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

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

## BRIEF IN OPPOSITION


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## QUESTION PRESENTED

Whether—under *Schlup v. Delo*, 513 U.S. 298 (1995), and *McQuiggin v. Perkins*, 569 U.S. 383 (2013)—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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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 906 F.3d 387. The order of the district court (Pet. App. 8a-18a) is not reported.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATEMENT

To demonstrate his alleged "actual innocence" for purposes of *Schlup*, Petitioner seeks to use affidavits from eyewitnesses who testified at trial. This does not constitute "new reliable evidence" for purposes of *Schlup*—under either the plurality opinion or Justice O'Connor's concurring opinion. While the circuits have been divided in the past on this question, the split is shallow and the question is resolving itself, especially after this Court's guidance in *McQuiggin*. And no plausible definition of "new reliable evidence" could include the "new" evidence here, which was created shortly after the offense, which was available to Petitioner at all relevant times, and which would have been cumulative of other impeachment evidence presented at trial. In fact, one of the affidavits on which Petitioner relies was introduced by the prosecution at trial. *See* R.34-38.[1] The lower court's decision is correct, and this Court's review is not warranted.

[1] Citations to "R.p" refer to pages of the Fifth Circuit record on appeal.

1. On May 2, 2002, Jamal Martinez Hancock got into a verbal altercation with Brandon Naill outside a nightclub in Houston, Texas. Randy Gene Deimart, a cab driver, saw the altercation while he was parked at the club around 1:00 am. He saw Hancock walk back toward the club, then turn to shoot at Naill's SUV as it left the parking lot. Pet. App. 12a-13a. Naill died from a gunshot wound to the back of the head. Pet. App. 16a.

Two other individuals—Moises Reyes, a valet, and Brandon Gurie, a friend of Naill's who was in the SUV with Naill during the shooting—did not see the shots being fired, but both identified Hancock as the person who argued with Naill outside the club just before the shooting. Pet. App. 10a-11a. A fourth witness—Juan Carlos Gravina, a security guard at the club—saw the same man who argued with Naill entering the club shortly after the shots were fired. Pet. App. 13a.

Another witness—Patrick Martinez, a friend of Hancock's—testified that Hancock left the club to talk on his cell phone and then came back in saying that someone was shooting outside. According to Martinez, Hancock told him that he had argued with Naill and Gurie, but he claimed that he had backed off when they approached him to fight. Pet. App. 14a-15a.

Hancock provided a different version of events. He testified that he had gone outside the club to answer a phone call, but he claimed that he saw Naill and Gurie arguing with someone else and then backed away and went inside the club as Naill and Gurie approached him. Pet. App. 15a.

A jury convicted Hancock of murder on the basis of the eyewitness testimony and sentenced him to ninety-nine years' imprisonment. Pet. App. 2a.

2. Hancock's conviction was affirmed on direct appeal, and Hancock did not seek discretionary review in the Texas Court of Criminal Appeals. Pet. App. 2a. In 2014, he filed a *pro se* application for post-conviction relief in the TCCA raising several claims, including that his counsel was ineffective for failing to object to the procedure through which Deimart identified him to the jury at trial. The TCCA denied relief. Pet. App. 2a.

3. In 2016, Hancock filed a *pro se* petition for habeas corpus relief in the Southern District of Texas, raising the same claims as his state habeas application. He acknowledged that his petition was untimely but argued that he was entitled to have his untimely claims heard because he could pass through the *Schlup* actual-innocence gateway. Pet. App. 9a. To his application, he attached affidavits obtained by law enforcement from Deimart, Reyes, Gurie, and Gravina in the days after the offense. Pet. App. 16a. In particular, Hancock focused on Deimart's description of the shooter in his affidavit and how it differed from Hancock's actual physical characteristics. *See* R.23-24; Pet. App. 16a.

The district court found that the petition was barred by AEDPA's one-year limitations period and dismissed *sua sponte* under Rule 4 of the Rules Governing Section 2254 Cases in United States District Courts. Pet. App. 8a. The court held that *Schlup* was not available because the affidavits Hancock presented were not new evidence under Fifth Circuit precedent. The district court

further held that even if the affidavits qualified as new evidence, Hancock had not shown that if they had been presented, "it is more likely than not that no reasonable juror would have found [him] guilty beyond a reasonable doubt." Pet. App. 17a (quoting *Schlup*, 513 U.S. at 327).

