No. 18-

IN THE

Supreme Court of the United States

FAYETTE SCI, THE ATTORNEY GENERAL OF PENNSYLVANIA, THE DISTRICT ATTORNEY OF DAUPHIN COUNTY

Petitioners,

v.

JERRY REEVES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether evidence that was available but not presented at trial satisfies the new evidence requirement of the actual innocence exception which permits review of untimely *Habeas Corpus* petitions?

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The Memorandum of the United States District Court for the Middle District of Pennsylvania was an Unpublished Decision and is found at Appendix D, page 43a.

The Order of the United States District Court for the Middle District of Pennsylvania is found at Appendix C, page 41a.

The Judgment of the United States District Court for the Third Circuit of Pennsylvania is found at Appendix B, page 39a.

The Third Circuit's decision reversing the District Court is at Appendix A, page 1a and was published at *Reeves v. Fayette SCI*, 897 F.3d 154 (3d. Cir. 2018).

JURISDICTION

The published decision of the Court of Appeals was issued on July 23, 2018, and amended on July 25, 2018. Pursuant to 28 U.S.C. § 1254(1), this Court has jurisdiction to review the decision of the United States Court of Appeals for the Third Circuit.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence [sic]."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

The trial court summarized the facts presented at Reeves' jury trial as follows:

> On May 25, 2006, after making sure any customers had left the premises, [Reeves] entered the City Gas and Diesel convenience store between 12:30 a.m. and 1:00 a.m. He walked up to the clerk's counter and pulled a semiautomatic pistol from the front of his pants. He pointed it through the open, bullet proof counter window at the on duty clerk, Hitender Thakur. [Reeves] demanded money from the cash register. Hitender refused. There was a brief struggle and [Reeves] fired the weapon, hitting Hitender in the upper right chest. Hitender remained on his feet and attempted to remove the money from the cash register, but fell to the ground seconds later. Hitender died almost immediately from a gunshot wound to the chest, which pierced his heart and

punctured his aorta. [Reeves] jumped over the counter and emptied the cash register. He then fled the store.

That night had not been the first time [Reeves] was at City Gas and Diesel. In fact, by his own admission, [Reeves] had been to the store numerous times and was familiar with the clerks on duty. Nishant Rana, another clerk at the store and Hitender's friend, testified that [Reeves] came to the store almost every day. Occasionally, [Reeves] did odd jobs for the clerks in exchange for Black and Mild cigars. Following the night of Hitender's death, Nishant never saw [Reeves] at the store again.

State Trooper Curtis Salak, who was a patrol officer with the Harrisburg City Police at the time, was the first to arrive on the scene following the shooting. He was dispatched to the convenience store. As he approached he observed a white male in the street flagging him down. A brief conversation with the white male alerted Trooper Salak that someone inside the store had been shot. He parked his vehicle, secured the scene and entered the store. There he observed Hitender lying on the floor behind the counter. He jumped through the open, bulletproof window at the counter, and attempted to render aid. Hitender was lying on his back with his eyes open and did not appear to be breathing. His chest and shirt were covered with blood, and there was a pool of blood on the floor around him. Other officers

began arriving on the scene. Trooper Salak called for medical assistance. They then opened the secured door which led behind the counter to give EMS access to Hitender. He also spoke with Sansay Ghanur, a friend of Hitender's who arrived at the store at approximately 1:10 a.m., immediately after Hitender was shot.

William Kimmick, a forensic investigator with the Harrisburg Police, arrived on the scene at approximately 1:20 a.m. By that time, other officers were already on the scene and EMS had departed. Investigator Kimmick testified that Investigator Kunkle, who is no longer with the Harrisburg Police Department, arrived at the scene at approximately 2:20 a.m. or 2:30 a.m. Investigator Kunkle took photographs of the crime scene. They collected a 20 dollar bill from the floor under the register as well as the video surveillance tape from the store. Investigator Kimmick testified that the cash register drawer was open and empty except for some coins. He observed blood on the cash register and on the floor directly beneath the cash register. They processed the counter, window and door to the clerk's area for fingerprints. However, Karen Lyda, another forensics expert with the Harrisburg Police Department, testified that none of the prints that were collected matched [Reeves]'s fingerprints.

Lyda was also present for Hitender's autopsy. There, she collected the bullet from Hitender's body which she sent to the Pennsylvania State

Police for processing. There, Corporal David A. Krumbine, an expert in firearms and tool markings, determined that the bullet was a .25 caliber. He testified that it was most likely fired from a semiautomatic pistol.

Police also identified Derrick Small, another individual seen on the video tape in the store prior to the shooting. Xavier Hendry, a witness for the Commonwealth, testified that on the night of Hitender's death, he had driven Small to the City Gas and Diesel. He also identified a picture of Small. Detective Christopher Krokos, who was familiar with Small from past interactions, identified Small in the surveillance video that was played for the jury. He was seen leaving the store moments before [Reeves] entered.

The Commonwealth also presented testimony regarding [Reeves]'s confession to police as well as the conflicting statements he made to officers and detectives prior to making his confession. [Reeves]'s first contact with police occurred at the end of May, 2006. Shortly after the homicide, [Reeves] had a conversation with Officer Derrick Fenton of the Harrisburg City Police. During that conversation, [Reeves] told Officer Fenton that he had information about the City Gas and Diesel homicide, and that he could provide the name of the individual responsible. Officer Fenton testified that [Reeves] stated he was a witness to the crime. [Reeves] claimed he was standing across the

street at the time of the shooting, and told Officer Fenton that he saw an individual named Jermaine Taylor enter the store and rob it. [Reeves] further claimed that Taylor exited the store following the shooting and got into a dark colored car with tinted windows and left the area. He claimed that there were other people sitting in the car. When Detective Krokos later spoke with [Reeves] regarding the homicide on May 30, 2006, [Reeves] changed his story. [Reeves] told Detective Krokos that he did not know anything about the City Gas and Diesel homicide. Further, [Reeves] claimed that he told Officer Fenton that he was a witness because he was under arrest at the time and he was hoping that police would let him go to be with his family over the Memorial Day holiday if he provided them with information. Detective Krokos further testified that [Reeves] admitted to fabricating the story and that, to his knowledge, the individual named Jermaine Taylor did not actually exist. [Reeves] also told Detective Krokos that he had been lying when he stated he saw the shooting. However, [Reeves] did tell the detective that he had heard the shooting from his house. Detective Krokos typed [Reeves]'s statement from that day and [Reeves] signed the back of it.

[Reeves] spoke to police about the homicide again on July 29, 2009. At that time, Detective Donald Heffner, Detective Hector Baez and Detective Krokos were present for the interview. The detectives read [Reeves] his

Miranda rights and confirmed that he was not under the influence of any drugs or alcohol. Further, they determined that he was not suffering from any medical problems at the time of the interview.

Detective Heffner and Detective Baez both testified that in the early stages of the interview, [Reeves] claimed he was a witness to the homicide and that he was sitting across the street on a porch when Ferred Ray and Joseph Baldwin and an unknown third male arrive[d] at the City Gas and Diesel. [Reeves] told the detectives that Baldwin and the unknown male entered the store, while Ray remained outside. [Reeves] stated that he heard a gunshot, and that the two men exited the store. [Reeves] told the detectives that the three got into a car and fled the scene. As the interview progressed, [Reeves] told the detectives that he was actually right in front of the store with Ray, Baldwin and the unidentified male. He stated that Ray was the individual that walked into the store. [Reeves] told the detectives that, when he heard the gunshot, he ran from the scene and did not know what happened to the other three men.

