it was "based on facts that were known to [petitioner] or discoverable by him or his counsel at the time of his trial." *Id.* at 536.

Finally, the First Circuit has stated that *Schlup* requires the petitioner to come forward with "newly *presented* evidence." *Riva* v. *Ficco*, 803 F.3d 77, 84 (1st Cir. 2015), *cert. denied*, 136 S. Ct. 1536 (2016) (emphasis added). In *Riva*, the "new" evidence consisted of the opinion of a recently retained psychiatrist that the petitioner was legally insane at the time of the murder. *Id.* The court considered this evidence "new" even though the psychiatrist's opinion merely interpreted an IQ test that the petitioner took two years before the murder and argued that the Commonwealth's psychiatric expert misrepresented the nature of petitioner's mental illness at trial. *Id.* at 84 n.7.[4]

2. By contrast, the Eighth Circuit and the Fifth Circuit have taken the opposite position.

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[4] The Eleventh Circuit has acknowledged the split of authority but did not reach the issue because the petitioner's proffered evidence, whether "new" or not, failed to demonstrate that no reasonable juror would have voted to convict. *See Rozzelle*, 672 F.3d at 1018-19 & n.21.

In *Osborne* v. *Purkett*, 411 F.3d 911 (8th Cir. 2005), *cert. denied*, 547 U.S. 1022 (2006), the Eighth Circuit held that "[e]vidence is only 'new' if it was 'not available at trial and could not have been discovered earlier through the exercise of due diligence.'" *Id.* at 920 (quoting *Amrine* v. *Bowersox*, 238 F.3d 1023, 1029 (8th Cir. 2001)). In that case, the petitioner was convicted of rape based, in part, on a physical examination of the victim that resulted in findings that were consistent with having had sexual intercourse. *Id.* at 914. In his federal habeas petition, the petitioner made the (procedurally defaulted) claim that his trial counsel was ineffective for failing to investigate the victim's prior sexual history, and presented an affidavit from the victim's then-boyfriend stating that the two had a sexual relationship. *Id.* at 919-20. The court held that the affidavit was not "new" evidence because the boyfriend's testimony "existed at the time of trial and could have been discovered earlier had [petitioner] or his counsel diligently pursued it." *Id.* at 920.

The Fifth Circuit's holding in this case places it squarely in the same camp as the Eighth Circuit. Although the court of appeals below professed to avoid weighing in on this circuit split by relying on *Moore* v. *Quarterman*, 534 F.3d 454 (5th Cir. 2008), *Moore* in fact adopts the Eighth Circuit's view. *Moore* held that the petitioner's evidence was not "new" because "it was always within the reach of [his] personal knowledge or reasonable investigation." 534 F.3d at

465.[5] That is just another way of articulating the approach taken by the Eighth Circuit: "[e]vidence is only 'new' if it was 'not available at trial and could not have been discovered earlier through the exercise of due diligence.'" *Osborne*, 411 F.3d at 920 (quoting *Amrine*, 238 F.3d at 1029). Although one court's standard is framed in the negative and one in the affirmative, both standards describe the same category of evidence. Evidence that was "always within the reach of [petitioner's] personal knowledge or reasonable investigation," *Moore*, 534 F.3d at 465, is precisely evidence that *was* "available at trial" or *could* "have been discovered earlier through the exercise of due diligence." *Osborne*, 411 F.3d at 920. Neither the Fifth Circuit nor the Eighth Circuit would consider such evidence to be "new."

Moreover, the court of appeals' holding in this case is incompatible with the holdings of the First, Second, Sixth, Seventh, and Ninth Circuits. The Seventh Circuit, for example, held that *the petitioner's own testimony* constituted "new" evidence because it was not presented at trial. See *Gomez*, 350 F.3d at 679. And the Ninth Circuit held that psychiatric records were "new" evidence even though there was no dispute that they were in the petitioner's possession at the time of his trial court proceedings. *Griffin*, 350

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[5] At the time *Moore* was decided, a split had already emerged between the Eighth Circuit, on one hand, and the Sixth, Seventh, and Ninth Circuits, on the other. However, the court did not acknowledge the split or engage in any substantive analysis of the appropriate standard to be applied when deciding whether evidence is "new." See 534 F.3d at 464-65.