4. The Fifth Circuit affirmed the dismissal, agreeing that the affidavits did not constitute new evidence for purposes of *Schlup*. Pet. App. 6a. The court recognized that this Court "has not explicitly defined what constitutes 'new reliable evidence' . . . and [that] there is a circuit split." Pet. App. 5a. The Fifth Circuit concluded, however, that its previous holding in *Moore v. Quarterman*—that evidence does not count as new if "it was always within the reach of [petitioner's] personal knowledge or reasonable investigation"—controlled the outcome here. Pet. App. 6a (quoting *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008)). Hancock never denied that he previously had access to the affidavits offered as new evidence; thus, his claim was precluded. Pet. App. 6a.

## SUMMARY OF THE ARGUMENT

While the circuits have been divided in the past on the question of what constitutes "new reliable evidence . . . not presented at trial" under *Schlup*, that split is dissolving as the circuits recognize the error in Petitioner's expansive view of "new evidence." Petitioner argues that there is a 5-2 split in his favor, but the count is better understood as 1-7 against him. One of his circuits seems to have backed off its prior holding, and three have not addressed the question. He also fails to account for the multiple circuits to decide against him on this question in the wake of this Court's decision in *McQuiggin*.

That shifting tide is consistent with *Schlup*, in which the plurality and the concurrence excluded evidence that was "available at trial" from consideration as new evidence. Requiring the prisoner to produce new (*i.e.*, not previously known) reliable evidence that was not presented to the jury (*i.e.*, not cumulative of other evidence) is in line with both *Schlup* and *McQuiggin*, as well as the goals underlying AEDPA. The Fifth Circuit properly recognized that when a prisoner is aware of potential evidence at trial, that evidence cannot be used later as new evidence for purposes of the *Schlup* gateway.

## ARGUMENT

### I. The Circuit Split Is Shallow and Resolving Itself.

Hancock posits (at 11-17) a 5-2-1 circuit split on what constitutes new evidence under *Schlup*. A closer look reveals a shifting landscape, in which the circuits are correctly coming around to the Fifth Circuit's view. The circuit count is closer to 1-7 against Hancock. For its part, although the Fifth Circuit has not affirmatively defined the range of acceptable new evidence, it has correctly held that previously available evidence necessarily falls outside of it. Thus, while this Court's review here could clarify the *Schlup* standard, it is not necessary to do so.

A. Petitioner offers (at 15) five potential circuits on his side of the split—the First, Second, Sixth, Seventh, and Ninth Circuits. But this overstates the matter. At present, only one circuit appears to take the extreme position that any newly presented evidence is "new" enough to enter the *Schlup* gateway, while at least seven circuits have held that not all "newly presented" evidence is sufficient. *See* Part I.B.

Originally, the Seventh and Ninth Circuits adopted a broad approach, allowing any newly presented evidence to support a gateway actual-innocence claim. *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). But the Ninth Circuit has since modified that position. *Chestang v. Sisto*, 522 F. App'x 389, 391 (9th Cir. 2013) ("[A]ctual innocence claims focus on 'new' evidence—*i.e.*, 'relevant evidence that was either excluded or unavailable at trial.'" (quoting *Schlup*, 513 U.S. at 327–28)).

The Second Circuit's position is less clear. In *Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012), the court defined new evidence as "evidence not heard by the jury," but that statement is ambiguous in the context of the case, as the evidence at issue in *Rivas* seems to have been unavailable at the time of trial. The petitioner alleged that the government withheld exculpatory evidence and that he did not discover a potential conflict of interest with the medical examiner who altered his original autopsy conclusions that allowed for the prisoner's conviction in the murder case. *Id.* at 528-29. The testimony revolved around facts known at the time of the trial, but those facts were colored by information that did not come out until afterward. And the court did not answer the question whether the phrase "evidence not heard by the jury" applies broadly to all newly presented evidence or only narrowly to newly discovered evidence. *See id.* at 547 (focusing the inquiry on whether the innocence claim was credible and compelling).

Similarly, the First and Sixth Circuits have not taken a firm position on the question presented. In *Riva v. Ficco*, 803 F.3d 77, 84-85 (1st Cir. 2015), the First Circuit

found that the "newly presented evidence" that had been offered did not meet the *Schlup* standard because it could not meet the no-reasonable-juror prong of the actual-innocence test. The court did not opine on the underlying question here, and passing references to the prisoner's proposed evidence are, at most, dicta. And while the Sixth Circuit allowed newly presented evidence to be considered in *Souter v. Jones*, 395 F.3d 577 (6th Cir. 2005), the panel merely noted in a footnote that the *Schlup* standard was different from the Michigan standard for a new trial, *id.* at 595 n.9. Later opinions have clarified that the Sixth Circuit has not directly "address[ed the] problem that has concerned the other circuits—namely, whether there is a meaningful difference between 'newly discovered' and 'newly presented' evidence." *Connolly v. Howes*, 304 F. App'x 412, 419 (6th Cir. 2008) (Sutton, J., concurring); *see also Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) (noting that "*Souter* suggests that this Circuit considers 'newly presented' evidence sufficient" but determining that it was not a question the court needed to resolve in that instance).