Detective Heffner testified:

> During the course of the conversation, where he was saying he was closer and closer to the store. He was putting himself physically closer to the store he became more serious. At

> one point right before he said that he had committed this crime he began to tremble and he began to cry.... It came to a point where we actually said we are going to interview these other guys you just named. What are they going to say about it? That is kind of where he broke down and he said, no, I did this.

[[Reeves]] confessed to the homicide, stating that it was an accident and that he needed the money. Following the initial confession, [Reeves] gave his consent for the detectives to [record] his statement. The audio-recording of the confession was played for the jury.

[Reeves] took the stand and stated that he did not rob or shoot Hitender. He stated he was picked up by police at approximately 2:30 a.m on July 29, 2009. [Reeves] testified that, at the time he spoke with detectives later that day, he had various health problems. Specifically, [Reeves] stated he was light headed and was vomiting up blood at the time. However, none of the detectives observed any of [Reeves]'s alleged medical issues. Further, on the audio-tape of the confession, [Reeves] stated he was not suffering from any medical problems. [Reeves] further claimed that one of the reasons he confessed to the homicide was because detectives told him that they would take him to the hospital only if he confessed. [Reeves] also claimed that, on top of his other medical

issues, he was also suffering from a hangover from the night before.

* * *

Besides his alleged medical problems, [Reeves] also testified that another reason he spoke with police was because the detectives promised to help him out by letting his girlfriend go free. She had been picked up at the same time [Reeves] was arrested.

Despite his contentions that police fed him details of the homicide, [Reeves] provided them to the police during his taped confession. [Reeves] also stated that he did not rob or murder Hitender and that he was in Baltimore at the time of the crime. However, [Reeves] was unable to state the exact timeframe in which he was in Baltimore or explain how he learned the details of the homicide upon his alleged return to Harrisburg. Further, James Thornton, a rebuttal witness for the Commonwealth, testified that he spoke with [Reeves] regarding his Baltimore alibi while at Dauphin County Prison:

> Well, I happened to be sitting there, and it was maybe four individuals sitting around where I was and they were talking, and one individual was saying they almost got me, man. And I called for some help. He needs an alibi. So the individual told me that he had

> a friend in Baltimore he was going to give a thousand dollars and get him to say he was down there.
>
> Thornton identified the individual speaking as [Reeves].

Commonwealth v. Reeves, No. 2159 MDA 2012, 2013 WL 11250902, at *1-4 (Pa. Super. Ct. Nov. 7, 2013) (quoting Trial Court Memorandum Opinion Pursuant to Pennsylvania Rule of Appellate Procedure 1925(A)).

On June 23, 2010, the jury found Reeves guilty of all of the aforementioned charges, save the tampering with or fabricating physical evidence charge, which was withdrawn by the Commonwealth prior to jury deliberations. Thereafter, Reeves was sentenced to life imprisonment on the murder count, a concurrent five to ten-year term of imprisonment on the robbery count, and a concurrent one to two-year term of imprisonment on the firearm count. On July 1, 2011, in an unpublished memorandum, the Pennsylvania Superior Court affirmed the judgment of sentence. *See Commonwealth v. Reeves*, 1193 MDA 2010 (Pa. Super. July 1, 2011) (unpublished memorandum).

On July 30, 2012, Reeves filed a PCRA petition, wherein Reeves alleged that trial counsel was ineffective. On November 26, 2012, the PCRA court dismissed Reeves' PCRA petition. On November 7, 2013, the Pennsylvania Superior Court affirmed the dismissal of Reeves' PCRA petition. *See Commonwealth v. Reeves*, 2159 MDA 2012 (Pa. Super. November 7, 2013) (unpublished memorandum). Reeves filed a petition for allowance of appeal with the

Pennsylvania Supreme Court, which was denied on March 25, 2014.

Reeves filed his petition for writ of *habeas corpus* on July 31, 2014, which was ultimately dismissed on December 22, 2016. Reeves filed a notice of appeal on January 4, 2017, and the United States Court of Appeals for the Third Circuit granted a certificate of appealability as to his claim that trial counsel was ineffective for failing to investigate and present the exculpatory evidence upon which Reeves relied in the District Court. On July 23, 2018, the United States Court of Appeals for the Third Circuit vacated the United States District Court for the Middle District of Pennsylvania's December 22, 2016, order and remanded. The Third Circuit held that as a matter of first impression when a state prisoner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the actual innocence miscarriage of justice gateway to excusing procedural default of a state prisoner's federal habeas claim. The Commonwealth of Pennsylvania files this petition for writ of *certiorari* in response.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ADDRESS AN UNRESOLVED ISSUE AND A CIRCUIT SPLIT AS TO WHETHER EVIDENCE THAT WAS AVAILABLE BUT NOT PRESENTED AT TRIAL SATISFIES THE NEW EVIDENCE REQUIREMENT OF THE ACTUAL INNOCENCE EXCEPTION WHICH PERMITS REVIEW OF UNTIMELY *HABEAS CORPUS* PETITIONS.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") state prisoners have one year to file a federal habeas petition which begins to run from "the date on which the judgment became final." 28 U.S.C. § 2244(d)(1)(A). However, to prevent a "fundamental miscarriage of justice," an untimely petition is not barred when a petitioner makes a "credible showing of actual innocence," which provides a gateway to federal review of the petitioner's otherwise procedurally barred claim of a constitutional violation. *McQuiggin v. Perkins*, 569 U.S. 383, 386 (2013). This "exception[ ] is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons," and it "survived AEDPA's passage." *Id.* at 392-93. In this context actual innocence refers to factual innocence, not legal insufficiency. *Bousley v. United States*, 523 U.S. 614, 623 (1998).

To satisfy this standard, first, "a petitioner must present new, reliable evidence" and second, "show by a preponderance of the evidence 'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence,' " *Schlup v. Delo*, 513 U.S.

298, 324, 327 (1995), or stated differently, that it is "more likely than not any reasonable juror would have reasonable doubt." *House v. Bell*, 547 U.S. 518, 538, 126 S.Ct. 2064, 165 L.Ed.2d 1 (2006).

In the present case, the United States Court of Appeals for the Third Circuit acknowledged that this Court's opinions addressing the actual innocence gateway do not explicitly define "new evidence," and that the circuits are split on whether the evidence must be newly discovered or whether it is sufficient that the evidence was not presented to the fact-finder at trial.

The Court of Appeals for the Eighth Circuit held that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox*, 238 F.3d 1023, 1028 (8th Cir. 2001) (internal citation and quotation marks omitted). The Courts of Appeals for the Seventh and Ninth Circuits, however, conclude that petitioners can satisfy the actual innocence standard's new evidence requirement by offering "newly presented" exculpatory evidence, meaning evidence not presented to the jury at trial. *See Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). The Courts of Appeals for the First, Second, and Sixth Circuits have similarly suggested that actual innocence can be shown by relying on newly presented—not just newly discovered—evidence of innocence. *See Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 543, 546-47 (2d Cir. 2012). Though the Fifth Circuit Court of Appeals acknowledged the circuit split, it did not weigh in. *Fratta v. Davis*, 889 F.3d

225, 232 (5th Cir. 2018). The Eleventh Circuit Court of Appeals refrained from reaching the issue of whether the petitioner's evidence that was available at trial but was not presented should be considered "new" for purposes of *Schlup*. *Rozzelle v. Sec'y, Fla Dep't of Corr.*, 672 F.3d 1000, 1018 n. 21 (11th Cir. 2012).