F.3d at 963. In both cases, the evidence was undeniably within "the reach of [petitioner's] personal knowledge or reasonable investigation." App. 6a (quoting *Moore*, 534 F.3d at 465). Similarly, the First, Second, and Sixth Circuits would not have required Mr. Hancock to establish that the affidavits he presented were "unavailable to counsel at the time of trial." App. 6a. See *Souter*, 395 F.3d at 595 n.9 (holding that photographs were "new evidence" because there was "no evidence in the record that they were ever presented to the jury"); *Rivas*, 687 F.3d at 543 (defining "new evidence" as "evidence not heard by the jury"); *Riva*, 803 F.3d at 84 (requiring "newly *presented* evidence" (emphasis added)). Thus, had Mr. Hancock filed his habeas petition in the First, Second, Sixth, Seventh, or Ninth Circuit, it would not have been dismissed on the ground on which the court of appeals relied below.

3. The Third Circuit has charted a middle course. As a general matter, the Third Circuit follows the Eighth Circuit's approach, holding that evidence is not "new" if it "was available at trial." *Hubbard* v. *Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004), *cert. denied*, 543 U.S. 1070 (2005). However, in a recent decision (from which a petition for certiorari is currently pending), the Third Circuit acknowledged that this rule would "operate as a roadblock" where the underlying constitutional violation alleged by the petitioner is precisely counsel's failure to present the evidence of actual innocence that the petitioner contends opens the *Schlup* gateway. *Reeves* v. *Fayette SCI*, 897 F.3d 154, 164 (3d Cir. 2018) (quoting *Gomez*, 350 F.3d at 679-80), *petition for cert. filed*, No. 18-543

(Oct. 25, 2018). Accordingly, the Third Circuit recognized a "limited" exception that applies "when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence." *Id.*

4. In sum, the courts of appeals are deeply divided on the question presented, and there is no realistic likelihood that this conflict will be resolved without this Court's intervention. Eight of the courts of appeals have considered this issue and have thoroughly developed the arguments on all sides. And absent action by this Court, the outcome of the "new" evidence inquiry in cases like this one will continue to depend on the happenstance of which circuit court decides the case. The question presented here therefore warrants this Court's review.

B. The decision below is incorrect.

The court of appeals' holding not only conflicts with the approach taken by the majority of circuits to have considered the question but also is incorrect. It cannot be reconciled with *Schlup* and would lead to manifestly unjust results.

1. Nothing in *Schlup* indicates that a habeas petitioner presenting "new" evidence of actual innocence must demonstrate that the evidence was unavailable at the time of trial. To the contrary, in articulating the requirements for passage through the actual-innocence gateway, *Schlup* states that the petitioner must come forward with "new reliable evidence * * * that was not *presented* at trial." 513

U.S. at 324 (emphasis added). *Schlup* refers repeatedly to "newly *presented* evidence," *id.* at 330, 332 (emphasis added), and expressly contemplates that the reviewing court should consider evidence that was "wrongly excluded," *id.* at 328—*i.e.*, evidence that was necessarily "available" at the time of trial.

Indeed, the petitioner in *Schlup* would not have met the standard for "new" evidence applied by the court of appeals below. Lloyd Schlup was convicted of participating in the murder of a fellow inmate at the facility where he was incarcerated and sentenced to death. 513 U.S. at 301. In Schlup's second federal habeas petition, he presented the transcript of an interview conducted shortly after the murder with another inmate, John Green, whose account Schlup contended provided conclusive proof of his innocence. *Id.* at 308-09. Schlup's post-conviction counsel subsequently located Mr. Green and obtained an affidavit confirming the account given in the interview. *Id.* at 310. But Schlup's trial counsel had reviewed the interview transcripts while preparing for trial and could have followed up with Mr. Green—indeed, Schlup claimed that his trial counsel was ineffective for failing to do so. *Id.* at 312-13. Mr. Green's testimony was therefore "always within the reach of * * * reasonable investigation." App. 6a (quoting *Moore*, 534 F.3d at 465). The Court, however, did not even consider whether Mr. Green's testimony could have been discovered at the time of trial; it simply treated the testimony as "new" evidence because it was not heard by the jury that convicted Schlup. *Schlup,* 513 U.S. at 316-17.