B. Following *McQuiggin*, the courts of appeals have begun to coalesce around *Schlup*'s original standard, employed by the Fifth Circuit here, which provides that evidence is "new" if it was unavailable at trial, not merely unpresented. This includes the Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits. *See Nash v. Russell*, 807 F.3d 892, 899 (8th Cir. 2015) ("We have further defined 'new evidence' as evidence that 'was not available at trial and could not have been discovered earlier through the exercise of due diligence.'" (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1028 (8th Cir. 2001))); *Chestang*, 522 F. App'x at 391

("[A]ctual innocence claims focus on 'new' evidence—*i.e.*, 'relevant evidence that was either excluded or unavailable at trial.'" (quoting *Schlup*, 513 U.S. at 327–28)); *Johnson v. Medina*, 547 F. App'x 880, 884–85 (10th Cir. 2013) (holding that, where a habeas petitioner "argues that there was DNA and other evidence casting doubt on his guilt, which his plea counsel failed to further investigate and/or properly present or discuss with him . . . the evidence is not 'new.' Actual innocence claims focus on 'new' evidence—'relevant evidence that was either excluded or unavailable at trial'" (quoting *Schlup*, 513 U.S. at 327–28)); *Bembo v. Sec'y, Fla. Dep't of Corr.*, No. 16-16571-C, 2017 WL 5070197, at *5 (11th Cir. Mar. 30, 2017) ("[I]n any case, [defendant's girlfriend's alleged statement that they were together at the time the crime occurred] is not newly discovered evidence, since if Bembo had been with his girlfriend during the crime, he would have known that at the time of his trial."); *Adams v. Middlebrooks*, 640 F. App'x 1, 3–4 (D.C. Cir. 2016) (affirming the district court's determination that three affidavits offered as alibi evidence "were not new evidence" because two of them "w[ere] known to [defendant]'s trial counsel at the time of his trial" and the third "made the same assertions as the other two regarding Adams's location" (citations and internal quotation marks omitted) (brackets in original)).

The Third Circuit is also against Hancock. *Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004). While that court's recent opinion in *Reeves v. Fayette SCI*, 897 F.3d 154 (3d Cir. 2018), *petition for cert. filed*, No. 18-543 (Oct. 25, 2018), clarifies its interpretation of *Schlup*, it does not create a new rule. In *Reeves*, the court acknowledged that

there could be an issue with counsel not presenting evidence that could show innocence. *Id.* at 164. To the extent that this holding allows a prisoner to present evidence of which he was unaware during trial, that does not conflict with the Fifth Circuit's rule focusing on the petitioner's personal knowledge. If the petitioner's attorney were at fault for the lack of evidence—such as the attorney withholding information from the client—the evidence was not within the petitioner's personal knowledge or available at trial. The "limited" exception in *Reeves* for IATC claims related to the lack of evidence showing actual innocence can thus be reconciled with the Third Circuit's prior holding that evidence "available at trial" to a petitioner is not new. *Hubbard*, 378 F.3d at 340. Unsurprisingly, then, Hancock's proposed new evidence would not qualify under the *Reeves* standard, either, since Hancock knew of the testimony in question at the time of trial.

The one holdout is the Seventh Circuit, which has continued to cite pre-*McQuiggin* precedent that erroneously interprets *Schlup* as supporting a "newly presented" standard. *See Gladney v. Pollard*, 799 F.3d 889, 898 (7th Cir. 2015) (claiming that "[a]ll *Schlup* requires is that the new evidence is reliable and that it was not presented at trial" (quoting *Gomez*, 350 F.3d at 679)). Not only has the Seventh Circuit departed from the majority of circuits, it has failed to consider this Court's consistent use of the term "newly discovered" in *McQuiggin*. *See infra* Part II.B.

## II. "New Reliable Evidence" Cannot Include Evidence Available at Trial.

The circuit split has become shallower precisely because of the correctness of the Fifth Circuit's rule. Even assuming that the precise definition of "new evidence" is debatable, it is clear from *Schlup* that "new evidence" cannot include evidence that was available to a defendant at trial.