As the instant question involves the interpretation of a federal statute under which innumerable state inmates all over the country proceed, the Commonwealth of Pennsylvania respectfully requests that this Honorable Court clarify the standard for newly discovered evidence under the actual innocence gateway to ensure uniformity across the states.

CONCLUSION

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

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED JULY 25, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1043

JERRY REEVES,

Appellant,

v.

FAYETTE SCI; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY OF DAUPHIN COUNTY.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. No. 3-14-cv-01500)
District Judge: Hon. Malachy E. Mannion

May 16, 2018, Argued,
July 25, 2018, Filed

MCKEE, SHWARTZ, and COWEN, Circuit Judge.
McKEE, Circuit Judge, Concurring.

Appendix A

OPINION OF THE COURT

SHWARTZ, *Circuit Judge.*

Jerry Reeves was convicted of robbery, carrying a firearm without a license, and second degree murder relating to an armed robbery of a gas station convenience store that resulted in the death of the store clerk. Reeves was sentenced to life imprisonment without the possibility of parole. He filed a four-months-late habeas petition in federal court asserting ineffective assistance of counsel and seeking to excuse his petition's untimeliness based on the actual innocence exception to procedural default recognized in *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), and extended to include time-barred petitions in *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924, 185 L. Ed. 2d 1019 (2013). To qualify for this exception, the petitioner must present new, reliable evidence showing it is more likely than not that no reasonable juror would have voted to convict him. *Schlup*, 513 U.S. at 324, 329. Because we conclude that Reeves has identified evidence that may show actual innocence that was not presented to the jury, we will vacate and remand for further proceedings.

I

On May 25, 2006, a man robbed a City Gas and Diesel convenience store in Harrisburg, Pennsylvania and shot and killed the store's clerk. The robbery and shooting were captured on the store's silent, black-and-white surveillance video. The video shows that a single robber entered the

store and pointed a gun at the clerk. The clerk tried to close a bulletproof glass window, but the robber's arm blocked the window from closing. The robber fired a shot, causing the clerk to fall back. The clerk got up, made a surrendering gesture, and began emptying the cash register. The clerk then fell to the floor, and the robber jumped over the counter through the open bulletproof glass window and collected the remaining money. He then left the store on foot. A local newspaper published a story about the crime the next day.

A few days after the shooting, Reeves, then eighteen years old, was in jail for conduct unrelated to the robbery. A police officer asked him about the convenience store robbery and Reeves claimed that he had witnessed the crime and identified a robber by name. Reeves was subsequently released and attended his family's Memorial Day cookout a few days later. On May 30, 2006, the police interviewed Reeves, who ultimately admitted that he had lied about witnessing the robbery to gain release and attend his family's cookout. He was charged with and pleaded guilty to hindering apprehension.

Around this time, the police had received information about other potential suspects. The same day the robbery occurred, the police were notified that two individuals who had previously been convicted of other crimes—Kai Anderson and Michael Holmes—failed to show up at a work-release center located near the City Gas and Diesel and that Anderson fit the physical description of the robber. On May 29, 2006, the police spoke to Danielle Ignazzito—the mother of Anderson's child—who stated

that Anderson called her two days after the robbery, telling her he had "a lot of money" to give her for outstanding child support. App. 155. She further stated that she received a call from Kenneth Marlow, who told her that Anderson and Holmes had fled the state because police were looking for Anderson for the robbery. On May 31, 2006, Anderson was arrested and admitted escaping the work release center with Holmes, talking to Marlow, and asking Marlow to call Ignazzito. Anderson claimed that a different person committed the robbery.

On June 9, 2006, the police interviewed Marlow. Marlow stated that Anderson told him that he was involved in the robbery and asked Marlow to call Ignazzito for him. A few weeks later, Johnathan Johnston—who had been incarcerated with Anderson—told the police that Anderson confessed to him that he participated in the robbery with Holmes and Holmes's younger brother to obtain money to repay a victim of another robbery Anderson committed. According to Johnston, Anderson provided specific details about the robbery, including that the robber was not supposed to shoot the clerk but that the gun went off, and the clerk fell, got up, then fell again, at which point the robber jumped over the counter to retrieve the money. Johnston also stated that Anderson wanted Johnston's wife to threaten Ignazzito so that she would not talk to the police. Johnston further told the police that Anderson said he had also confessed to Marlow and that Marlow was not supposed to tell Ignazzito about the robbery. On March 9, 2007, the police interviewed Michael Holmes, who admitted to leaving the work release center with Anderson on the day of the robbery but spent the

day visiting various people's homes. The record does not indicate why the Anderson leads were not pursued further, but before trial, Reeves's trial counsel was provided with copies of the police reports about Anderson and Holmes.

On July 29, 2009, more than three years after the shooting, Reeves and his then-girlfriend, who was pregnant, were arrested and taken to jail for conduct unrelated to the City Gas and Diesel robbery. Reeves again spoke to police officers and, ten to twelve hours later, confessed to committing the City Gas and Diesel robbery.

At Reeves's trial in 2010, the prosecutor presented the testimony of the officers who had interviewed Reeves, an audio recording of Reeves's confession, and the store surveillance tape of the robbery and shooting, among other evidence. Reeves testified and denied involvement in the robbery, stating that he was experiencing health problems on the day of his July 29, 2009 confession and that detectives told him they would take him to the hospital only if he confessed. He also asserted that detectives promised to release his girlfriend if he confessed and that the police fed him details about the robbery for his taped confession. Reeves further stated that he was in Baltimore at the time of the crime, which caused the prosecution to call a rebuttal witness who testified that while he was in jail with Reeves, Reeves discussed paying a person to say that Reeves was in Baltimore, not Harrisburg, when the robbery occurred. The Kai Anderson evidence was not presented at trial.

The jury convicted Reeves of robbery, carrying a firearm without a license, and second degree murder. He was sentenced to life imprisonment. The Pennsylvania Superior Court affirmed the conviction and sentence on July 1, 2011, and Reeves did not appeal to the Pennsylvania Supreme Court.

On July 30, 2012, Reeves filed a Post-Conviction Relief Act ("PCRA") petition asserting ineffective assistance of counsel based on his trial counsel's failure to present the Kai Anderson evidence, among other alleged deficiencies. On October 10, 2012, the PCRA Court issued a memorandum order notifying Reeves of its intent to dismiss the PCRA petition. Reeves filed objections on October 29, 2012, and the PCRA Court dismissed the petition on November 26, 2012 without a hearing, concluding that trial counsel's failure to present evidence of an alternate suspect did not prejudice Reeves because Reeves confessed to committing the robbery and the store surveillance video corroborated his confession.[1] On November 7, 2013, the Pennsylvania Superior Court summarily affirmed and adopted the PCRA Court's October 10, 2012 and November 26, 2012 opinions without additional reasoning. The Pennsylvania Supreme Court denied Reeves's petition for review.

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1. In its discussion concerning the Kai Anderson evidence, the PCRA Court stated: "Accepting Petitioner's argument that all of the hearsay and non-hearsay testimony that would have been presented at trial would have been admissible, Petitioner fails to explain how this testimony would have rebutted Petitioner's own admission to the robbery/homicide." App. 492.