2. More generally, the court of appeals' holding in this case cannot be squared with *Schlup*'s reasoning. *Schlup* explained that, where a petitioner "accompanies his claim of innocence with an assertion of constitutional error at trial," his "conviction may not be entitled to the same degree of respect as one * * * that is the product of an error free trial." 513 U.S. at 316. If the petitioner "presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial unless the court is also satisfied that the trial was free of nonharmless constitutional error, the petitioner should be allowed to pass through the gateway and argue the merits of his underlying claims." *Id.* The risk of unjustly incarcerating an innocent person is present regardless of whether the evidence of innocence was available at the time of trial. Available or not, if the evidence is strong enough to convince the reviewing court that "it is more likely than not that no reasonable juror would have convicted [the petitioner] in light of the new evidence," *id.* at 327, then review of the petitioner's underlying claims of constitutional error is necessary to prevent a "fundamental miscarriage of justice." *Id.* at 315.

3. The rule announced by the court of appeals below is particularly likely to result in miscarriage of justice where a petitioner asserts that the exculpatory evidence supporting his claim of actual innocence was not presented at trial because his trial counsel was constitutionally ineffective. Under such circumstances, the petitioner faces a Catch-22: to prove trial counsel's deficient performance, see *Strickland* v. *Washington*, 466 U.S. 668, 687 (1984),

he must demonstrate that counsel could have discovered the evidence through reasonable investigation; but to show that the evidence is "new," he or she must demonstrate that the same evidence could *not* have been discovered through reasonable investigation. The court of appeals' holding thus puts petitioners with potentially meritorious claims in an untenable position.

C. The question presented is an important and recurring one and this case is an apt vehicle to resolve it.

The meaning of "new" evidence for purposes of the *Schlup* actual-innocence gateway is an important question of federal law that determines the rights of numerous prisoners in state and federal custody. This question recurs frequently, as demonstrated by the fact that it has arisen in nine of the courts of appeals, and eight have weighed in. Indeed, there is another petition for certiorari currently pending before the Court that presents the related but narrower question whether a prisoner may satisfy the actual-innocence gateway using evidence that was available but not presented at trial, when the prisoner contends that trial counsel was ineffective for failing to discover or present that evidence. See *State Correctional Institution at Fayette* v. *Reeves*, No. 18-543 (cert. filed Oct. 25, 2018).

This case is a superior vehicle to resolve when evidence not presented at trial constitutes "new" evidence for purposes of *Schlup*. The sole issue decided by the Fifth Circuit was whether the

affidavits presented by Mr. Hancock in support of his claim of actual innocence constituted "new" evidence even though they were available at the time of trial, and its ruling was determinative of Mr. Hancock's claims.[6] The Third Circuit's decision in *Reeves*, by contrast, held narrowly that evidence that was available at the time of trial may constitute "new" evidence if the prisoner alleges that trial counsel was ineffective for failing to present it. See *Reeves* v. *Fayette SCI*, 897 F.3d 154, 163-64 (3d Cir. 2018). Granting review in *Reeves* alone thus would not permit the Court to resolve the broader question on which the courts of appeals have disagreed: whether evidence that was available at the time of trial may constitute "new" evidence even in the absence of an allegation of ineffective assistance, or whether the evidence must have been unavailable. This Court should therefore grant certiorari in this case to resolve the entire circuit split. The Court may also wish to grant certiorari in both cases and consolidate them so that it may consider the full range of approaches adopted by the courts of appeals.

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[6] Although the district court ruled in the alternative that Mr. Hancock failed to demonstrate that no reasonable juror would have voted to convict him in light of the newly presented evidence, App. 17a-18a, the court of appeals did not reach this issue. Accordingly, if this Court were to rule in Mr. Hancock's favor, the case would return to the court of appeals to consider this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-20662

JAMAL MARTINEZ HANCOCK

Petitioner-Appellant,

v.

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

Respondent-Appellee.

Appeals from the United States District Court
For the Southern District of Texas

[Filed October 23, 2018]

Before HIGGINBOTHAM, SMITH, and GRAVES,
Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Jamal Hancock was convicted of murder. The district court dismissed his petition for federal habeas corpus relief as untimely. Because Hancock has not presented new evidence of actual innocence under *Moore v. Quarterman*, 534 F.3d 454 (5th Cir. 2008), he has not made the showing necessary for this court to consider his claims despite the expired limitations period. Therefore, we affirm.

I.