Hancock argues (at 17-18) that *Schlup*'s standard focuses on "new reliable evidence * * * that was not *presented* at trial." 513 U.S. at 324 (emphasis added). Thus he argues that he should be able to introduce any reliable evidence not presented at trial, regardless of when or whether it was known. This is incorrect for two reasons. First, it misinterprets the *Schlup* standard (and negates this Court's directive that the evidence also be "new" in addition to "not presented at trial"). Second, it misapprehends the nature of the evidence that should be excluded, both here and in *Schlup*.

A. Petitioner's approach reflects a flawed understanding of *Schlup*. Both the plurality opinion and Justice O'Connor's controlling concurrence excluded evidence that was "available at trial" from consideration, but in different ways. In the plurality's view, courts are directed to consider "new" evidence only if it was unavailable at trial or wrongfully excluded. *Id.* at 327–28 ("Instead, 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."). In Justice O'Connor's view, the evidence must be "newly discovered." *Id.* at 332.

The claim that any newly presented evidence is "new" derives from erroneous citations to a passage in *Schlup* that does not even address the question. *Cf. Gomez*, 350 F.3d at 679 (asserting that "[a]ll *Schlup* requires is that the new evidence is reliable and that it was not presented at trial" (citing *Schlup*, 513 U.S. at 324)); *Griffin*, 350 F.3d at 961 (citing *Schlup*, 513 U.S. at 324, as being ambiguous as to whether evidence must be "newly presented" or "newly discovered"). Contrary to the Seventh Circuit's assertion, the cited passage does not define evidence not presented at trial as being "new"; it defines what it means for an assertion of actual innocence to be credible, explaining that "[t]o be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Tellingly, the Seventh Circuit's interpretation would render superfluous the requirement that the evidence be "new." But this Court does not just require the evidence in question to be "reliable" and "not presented at trial"—it requires the evidence to be "new." *Id.*

B. The Fifth Circuit offers a better interpretation of the *Schlup* test. To be new, the evidence presented must have been unavailable at the time of trial, and the information presented in the allegedly new evidence must not be cumulative of evidence presented at trial. *Shank v. Vannoy*, No. 16-30994, 2017 WL 6029846, at *2 (5th Cir. Oct. 26, 2017) ("Evidence that was available to be presented to the jury at the time of trial is not now 'new' evidence, even if it was not actually presented to the jury. . . .

[T]o qualify as new evidence of actual innocence, the evidence must be 'material, not merely cumulative or impeaching.'" (citing and quoting *Lucas v. Johnson*, 132 F.3d 1069, 1074, 1075 n.3 (5th Cir. 1998))). This is consistent with the command of *Schlup*, which elsewhere defined "new" evidence for purposes of an actual innocence claim as "relevant evidence that was either excluded or unavailable at trial." *Schlup*, 513 U.S. at 327–28.

*McQuiggin* confirms this conclusion. There, the conception of gateway actual innocence claims in *Schlup* was extended to cover procedural defaults based on expiration of a statute of limitations. 569 U.S. at 386–87. In doing so, this Court clarified that evidence was new if "newly discovered." *See, e.g.*, *id.* at 389 ("Perkins asserted newly discovered evidence of actual innocence."); *id.* ("Characterizing the affidavits as newly discovered evidence was 'dubious' . . . ."); *id.* at 390 ("assuming qualification of the affidavits as evidence newly discovered"); *id.* at 400–01 ("The District Court then found that Perkins' alleged newly discovered evidence, *i.e.*, the information contained in the three affidavits, was 'substantially available to [Perkins] at trial.' Moreover, the proffered evidence, even if 'new,' was hardly adequate to show that, had it been presented at trial, no reasonable juror would have convicted Perkins. . . . On remand, the District Court's appraisal of Perkins' petition as insufficient to meet *Schlup*'s actual-innocence standard should be dispositive . . . ."). Not once did this Court make any reference to whether evidence was "newly presented"—a position consistent with both the plurality and concurrence in *Schlup*.

The Seventh Circuit's contrary view rests on a misreading of *McQuiggin*. That court has held that, "[i]n

*McQuiggin*, the Court made clear that the threshold diligence requirement of equitable tolling and § 2244(d)(1)(D) tolling does not apply when a court is considering whether evidence is new for the purposes of the actual innocence inquiry." *Gladney*, 799 F.3d at 898 (citing *McQuiggin*, 569 U.S. at 398-99). But this misses the point.