On July 31, 2014, Reeves filed a federal habeas petition with new counsel, asserting ineffective assistance of counsel on the grounds that Reeves's trial counsel failed to investigate and present certain exculpatory evidence at trial, including evidence suggesting that Anderson and Holmes committed the robbery.[2] Reeves conceded that his federal habeas petition was filed approximately four months late, but asserted that this procedural defect was excusable because he had shown actual innocence. The petition was referred to the Magistrate Judge for a report and recommendation. The Magistrate Judge opined that the actual innocence exception requires the petitioner to present new evidence and that the evidence Reeves claims should have been presented was available to him and his trial counsel and thus did not qualify as new evidence. As a result, the Magistrate Judge denied an evidentiary hearing and recommended that the District Court dismiss Reeves's petition as untimely. The District Court adopted the Magistrate Judge's report and recommendation, agreed that the evidence concerning alternative suspects was not new evidence because it was available at trial, concluded that Reeves failed to demonstrate actual innocence sufficient to overcome the statute of limitations,

2. Besides the evidence concerning other alternative suspects, Reeves pointed to trial counsel's failures to adequately develop and/or present (1) evidence of Reeves's left-handedness and the shooter's right-handedness, (2) inconsistencies between Reeves's confession and the surveillance video, (3) a news article of the robbery which would show that Reeves's confession contained public information about the crime, (4) medical records showing Reeves was hospitalized on the day of his confession for a suicide attempt and had a history of mental health problems, and (5) evidence of Reeves's history of uncontrolled lying.

and dismissed Reeves's petition as time-barred. The District Court also denied an evidentiary hearing and a certificate of appealability. Reeves sought a certificate of appealability, which we granted as to, among other things, "(1) whether the evidence Appellant relied on in the District Court constitutes ‹new› evidence" and "(2) whether Appellant's evidence satisfied the [actual innocence] standard. App. 72-73.

II[3]

Reeves asserts that his trial counsel was ineffective for failing to present at trial evidence of alternative suspects for the shooting, his left-handedness, mental condition at the time of his confession, and history of compulsive lying. He concedes that his petition is late but argues that this exculpatory evidence demonstrates actual innocence and warrants excusing his untimeliness.

A

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners have one year to file a federal habeas petition, which begins to run from "the date on which the judgment became final." 28 U.S.C.

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3. The District Court had jurisdiction under 28 U.S.C. § 2254. Our Court has jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. Our review is plenary where, as here, the District Court did not conduct an evidentiary hearing. *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010). In addition, we exercise plenary review over the District Court's determination of a petitioner's claim of actual innocence. *Sweger v. Chesney*, 294 F.3d 506, 522 (3d Cir. 2002).

§ 2244(d)(1)(A). However, to prevent a "fundamental miscarriage of justice," an untimely petition is not barred when a petitioner makes a "credible showing of actual innocence," which provides a gateway to federal review of the petitioner's otherwise procedurally barred claim of a constitutional violation.[4] *McQuiggin*, 569 U.S. at 386, 392. This "exception[] is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons," and it "survived AEDPA's passage."[5] *Id.* at 392-93. In this

4. In contrast to gateway (or procedural) actual innocence claims, freestanding (or substantive) claims of actual innocence assert innocence without any accompanying constitutional defect in the trial resulting in the conviction. *See Schlup*, 513 U.S. at 313-16 (distinguishing between the two types of claims). The Supreme Court has not definitively resolved whether such freestanding actual innocence claims are cognizable, *McQuiggin*, 569 U.S. at 392, but to the extent they are, they are assessed under a more demanding standard, since the petitioner's claim is that his conviction is constitutionally impermissible "even if his conviction was the product of a fair trial," *Schlup*, 513 U.S. at 316. *See House v. Bell*, 547 U.S. 518, 555, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (concluding that the petition satisfied the gateway innocence standard announced in *Schlup* but not the higher standard for freestanding innocence discussed in *Herrera v. Collins*, 506 U.S. 390, 417, 113 S. Ct. 853, 122 L. Ed. 2d 203 (1993)). Gateway innocence claims, on the other hand, assert a claim of actual 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." *Schlup*, 513 U.S. at 316.

5. Although AEDPA explicitly provides actual innocence exceptions to some of its procedural provisions, and these

context, actual innocence refers to factual innocence, not legal insufficiency. *Sistrunk v. Rozum*, 674 F.3d 181, 191 (3d Cir. 2012) (citation omitted).

To satisfy this standard, first, "a petitioner must present new, reliable evidence" and second, "show by a preponderance of the evidence 'that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence,'" *Houck v. Stickman*, 625 F.3d 88, 93 (3d Cir. 2010) (citing and quoting *Schlup*, 513 U.S. at 324, 327), or stated differently, that it is "more likely than not any reasonable juror would have reasonable doubt," *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006). As part of the reliability assessment of the first step, the court "may consider how the timing of [the petitioner's] submission and the likely credibility of the [witnesses] bear on the probable reliability of that evidence, as well as the circumstances surrounding the evidence and any supporting corroboration. *Id.* at 537, 551 (internal quotation marks and citation omitted); *see also McQuiggin*, 569 U.S. at 399.

In evaluating the second step—whether it is more likely than not no reasonable juror would convict the

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exceptions incorporate a newly discovered evidence standard, *see* 28 U.S.C. §§ 2244(b)(2)(B) and 2254(e)(2), the Supreme Court has explained that the actual innocence miscarriage of justice exception is separate from AEDPA's statutory provisions, and the exception survived AEDPA's passage. *McQuiggin*, 569 U.S. at 393-98. Thus, AEDPA's actual innocence provisions are not dispositive of the scope of new evidence under the actual innocence miscarriage of justice exception recognized by the Supreme Court in *Schlup, House*, and *McQuiggin*.

petitioner—the court "must consider all the evidence, old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under rules of admissibility that would govern at trial." *House*, 547 U.S. at 538 (internal quotation marks and citation omitted). "[M]ere impeachment evidence is generally not sufficient to satisfy the [actual innocence gateway] standard." *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012). However, new, reliable evidence that "undermine[s] the [trial] evidence pointing to the identity of the [perpetrator] and the motive for the [crime]" can suffice to show actual innocence. *Goldblum v. Klem*, 510 F.3d 204, 233 (3d Cir. 2007); *see also Munchinski*, 694 F.3d at 336-37 (explaining that actual innocence was demonstrated where new evidence both showed that the crime could not have happened in the way the Commonwealth presented at trial and provided an alternative theory that was more appropriate and better fit the facts of the case). In weighing the evidence, "[t]he court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors"; the actual innocence standard "does not require absolute certainty about the petitioner's guilt or innocence." *House*, 547 U.S. at 538.

The gateway actual innocence standard is "demanding" and satisfied only in the "rare" and "extraordinary" case where "a petition 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." *McQuiggin*, 569 U.S. at 386, 392, 401 (internal quotation marks and citations omitted).