In 2002, a Texas jury convicted Hancock of murder, and he was sentenced to ninety-nine years' imprisonment. On direct appeal, in 2004, the state court of appeals affirmed, and Hancock did not seek discretionary review with the Texas Court of Criminal Appeals ("TCCA"). In 2014, Hancock filed a state postconviction application, asserting that he suffered a due process violation based on a biased in-court identification procedure, that his trial counsel rendered ineffective assistance, and that the state presented false evidence. The TCCA denied relief without written order in 2015.

Hancock filed a federal habeas corpus petition under 28 U.S.C. § 2254, raising the same claims (of ineffective assistance of counsel and an impermissibly suggestive in-court identification process) that he had presented in the state court. That petition was untimely. Hancock had one year from the date his state court judgment became final, in 2004, to file a federal habeas petition. 28 U.S.C. § 2244(d)(1).

Hancock acknowledged that his petition was untimely but maintained that the court could

nevertheless exercise jurisdiction under the "actual innocence" gateway of *Schlup v. Delo*, 513 U.S. 298 (1995), and *McQuiggin v. Perkins*, 569 U.S. 383 (2013). Hancock attached to his habeas petition affidavits obtained by law enforcement, close to the date of the murder, from four state witnesses that, he alleges, contradict their trial testimony regarding the shooter's physical description.

The district court dismissed Hancock's petition as untimely under § 2244(d)(1), determining that he had not proffered new evidence or demonstrated actual innocence. Relying on *Moore*, 534 F.3d at 465, the court concluded that Hancock had not "establish[ed] that the affidavits were un-available to trial counsel at the time of trial," a prerequisite to constitute new evidence. Alternatively, the court determined that even if the affidavits constituted new evidence, Hancock had failed to establish that "no reasonable juror would have found [him] guilty beyond a reasonable doubt," *Schlup*, 513 U.S. at 327, because the jury was already presented with differing, impeached descriptions of the shooter. The district court therefore denied Hancock a certificate of appealability ("COA").

Hancock timely appealed, and this court granted a COA on four issues:

1. Whether "new" evidence for the purpose of the actual-innocence gate-way of *Perkins* must be newly discovered, previously unavailable evidence or if, instead, it includes reliable evidence that was

available but not presented at trial, *see Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006);

2. Whether the record was sufficient to permit the district court to determine that Hancock's affidavits, even if "new," would not have prevented a reasonable juror from voting for guilt beyond a reasonable doubt;

3. Whether, if the record is sufficient, the district court was correct in its determination that a reasonable juror still could have found Hancock guilty in light of the affidavits, *see Perkins*, 569 U.S. at 386–87; and

4. Whether Hancock's delay in presenting his claims based on the new affidavits had any effect on his allegations of actual innocence, *see Perkins*, 569 U.S. at 398–400.

We review *de novo* the denial of a habeas petition on procedural grounds. *Thomas v. Goodwin*, 786 F.3d 395, 397 (5th Cir. 2015).

II.

Hancock claims that despite the expiration of § 2244(d)(1)'s limitations period, the district court should be able to exercise jurisdiction over his claims because he is alleging actual innocence. In *Perkins*, 569 U.S. at 386, the Court held that "actual innocence, if proved, serves as a gateway through

which a petitioner may pass [even if] the impediment is a procedural bar . . . or . . . expiration of the statute of limitations." As a threshold matter, a credible gateway "claim [of actual innocence] requires [the] petitioner to support his allegations of constitutional error with new reliable evidence . . . that was not presented at trial." *Schlup*, 513 U.S. at 324. "[T]enable actual-innocence gateway pleas are rare: '[A] petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'" *Perkins*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329).

The Supreme Court has not explicitly defined what constitutes "new reliable evidence" under the *Schlup* actual-innocence standard, and there is a circuit split.[1] "This court has yet to weigh in on the

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[1] *See Wright*, 470 F.3d at 591 (collecting cases). The disagreement centers on whether "new reliable evidence" for the purpose of the *Schlup* actual innocence gateway must be newly discovered, previously unavailable evidence, or, instead, evidence that was available but not presented at trial. *Compare Osborne v. Purkett*, 411 F.3d 911, 920 (8th Cir. 2005) (holding that evidence is "new" only if it was unavailable at trial and could not have been discovered earlier through due diligence), *and Amrine v. Bowersox*, 238 F.3d 1023, 1028 (8th Cir. 2001) (same), *with Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015) (considering newly presented evidence "of opinions from a psychiatric expert that [petitioner] recently retained"), *Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012) (finding that "new evidence" is "evidence not heard by the jury"), *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003) ("All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial."), *and Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003)

circuit split concerning what constitutes 'new' evidence." *Fratta v. Davis*, 889 F.3d 225, 232 (5th Cir. 2018). Nor does this case require us to do so, because *Moore* squarely answers that the four affidavits Hancock presents do not constitute "new" evidence under *Schlup*.