The discussion of a diligence requirement in *McQuiggin* had nothing to do with whether the evidence was "new," but instead concerned whether a petitioner, in addition to having new evidence, must exercise reasonable diligence in exercising his right to file a habeas petition based on that new evidence. *McQuiggin*, 569 U.S. at 390, 398-401. The prisoner in *McQuiggin* came into possession of the affidavits he claimed constituted new evidence five years after his conviction, but then waited another six years before filing a habeas petition based on the allegedly new evidence. *Id.* at 388, 391. There were thus two distinct timing issues with regard to a gateway innocence claim on the facts: first was whether the evidence was new, an issue on which the Court deferred to the trial court's determination as to whether or not the evidence was "newly discovered," *id.*, at 400–01; second was whether an independent requirement of "reasonable diligence" was "a precondition to relying on actual innocence as a gateway to adjudication of a federal habeas petition on the merits," *id.* at 390.

It was in that context that this Court held that there was no absolute requirement of reasonable diligence in bringing newly discovered evidence to the court's attention, but that, as was the case with the six-year delay in that case, "[u]nexplained delay in presenting new evidence bears on the determination whether the petitioner

has made the requisite showing." *Id.* at 399. Accordingly, any delay in bringing allegedly new evidence to the courts through a habeas petition does not bar the appellant from raising truly new evidence, though the delay would count against the credibility of the evidence. *Id.* Whether the evidence is "new" is an independent question.

C. There is good reason for the Fifth Circuit's rule. First, it reinforces Congress's desire to protect against "threat[s] to the finality of state-court judgments and to principles of comity and federalism" posed by successive federal habeas petitions, among other abuses. *Schlup*, 513 U.S. at 318. Second, were it otherwise, virtually every defaulted IATC claim would become an "actual innocence" claim revolving around a strategic decision that trial counsel made—even in situations where the decision was made in consultation with the defendant. Allowing petitioners to avoid AEDPA's limitations period based on evidence that was available at trial creates an obvious and avoidable threat to finality, comity, and judicial resources.[2] This case underscores the gravity of that threat, as Hancock's primary "new" evidence was not only available at trial, it was part of the trial record. *See* R.34-38 (alleging ineffective assistance related to the prosecution's use of Deimart's affidavit at trial).

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[2] Allowing petitioners to bring time-barred claims based on evidence that could have been developed at trial would be futile, in any case, because AEDPA would preclude consideration of the new evidence. *See* 28 U.S.C. § 2254(e)(2); *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (holding that § 2254(e)(2) bars evidence that was undeveloped in state court proceedings due to "lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel").

Hancock's argument (at 18) that barring evidence available at the time of trial would have precluded the evidence at issue in *Schlup* itself is incorrect. In *Schlup*, the prisoner had both an IATC claim (based on his attorney not making the critical evidence available at the time of trial) and a claim that the state had withheld exculpatory evidence. 513 U.S. at 308. Assuming that was true, his evidence showing actual innocence was not available at the time of trial. Thus it does not conflict with an interpretation that requires the prisoner's evidence to be more than just "newly presented."

It is true that the Fifth Circuit nominally excludes evidence that was "always within the reach of . . . reasonable investigation." Pet. App. 6a (quoting *Moore*, 534 F.3d at 465). But the Fifth Circuit's rule applies to, and holds the petitioner responsible for, evidence that "was always within the reach of [the petitioner's] personal knowledge or reasonable investigation." *Moore*, 534 F.3d at 465. Such a rule does not affect the outcome in *Schlup* because Schlup was evidently unaware of the transcripts at issue and could not have reasonably uncovered them on his own. 513 U.S. at 307-08. Thus his new information would qualify as "new evidence" under *Hancock*.

So long as it is not a case of the attorney hiding information from his client or being constitutionally ineffective to the point of not bothering to obtain relevant evidence—in which case the evidence arguably would not have been available at the time of trial—the defendant will know what testimony and evidence is being put on and what is being withheld. Indeed, it would be unfair not to hold him responsible for that knowledge. If a defendant believes a piece of evidence should be introduced at trial because it

shows innocence, he should, at the least, raise a timely habeas claim in state court for the attorney's ineffective assistance. Continuing to enforce the Fifth Circuit's rule that "new" evidence for purposes of *Schlup* cannot be something that was available to the defendant at trial is both right and fair.

Importantly, no matter its source, evidence of actual innocence must be linked to the underlying constitutional violation before it may be considered in conjunction with the *Schlup* gateway. *See Murray v. Carrier*, 477 U.S. 478, 495 (1986). If a habeas petitioner claims that IATC is the reason the evidence was not presented, the petitioner either (a) knew about the evidence (in which case he should be held responsible for the evidence and any strategic decisions about its use during trial); or (b) was unaware of the evidence because his attorney hid it from him or did not obtain it (in which case the evidence was at least arguably unavailable to him and potentially "new"). In this case, since Hancock's newly presented evidence was available to him at trial, it cannot support an actual-innocence exception to permit litigation of his untimely IATC claim.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2019