B

The threshold requirement for applying the actual innocence standard is new evidence supporting the petitioner's innocence. The Supreme Court opinions addressing the actual innocence gateway do not explicitly define "new evidence," and our sister circuit courts are split on whether the evidence must be newly discovered or whether it is sufficient that the evidence was not presented to the fact-finder at trial. The Court of Appeals for the Eighth Circuit—the first to address the issue—held that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox*, 238 F.3d 1023, 1028 (8th Cir. 2001) (internal citation and quotation marks omitted). Thereafter, the Courts of Appeals for the Seventh and Ninth Circuits concluded otherwise: petitioners can satisfy the actual innocence standard's new evidence requirement by offering "newly presented" exculpatory evidence, meaning evidence not presented to the jury at trial. *See Gomez v. Jaimet*, 350 F.3d 673, 679-80 (7th Cir. 2003); *Griffin v. Johnson*, 350 F.3d 956, 963 (9th Cir. 2003). More recently, the Courts of Appeals for the First, Second, and Sixth Circuits have similarly suggested that actual innocence can be shown by relying on newly presented—not just newly discovered—evidence of innocence. *See Riva v. Ficco*, 803 F.3d 77, 84 (1st Cir. 2015); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 543, 546-47 (2d Cir. 2012). The Court of Appeals for the Fifth Circuit has acknowledged but not weighed in on the circuit split.[6]

6. Recent Fifth Circuit decisions, however, have included language arguably suggesting an inclination toward a newly

Fratta v. Davis, 889 F.3d 225, 232 (5th Cir. 2018); *see also Rozzelle v. Sec'y, Fla Dep't of Corr.*, 672 F.3d 1000, 1018 n.21 (11th Cir. 2012) (refraining from reaching issue of whether petitioner's evidence that was available at trial but was not presented should be considered "new" for purposes of *Schlup*).

Those courts that define "new evidence" to include evidence not presented at trial find support in *Schlup*. In announcing the standard for a gateway actual innocence claim, the *Schlup* Court stated that a federal habeas court, after being presented with new, reliable exculpatory evidence, must then weigh "all of the evidence, including . . . evidence tenably claimed to have been wrongly excluded or to have become available only after the trial" to determine whether no reasonable juror would have found the petitioner guilty. 513 U.S. at 327-28. The reference to "wrongly excluded" evidence suggests that the assessment of an actual innocence claim is not intended to be strictly limited to newly discovered evidence—at least not in the context of reaching an ineffective assistance of counsel claim based on counsel's failure to investigate or present at trial such exculpatory evidence, as was the case in *Schlup*. In addition, in articulating the

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discovered standard. *See Fratta*, 889 F.3d at 232 n.21 (citing *Moore v. Quarterman*, 534 F.3d 454, 465 (5th Cir. 2008), with a parenthetical stating that "evidence was not 'new' where 'it was always within the reach of [petitioner's] personal knowledge or reasonable investigation"); *Floyd v. Vannoy*, 894 F.3d 143, 2018 WL 3115935, at *7-9 (5th Cir. 2018) (using the phrase "newly-discovered evidence" in discussing fingerprint comparison evidence that existed at the time of trial but was neither known to the petitioner nor presented at trial, and holding that the evidence met the *Schlup* standard).

new, reliable evidence requirement, the Supreme Court stated that the petitioner must "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."[7] *Id.* at 324. Moreover, the Court used the phrase "newly presented evidence" in the context of discussing witness credibility assessments that may occur as part of the actual innocence gateway analysis. *Id.* at 330. When considered in the context of the Court's other statement about weighing all evidence—including not only evidence unavailable at trial but also evidence excluded at trial—these references to evidence not presented at trial further suggest that new evidence, solely where counsel was ineffective for failing to discover or use such evidence, requires only that the evidence not be presented to the factfinder at trial. Indeed, among the new evidence presented by the petitioner in *Schlup* was an affidavit containing witness statements that were available at trial, *see id.* at 310 n.21, but the Supreme Court did not discuss the significance of the evidence's availability nor reject the evidence outright, which presumably it would have done if the actual innocence gateway was strictly limited to newly discovered evidence. *Schlup* therefore strongly suggests that new evidence in the actual innocence context refers to newly presented exculpatory evidence.[8] Indeed,

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7. Post-*Schlup*, the Supreme Court clarified that credible, actual innocence evidence was not limited to these three types of evidence. *House*, 547 U.S. at 537.

8. The *Schlup* opinion discussed above was written by Justice Stevens and joined by Justices O'Connor, Souter, Ginsburg, and

in a subsequent decision, the Supreme Court cited *Schlup* for this very proposition, stating that "'[t]o be credible,'

Breyer, while the four remaining justices dissented. Justice O'Connor, in addition to joining Justice Stevens's decision, also separately concurred, stating that she understood the majority to hold that a petitioner "'must show that it is more likely than not that no reasonable juror would have convicted him' in light of newly discovered evidence of innocence." 513 U.S. at 332 (citation omitted). She then proceeded to state that the majority did not "decide whether the fundamental miscarriage of justice exception is a discretionary remedy." *Id.* at 333. Had Justice O'Connor merely joined part of the majority opinion, her use of "newly discovered evidence" would have constituted *Schlup*'s holding. *See Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977) (explaining that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."). However, Justice O'Connor joined the majority opinion, and her separate discussion of the actual innocence gateway test reflects agreement with that standard, not any desire to narrow the majority's construction of it. Nor did Justice O'Connor discuss any problems with the majority's reasoning in support of the test or note any distinction between newly presented and newly discovered evidence. Under these circumstances, the fairest reading of *Schlup* is that the test articulated by the majority opinion and its reference to evidence not presented (at least in the context of an ineffective assistance of counsel claim) was indeed supported by a majority of the justices, and therefore binding. Moreover, subsequently in *Calderon*, Justice O'Connor joined the majority opinion without writing separately, and the majority cited *Schlup* for the assertion that "a claim of actual innocence must be based on reliable evidence not presented at trial" in order to be credible. *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998).

a claim of actual innocence must be based on reliable evidence not presented at trial. *Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) (quoting *Schlup*, 513 U.S. at 324).[9]

Our Court has not yet resolved the meaning of new evidence in the actual innocence context. In dicta, we have suggested that new evidence generally must be newly discovered, while at the same time recognizing an exception may exist when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover the very exculpatory evidence on which the petitioner relies to demonstrate his actual innocence. *See Houck*, 625 F.3d at 94-95 (stating that the Court was "inclined to accept the [Eight Circuit's] *Amrine* definition of new evidence with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence" but deciding to "stop short of applying a modified *Amrine* standard" and instead "assum[ing] without deciding" that the petitioner's evidence constituted new evidence). This limited exception avoids an inequity that could lead to the "injustice of incarcerating an innocent individual. *McQuiggin*, 569 U.S. at 393. Such an inequity could occur under the following

9. The *Calderon* dissenters also stated that "as the Court realizes, our standard dealing with innocence of an underlying offense requires no clear and convincing proof . . . and the Court would be satisfied with a demonstration of innocence by evidence not presented at trial, even if it had been discovered, let alone discoverable but unknown, that far back." 523 U.S. at 573 (Souter, J., dissenting) (internal quotation marks and citations omitted).

circumstances: say that a petitioner was convicted of a murder, and the prosecutor had withheld a videotape depicting a different person committing the crime. Further assume the tape was not revealed until years after the trial. That petitioner could invoke the actual innocence gateway to pursue this *Brady* due process claim because the evidence was newly discovered. Now, assume the same videotape was produced to trial counsel and was available for use at trial, but counsel did not present it to the jury. Under *Amrine*, that petitioner would be forced to concede that the evidence was not new because it was available at trial, and he would be foreclosed from seeking relief under the actual innocence gateway. In contrast, in the former scenario, the same evidence, which existed but was unknown to the petitioner, would be deemed new evidence that could support the actual innocence gateway.