Evidence does not qualify as "new" under the *Schlup* actual-innocence standard if "it was always within the reach of [petitioner's] personal knowledge or reasonable investigation." *Moore*, 534 F.3d at 465. Consequently, though we have not decided what affirmatively constitutes "new" evidence, we have explained what does not.

Hancock supported his claim of actual innocence with affidavits, obtained close to the date of the murder, from four state witnesses who testified at trial. The district court determined that Hancock did not establish that the affidavits were unavailable to counsel at the time of trial, and therefore the court held that Hancock had offered no "new" evidence. Hancock did not contend in the district court, and does not contend in this appeal, that the affidavits were unavailable to him or trial counsel at or before trial. *Moore* thus prohibits Hancock from supporting his actual-innocence gateway claim with the proffered affidavits as "new" evidence, so he is unable to overcome § 2244(d)(1)'s limitations bar.

(holding that "habeas petitioners may pass *Schlup's* test by offering 'newly presented' evidence of actual innocence").

Accordingly, the district court correctly interpreted and applied *Moore*. The dismissal of Hancock's federal habeas corpus petition as barred by 28 U.S.C. § 2244(d)(1)'s limitations period is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-16-2388

JAMAL MARTINEZ HANCOCK,

Petitioner,

v.

LORIE DAVIS,

Respondent.

[Entered Aug. 25, 2016]

ORDER OF DISMISSAL

Petitioner, a state inmate proceeding *pro se*, filed this section 2254 habeas petition challenging his 2002 conviction and 99-year sentence for felony murder. After reviewing the pleadings under Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Court concludes that this case must be dismissed with prejudice as barred by limitations.

Petitioner states that he was convicted of murder and sentenced to 99 years imprisonment in 2002. His conviction was affirmed on appeal, and his application for state habeas relief, filed in 2014, was denied in 2015. Petitioner acknowledges that his federal habeas petition is barred by the one-year statute of limitations, but argues that he is entitled to proceed under *McQuiggin v. Perkins*, __U.S. __ , 133 S. Ct. 1924 (2013), due to new evidence of actual innocence. However, petitioner demonstrates neither new evidence nor actual innocence.

In *McQuiggin*, the Supreme Court held that a prisoner filing a first-time federal habeas petition could overcome the one-year statute of limitations bar of section 2244(d)(1) upon a showing of "actual innocence" under the standard in *Schlup v. Delo*, 513 U.S. 298, 329 (1995). A habeas petitioner, who seeks to surmount a procedural default through a showing of "actual innocence," must support his allegations with "new, reliable evidence" that was not presented at trial and must show that it was more likely than not that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt. *See Schlup*, 513 U.S. at 326-27 (1995); *see also House v. Bell*, 547 U.S. 518 (2006). "Actual innocence" in this context refers to factual innocence and not mere legal sufficiency. *Bousely v. United States*, 523 U.S. 614, 623-624 (1998). This is a "demanding" standard that is seldom met. *House*, 547 U.S. at 538; *see also Schlup*, 513 U.S. at 324 (noting that because the high standard of evidence required "is obviously unavailable in the vast majority of cases, claims of actual innocence are

rarely successful"). As is relevant here, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner has made the requisite showing." *McQuiggin*, 133 S. Ct. at 1935.

In affirming petitioner's conviction on direct appeal, the intermediate state court of appeals set forth the following statement of facts:

> Moises Reyes, a valet at the St. James Club, testified that, on May 2, 2002 at approximately midnight, Brandon Naill, the complainant, and his friend, Brandon Gurie, arrived at the club, and Reyes parked Naill's jeep. When Naill and Gurie left the club, a confrontation arose between Naill and Reyes over payment of the valet. Appellant approached the men and told Naill "don't bother my partner." Appellant, Naill, and Gurie then argued. Naill and Gurie drove away, and Reyes saw appellant walk toward the club entrance and then turn around and walk toward the entrance of the parking lot. Reyes lost sight of appellant when appellant went behind a limousine bus parked in front of the club. Reyes then heard five to seven gunshots, but he could not see who was shooting. Appellant came back into view and went inside the club. Reyes heard appellant say, "Somebody is shooting like crazy out there." Reyes walked into the club behind appellant

and saw appellant meet his friend, Patrick Martinez, in the lobby. Reyes identified appellant in a photographic array and at trial.