As the *Gomez* court stated, "in a case where the underlying constitutional violation claimed is ineffective assistance of counsel premised on a failure to present [such] evidence, a requirement that the new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway. 350 F.3d at 679-80. To overcome this roadblock, we now hold that when a petitioner asserts ineffective assistance of counsel based on counsel's failure to discover or present to the fact-finder the very exculpatory evidence that demonstrates his actual innocence, such evidence constitutes new evidence for purposes of the *Schlup* actual innocence gateway.

The approach we adopt is consistent with *Schlup* and the rulings of many of our sister circuits. Moreover, it recognizes that "the injustice that results from the

conviction of an innocent person has long been at the core of our criminal justice system." *Schlup*, 513 U.S. at 325. Indeed, "the conviction of an innocent person [is] perhaps the most grievous mistake our judicial system can commit," and thus, the contours of the actual innocence gateway must be determined with consideration for correcting "such an affront to liberty." *Satterfield v. Dist. Att'y Phila.*, 872 F.3d 152, 154 (3d Cir. 2017). The limited approach we adopt to evaluate new evidence to support an actual innocence gateway claim, where that claim is made in pursuit of an underlying claim of ineffective assistance of counsel: (1) ensures that reliable, compelling evidence of innocence will not be rejected on the basis that it should have been discovered or presented by counsel when the very constitutional violation asserted is that counsel failed to take appropriate actions with respect to that specific evidence; and (2) is consistent with the Supreme Court's command that a petitioner will pass through the actual innocence gateway only in rare and extraordinary cases. *Schlup*, 513 U.S. at 324.[10]

C

Here, the Magistrate Judge's report and recommendation and the District Court's decision adopting that report both understandably concluded that exculpatory evidence available to, but not presented by, Reeves's trial counsel—such as the evidence concerning

10. The Eighth Circuit's approach in *Amrine* and the Fifth Circuit's seemingly contrary approach in *Floyd* and *Fratta* are unpersuasive, as those courts provided no reasoning to support their narrower constructions of "new evidence."

alternative suspects—was not new evidence for purposes of the actual innocence gateway.[11] They therefore did not proceed to determine the reliability of the evidence or consider whether such evidence, assessed with all the rest of the evidence adduced at trial, would more likely than not convince any reasonable juror not to convict Reeves. In light of their view that Reeves failed to satisfy the actual innocence gateway standard, they also did not reach the merits of Reeves's ineffective assistance of counsel claim. Because we hold that under the circumstances presented here, the Kai Anderson evidence is "new," given that it was known but not presented allegedly due to his counsel's ineffective assistance, we will vacate the District Court's order and remand. If on remand the District Court concludes that this new evidence is reliable, then it should proceed to undertake a holistic assessment of the new, reliable evidence and the evidence presented at trial to determine whether Reeves has shown it is more likely than

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11. The Magistrate Judge relied on three Third Circuit opinions, *Hubbard, Goldblum*, and *Sistrunk*, as support for this conclusion that exculpatory evidence available to trial counsel but which counsel failed to present at trial did not constitute new evidence. However, "[t]he 'new' evidence *Hubbard* puts forth in alleging actual innocence is nothing more than a repackaging of the record as presented at trial." *Hubbard v. Pinchak*, 378 F.3d 333, 341 (3d Cir. 2004). As the Magistrate Judge acknowledged, we assumed for purposes of the appeal in *Goldblum* that the pathologist's report was new, reliable evidence, *Goldblum*, 510 F.3d at 226. Finally, *Sistrunk* did not characterize the petitioner's federal habeas claims as based on the alleged ineffective assistance of counsel who failed to discover or present to the fact-finder the exculpatory evidence demonstrating his actual innocence. *See Sistrunk*, 674 F.3d at 185-87.

not that no reasonable juror would have convicted him. If Reeves makes this showing, then the District Court should review his ineffective assistance of counsel claim on the merits under the applicable AEDPA standard of review.

III

For the reasons above, we will vacate the District Court's order and remand for further proceedings consistent with this opinion.

Appendix A

McKEE, Circuit Judge, *Concurring.*

I agree with my colleagues' conclusion that evidence defense counsel was aware of, but failed to present, can satisfy the new evidence requirement of *Schlup v. Delo*.[1] However, I write separately to emphasize the weight of the evidence that supports Reeves's claim of actual innocence, and the questionable nature of the investigation that resulted in the conviction of someone who may well have languished in a prison cell for eight years for a murder that was most probably committed by someone else.

The circumstances leading to Reeves's conviction are summarized in my colleagues› thoughtful opinion along with much of the evidence that supports his claim of actual innocence. Indeed, the case in support of Reeves's claim of actual innocence is so substantial that a group consisting of retired federal judges, former federal prosecutors, and a former member of the Office of the Pennsylvania Attorney General's Office, has filed an amicus brief on his behalf.[2] Yet, as I shall discuss, for some inexplicable reason, police simply refused to follow even the most obvious leads that did not confirm their suspicion that Reeves was the killer. They did eventually obtain a confession from Reeves. However, given the totality of the circumstances here, that confession does not negate his claim of actual innocence.

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1. 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995).

2. *See* Brief for Former Prosecutors, et al. as Amici Curiae Supporting Reeves 1.

Appendix A

I.

Shortly after the May 25th, 2006 robbery of the City Gas & Diesel described in the majority opinion, Jerry Reeves, who was then just eighteen years old, was arrested at a city park in Harrisburg, Pennsylvania. He was not arrested because police suspected him of being involved in the fatal robbery of City Gas & Diesel. Rather, he was arrested for throwing a rock onto a miniature golf course and hitting someone in the leg. While in his jail cell, Reeves was approached by Officer Derek Fenton. Fenton did not approach Reeves based on any suspicion that Reeves was involved in the fatal shooting. Rather, Fenton fancied himself a bit of a sleuth and prided himself on his ability to ferret out information. He testified that he went to Reeves in his jail cell because he, Fenton, believed himself to have "an excellent rapport with our detective division for the intelligence [he was] able to gather."[3] In Fenton's words, he approached Reeves because: "You don't know until you try and anyone you encounter on the street, you just strike them a conversation."[4] Reeves, who had been adopted out of foster care, and had a history of lying, was eager to get out of jail and go home for a family cookout the next day. Thus, Fenton's instincts appeared to pay off.

Reeves told Officer Fenton that he had witnessed the robbery from across the street. He even identified the robber. Reeves told Fenton that the robber was a

3. App. 307.

4. *Id.* at 306.

man named Jermaine Taylor, who was six feet tall with brown skin. Reeves would later testify at his trial that that was a lie. The police had apparently told Reeves that if he "had info they would let [him] out," and Reeves wanted to be released so he could get home in time for the aforementioned cookout.[5] He testified: "I ha[d] not seen my family in a while, so I wanted to see them." "That is why I lied."[6] As promised, the police released him after the conversation with Officer Fenton and he attended his family's cookout.

In the meantime, a "very excited" Officer Fenton notified the detective bureau.[7] Fenton told Detective Christopher Krokos, the lead detective on the City Gas & Diesel homicide, about Reeves's story. Krokos understandably followed up by contacting Reeves who agreed to come to the police station to be interviewed on May 30th, five days after the robbery. Once more, Reeves repeated that a six-foot-tall, brown-skinned, Black male named Jermaine Taylor had been the robber. This time he added a detail that police knew was not true. Even though the surveillance video depicted the shooter leaving the scene alone and on foot, Reeves stated that he had seen the robber run out of the store and get into a dark-colored Buick with lightly tinted windows and three other passengers.