Gurie confirmed Reyes' s account of the confrontation and further testified that appellant told Gurie, "I got something for you," and "I'll be right back motherfucker. Wait right here. I'll be right back." Appellant then backed up and placed his hands underneath his shirt. Gurie thought that appellant planned on pulling out a gun or a knife, so he bluffed and said, "I got something too." Gurie started backing up and suggested to Naill that they leave. Gurie lost sight of appellant as appellant walked behind a bus near the club's entrance.

Gurie further testified that Naill drove his jeep out of the club's parking lot. After Naill had driven approximately 30 to 40 feet onto Rankin Road, the road in front of the club, Gurie heard gunshots. First, he heard three quick shots, and Gurie told Naill to duck as Gurie ducked down on the floorboard with his head between his legs. Gurie heard more shots, heard glass shatter, and felt glass hit his shoulder. Then, Gurie heard one or two more shots fired. He then saw Naill's head slumped forward and

noticed blood running down the side of his neck. Gurie tried to maintain the steering to keep the jeep on the road, but could not, and the jeep hit a ditch near Rankin Road. Gurie testified that he did not see who was firing the shots. Gurie identified appellant in a photographic array and at trial as the man with whom he had argued at the club.

Randy Gene Deimart,[2] a cab driver, testified that he pulled into the club's parking lot at approximately 1:00 a.m. After Deimart parked, he saw a confrontation between a white man and appellant, who he described as "short." Deimart then saw appellant run toward the club, go back near the club's entrance near Rankin Road, raise his arm, and start shooting. Deimart had parked his taxi approximately 40 to 50 feet from where appellant stood. He looked to see what appellant aimed at and saw an "SUV" leaving the parking lot onto Rankin Road. After the shooting stopped, Deimart saw appellant raise his shirt, put something in his pants, drop his shirt, and run back toward the front of the club. During his testimony, Deimart explained how he could not identify appellant from a photographic array but was able to narrow his choices

[2] Petitioner's exhibits reflect the spelling as "Diemert."

down to two photos – one of which contained appellant. At trial, Deimart positively identified appellant as the shooter and testified that he had no doubt that the shooter was the same person who had argued with the white men.

Juan Carlos Gravina, a security guard at the club, also confirmed that the confrontation had occurred near the valet station. Gravina then saw the two white men walk towards their jeep and the black man walk towards the entrance to the parking lot. Gravina testified that the black man wore loose clothing and described his height as shorter than the white men. After hearing several shots, Gravina saw the same black man enter the club. Gravina was not asked to identify appellant at trial.

Victor Stone Butts, another cab driver, had parked his cab behind the bus that was in front of the club. Butts testified that he saw a black man wearing a dark baseball cap with a red bill turned toward the back, a gray shirt, and baggy brown pants leave the club. He then heard three shots and saw the same man with a gun in his hand. He saw the man fire six more shots, all in the direction of Rankin Road. Butts testified that the

man walked back toward the club, as if nothing had happened, and appeared to put the gun in his waistband or pocket. Butts could not identify the shooter from a photographic array, and he was not asked to identify appellant at trial.

Dottie Winters, the front clerk at the club, saw a man she described as having dark skin, a bald head, short, and wearing dark clothing, walk out of the club several minutes after he first entered. Winters heard the gunshots at approximately 1:15 a.m. Afterwards, she saw the man re-enter the club and meet Martinez in the lobby. She testified that the man appeared frightened and excited and told Martinez that they had to leave. Winters could not identify appellant at trial.

Patrick Martinez, appellant's friend, testified that he and appellant arrived at the club at approximately 1:00 a.m, and a few minutes later, appellant walked outside. Martinez thought that appellant walked outside to talk on his cell phone. A waitress then approached Martinez to tell him someone was shooting outside. Martinez headed for the front door to check on appellant. Before Martinez reached the door, appellant ran inside and told Martinez that someone was shooting outside.

Martinez and appellant left the club and saw a jeep in the ditch. Martinez testified that appellant told him that he had gotten into it with two white men. Appellant told Martinez that he had helped out the valet because the two white men were "picking" on the valet and were going to fight with the valet. Appellant also told Martinez that the white men approached him to fight, but appellant backed off.

Appellant testified at trial that, after arriving at the club, he had one drink, left Martinez at the table, and walked outside to answer his cell phone. He then went to Martinez's car to retrieve cigarettes and noticed people arguing as he walked back toward the club. Appellant testified that Gurie and Naill approached him. Appellant backed up and headed for the club as Naill and Gurie headed for their jeep. He then heard "burning rubber" from the jeep. Appellant testified that, when he came near the valet area, he heard gunshots and jumped down between a row of parked cars. After the shooting ended, he ran inside the club and told Martinez that there was shooting outside. Appellant later told Martinez that some white men had started something and that he thought they were the source of the shooting.

> Naill died as the result of a gunshot wound to the back of the head.

Hancock v. State, at *1-3.

In claiming new evidence of actual innocence, petitioner directs the Court to photocopies of affidavits executed by witnesses, particularly one signed by Diemert. The affidavits were voluntary statements given by Diemert and witnesses to the Harris County Sheriff's Office one or two days after the offense. In his affidavit, Diemert testified to witnessing the events, and described the shooter as a black male, mid 20s, 5'7 or 5'8, and of medium build. (Docket Entry No. 2, Exhibit A.) Diemert was unable to identify petitioner in an out-of-court head-only photo spread, but positively identified him in court after observing petitioner's full appearance. Petitioner argues that Diemert's affidavit testimony was in stark contrast to petitioner's actual height of 5'3, stocky build, and early 30s years of age. He also argues that Diemert's affidavit description contrasts with the more accurate descriptions given by the other witnesses in their affidavits or at trial. Petitioner claims that the State allowed Diemert to met [*sic*] with the other eyewitnesses and that he modified his in-court description and identification to correspond with those of the other witnesses. Petitioner argues that, had the jury been made aware of the description given by Diemert in his written affidavit, petitioner would not have been convicted.

In *Schlup*, the Supreme Court explained that a credible claim of actual innocence requires a petitioner to support his allegations with new reliable

evidence, whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence which was not presented at trial. Petitioner does not explain how these fourteen-year-old affidavits constitute "new evidence." Evidence is not new if "it was always within the reach of [the petitioner's] personal knowledge or reasonable investigation." *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008) (explaining if the allegation is that trial counsel should have presented evidence, then evidence was always within reach). Petitioner here does not establish that the affidavits were unavailable to trial counsel at the time of trial.

Even if the Court were to consider the affidavits to be new evidence, petitioner has not shown that "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. In making this determination, the Court is required to "assess the likely impact of the evidence on reasonable jurors." *House*, 547 U.S. at 538. In order to prevail, petitioner must provide new evidence of actual innocence "so strong that a court cannot have confidence in the outcome of the trial." *Schlup*, 513 U.S. at 316. He has failed to do so. Misidentification was petitioner's central defense at his 2002 jury trial, and the jury was presented with differing and impeached descriptions of the shooter. Diemert's affidavit description constitutes little more than additional potential impeachment evidence, and petitioner's speculation that Diemert's in-court testimony was intentionally influenced by the State is not evidence. The affidavits offer nothing more than

additional differing accounts of the offense or grounds for impeaching Diemert's in-court testimony. As a result, petitioner has not shown that "no reasonable juror would have found [him] guilty," and thus he cannot meet the actual innocence exception to the AEDPA's statute of limitations. *Id*. at 327.

The petition is DISMISSED WITH PREJUDICE as barred by limitations. Any and all pending motions are DENIED AS MOOT. A certificate of appealability is DENIED.

Signed at Houston, Texas, on Aug. 25, 2016.

ALFRED H. BENNETT
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

November 15, 2018

#1133210
Mr. Jamal Martinez Hancock
CID Connally Prison
899 FM 632
Kenedy, TX 78119-0000

No. 16-20662 Jamal Hancock v. Lorie Davis, Director
USDC No. 4:16-CV-2388

Dear Mr. Hancock,

We will take no action on your petition for rehearing en banc. The time for filing a petition for rehearing under FED. R. APP. P. 40 has expired.

Sincerely,

LYLE W. CAYCE, Clerk

By:
Donna L. Mendez, Deputy Clerk
504-310-7677

cc: Mr. Joseph Peter Corcoran
Mr. Edward Larry Marshall