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5. *Id.* at 318.

6. *Id.* at 318.

7. *Id.* at 307-08.

Detective Krokos would later write in his daily report that Reeves's adoptive father, Terrie Reeves, had informed the detective that Reeves had admitted to lying about witnessing the robbery. Krokos also noted in his report that Reeves's father had cautioned Reeves not to lie again to the police.[8]

Nevertheless, at this point, Krokos confronted Reeves about his untruthfulness. Reeves then revised his story and said that he had heard the shooting but had not actually seen it. To make things worse for Reeves, he admitted that Jermaine Taylor, the man he claimed had been the robber, "was someone he made up," and that "none of the information he gave [Krokos] was true. Reeves's admission that he had been lying clearly gave police reason to suspect that he might have been involved. As a result of that admission, Reeves was charged with hindering apprehension, and the investigation continued.

Police had already received a number of leads pointing in a different direction that should have, at the very least, cautioned against myopically focusing on Reeves. The very same day of the robbery, staff at the county work-release center in Harrisburg had informed police that two work-release clients—Kai Anderson and Michael Holmes—had escaped the night of the robbery. Anderson fit the description of the robbery suspect, and the work-

8. Officer Fenton, Detective Krokos and Terrie Reeves were not the only individuals to have witnessed Reeves lying. His foster care reports described him as "deliberately untruthful" as a child and "often untruthful . . . to avoid what would be minimal consequences."

release staff told police that it was "very coincidental" that Anderson and Holmes escaped the same night the robbery occurred. The work-release staff also provided police with photos and information about Anderson to aid in pursuing him.

Next, Kimberly Clark, the grandmother of Anderson's child, had independently called police to tell them that Anderson had been making minute-long calls to her daughter, Danielle Ignazzito, several times a day and had been "act[ing] mysterious[ly]."[9] Clark also reported that Anderson had told Ignazzito that "he's on the run and or is wanted."[10]

Then came a third tip about Anderson. Ignazzito, Clark's daughter and the mother of Anderson's son, had initially been "afraid" to give police information about Anderson's whereabouts.[11] But on May 29th, just four days after the robbery, Ignazzito told police that Anderson had called her several times to say that he had a lot of money to give her for their child. Ignazzito said she had also spoken to Kenneth Marlow, a friend of Anderson's. Marlow told her that Anderson was in trouble, that Anderson had fled to Ohio with Michael Holmes (who had escaped from the work-release center with Anderson), and that Anderson was being sought by police in connection with the City Gas & Diesel homicide.

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9. App. 137.

10. Id.

11. Id.

Six days after the robbery, police arrested Anderson for escaping from the work-release center. Detective Krokos took the opportunity to interview Anderson, just as he had interviewed Reeves a few days earlier. The interview was unfruitful. Anderson confirmed that he had escaped from the work-release center but denied any involvement in the robbery. He did, however, confirm that he had asked Marlow to call Ignazzito, just as Ignazzito had told Krokos. Yet it is not clear if he also confirmed that he had expressed concern about being connected to the robbery, as Ignazzito had reported. Anderson did admit that he had been "in the area of Linden St[.] and Walnut St."—just a few blocks away from the City Gas & Diesel—on the night of the robbery.[12] He also said that he had encountered the real robber there and actually heard that person confess to the crime. Despite information placing him near the crime scene, and the three independent tips at least suggesting that further investigation into Anderson was warranted, it does not appear that suspicion ever turned from Reeves to Anderson (or to anyone else).

Then came a fourth tip. A week after interviewing Anderson, Detective Krokos interviewed Marlow. Marlow admitted calling Ignazzito on Anderson's behalf, as Ignazzito had reported, and to telling Ignazzito that Anderson was on the run. Marlow also said that Anderson was "involved in the robbery/homicide at the City Gas & Diesel on State St."[13] Marlow even told Krokos that he heard Anderson admit his involvement. According

12. *Id.* at 159.

13. *Id.* at 165.

to Marlow, Anderson had said that he (Anderson) "got a gun[,] went to the gas station[,] and shot the dude and robbed him."[14]

Thus, Detective Krokos now had information implicating Anderson from not two, not three, but *four* sources—the work-release center staff, Clark, Ignazzito, and now Marlow. Yet, for reasons that are not at all clear on this record, the investigation continued to focus on Reeves. There is more.

Approximately a month after the robbery, another witness, Johnathan Johnston, came forward. Johnston and Anderson had known each other for over fifteen years and had reunited at Dauphin County Prison after Anderson's arrest for escaping from the work-release center. Johnston told Krokos that Anderson had admitted involvement in the City Gas & Diesel robbery while they were in the County Prison. Johnston's statement about Anderson's confession should have been taken particularly seriously because, unlike the stories that Reeves gave Krokos, Anderson's purported statements to Johnston included subtle details about the robbery, many of which were unknown to the public.[15] Specifically, Johnston said that Anderson had told

14. *Id.* at 82.

15. According to Johnston's statement, Anderson said he was "show[n]" the surveillance tape of the robbery during his interview with police. App. 93-94. The police report of Anderson's interview does not confirm that claim, nor does it suggest that any such viewing took place. However, the police reports indicate that police also showed the video to Xavier Henry, who had been identified as one of the City Gas & Diesel customers on the night of the robbery.

him that (1) the shooter needed to be small enough to fit through the gap in the bullet-proof glass window to get to the other side of the counter; (2) the shooter was wearing all black; and (3) the shooter left the store on foot heading west. Johnston's statements to Krokos contained other indicia of reliability: Johnston knew that Anderson had admitted his involvement to Marlow, and that Marlow had repeated Johnston's inculpatory statement to Ignazzito.

Johnston told Krokos something else that the detective inexplicably ignored. According to Johnston, "[Anderson] knew he could beat [the evidence in the surveillance video] he just need somebody talk to [Ignazzito] so she can, don›t say nothing and get scared because the cops already tried to scare her."[16] Indeed, Johnston said that Anderson had also asked him (Johnston) to have his wife threaten Ignazzito not to give the police any more information about Anderson and the City Gas & Diesel homicide. Finally, Johnston said that Anderson told him that after "the gun went off[,] the [clerk] fell then got back up and he fell again."[17] That detail was visible in surveillance

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Police did so in an attempt to identify Derrick Small, the only customer present in the City Gas & Diesel store when the robber entered. There is nothing in the record to establish any similar reason for showing the video to Anderson, who, as far as we know, had no information to identify Small or any other customer. Nor is it clear what portions of the video, if any, Anderson might have seen. The video is divided into multiple parts with footage from differing cameras both inside and outside of the store.

16. App. 94.

17. *Id.* at 97.

videos of the crime, but had not been made public. Again, for reasons that are not at all apparent on this record, Krokos failed to pursue Anderson as a suspect, and the investigation began to "stall."[18]

Despite information that directly implicated Anderson and despite the police learning that Anderson knew subtle details about the robbery, the investigation appears to have simply gone dormant for three years. Then, serendipity unfortunately placed Reeves in Detective Krokos's crosshairs yet again. In July of 2009, Reeves, who was now twenty-one years old, had been arrested with his girlfriend after an incident at a bar. Upon learning of Reeves's arrest, and despite all of the evidence pointing toward Anderson, Krokos took the opportunity to speak with Reeves once more about the City Gas & Diesel robbery. At his trial, Reeves testified that he agreed to be interviewed again because he wanted to keep his pregnant girlfriend—with whom he had been arrested—from going to prison and was told that the officers would "see what they could do" if he talked to them.[19]

Reeves offered the same story about having witnessed the crime that he had given Krokos three years earlier. However, this time Reeves said that two men, not one, had

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18. Krokos conducted an interview with Michael Holmes in March of 2007, some nine months after the crime, but Holmes admitted only that he and Anderson had left the work-release center before the homicide. Holmes denied having ever even been in the City Gas & Diesel.

19. App. 387-88.

robbed the store and that Reeves's own cousin had stood outside as a lookout. Again, Krokos pressed Reeves on his lack of truthfulness. The video showed that only one man had robbed the store. Reeves responded by changing his story yet again. This time, he stated he was not actually across the street when he saw the shooting, but was in a parking lot near the payphone; that he spoke to his cousin about the imminent plan to rob the store; and that it was an unknown male who actually went inside. The questioning continued until Reeves finally asked, "[W]hat if I was in the store when it happened then what[']s that?"[20] The police report states:

> Reeves was confronted with the fact that if other people are involved they may talk to us about the incident. He was asked what [are Reeves's cousin and the other individual Reeves named] going to say if asked about this incident? Reeves stated that they will say that it was me who did it. Reeves then began to become concerned that he would not see his unborn child if he told us what occurred. Reeves was further questioned.

Reeves then began to visibly shake and tremble. He began to cry.[21] Then Reeves "confessed." He said that he robbed the store because he needed money; that he knew the people in the store because he used to sweep the floors for them; that he got a gun but that he did not know the

20. *Id.* at 198.

21. Id.

make or caliber; and that he had been given the gun the same day by someone in Baltimore, Maryland.

Reeves then provided details on the robbery, many of which were prompted by leading questions from Krokos and his team. They posed questions to confirm that, like the robber in the video, Reeves had also jumped over the counter:

> Q. . . . Do you remember did you jump up or do anything in the store?
>
> A. I think I jump behind the counter.[22]

They asked questions to corroborate the fact that bullet-proof plastic separated the robber from the clerk:

> Q. Okay what was separating customers from behind the register?
>
> A. Glass[.]
>
> Q. Was it glass or plastic or?
>
> A. Probably bullet proof plastic or something.[23]
>
> They verified that Reeves's gun matched the gun used:

22. *Id.* at 106.

23. Id.

> Q. And describe the gun again what color was it?
>
> A. All black[.]
>
> Q. And it was a semi-automatic not a revolver.
>
> A. Semi-automatic yes.[24]

They asked Reeves to specify that he had acted alone:

> Q. And just, just so we're clear you were the only one involved in this there was nobody else involved in this incident?
>
> A. No not at all.[25]

And they repeatedly pressed Reeves on whether he had worn something to disguise his face, as the robber had done in the video:

> Q. Okay so what are you wearing when you go in the store?
>
> A. Black, black pants, black t-shirt.
>
> Q. Are you wearing a mask? Do you remember?
>
> A. No I don't remember if I had a mask on or not probably, probably did, no I didn't have a

24. *Id.* at 108.

25. App. 113.

mask on.

Q. You didn't have a mask on?

A. No[.]

A. Did you have gloves?

Q. I think so, I think so probably.

. . .

Q. Did [the store clerk] recognize you?

A. Most likely yes. He seen me plenty of times before that so if I wasn't wearing a mask yes.

Q. [S]o what you're saying is you don't remember whether or not you were wearing . . .

A. [INAUDIBLE] masks or gloves that night.

Q. Okay, those are the two things you don›t remember whether or not you were wearing that night.

A. Yes[.]

Q. Just for the tape I›m not sure it got ah on there clearly, you don›t remember if you were wearing a mask or gloves?

A. No[.][26]

Despite obtaining what purported to be a confession, Krokos either ignored or did not credit some rather remarkable discrepancies between Reeves's account and the actual facts of the robbery. Reeves said that he struggled with the clerk before the shooting. Yet the surveillance video shows that the clerk and the robber never even touched one another.[27] Reeves said he ran towards Boas Street, which is north of the City Gas & Diesel, while the actual robber headed in a westerly direction, according to the surveillance video. Reeves also said he did not remember if he had gotten anything from the store after firing the gun, though the real robber left with a bag full of money from the cash register. Finally, Reeves said the gun he used "looked like a []9 millimeter,"[28] which is the same caliber as a .357, but the actual gun used was a much smaller, .25 caliber.

Most significantly, in the video, the shooter appears to be right-handed. He removed the pistol from the front of his pants with his right hand then brandished it in his right hand. He switched the gun to his left hand only after the clerk had been shot and he needed his right hand to finish taking money from the register and from the floor. Once he had collected the money, he used his right hand to

26. *Id.* at 105, 112.

27. The clerk simply attempted to close the bullet-proof window separating the check-out counter from the customer area before the robber could point the gun through the window's opening.

28. *Id.* at 108.

jump back over the counter. It is uncontested that Reeves is left-handed, and he has offered affidavits from people who knew him as a child to corroborate that.[29]

Of course, police may not have noticed that Reeves was left-handed during the numerous times they interacted with him and it would have been understandable to simply assume, absent a reason to suspect otherwise, that he was right-handed. This is particularly true in light of his confession and his prior interviews, which continuously resulted in what can only be described as false exculpatory statements.

However, as I have already detailed, police had to ignore several leads to even get to the point of Reeves's confession three years after the fatal robbery. These leads included evidence that Anderson had admitted his involvement in the crime to two people; that he had suddenly come into a significant sum of money; that he had escaped from the work-release center on the night of the robbery; and that he had been in the vicinity of the robbery that night. Anderson had also tried to have someone threaten Ignazzito to keep her from saying anything more about his involvement in the robbery, and he had made statements revealing a detail about the robbery not known to the general public. Yet, during the three-year lapse in this investigation, it does not appear that police did anything to pursue the evidence of Anderson's

29. Reeves offered testimony at trial that he was left-handed, but his trial counsel never offered evidence to corroborate that fact. Given his confession, the jury most likely simply discredited his uncorroborated testimony.

involvement before initiating the discussion with Reeves that ultimately led to the statement that resulted in his conviction for the fatal robbery. Given this record, as I noted at the outset, Reeves's apparent confession does not negate the claim of actual innocence based on newly discovered evidence under *Schlup v. Delo*.[30]

Reeves would not be the first person to have falsely confessed to a crime.[31] According to the National Registry of Exonerations, roughly half of individuals who have been exonerated following murder convictions involving DNA evidence in the United States since 1989, made a false confession.[32] In Pennsylvania, the rate of false confessions

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30. 513 U.S. at 324. I do not suggest that evidence of actual innocence must always be as strong as we have on this record before relief is available under *Schlup v. Delo*. Indeed, it can only be hoped that the kind of investigation that led to Reeves's confession, despite the strong evidence of someone else's guilt, will be exceedingly rare. Although the bar set by *Schlup* is a high one, it should not be raised so high that it becomes impossible to clear it. Nothing in *Schlup* leads me to conclude that the Court intended the interests of justice advanced by that case to be illusory in all but the most outrageous and extreme cases or that the accused must be able to prove actual innocence to a near mathematical certainty.

31. During oral argument, counsel for Reeves was asked about the reported frequency of exonerations following false confessions. He subsequently submitted a reply pursuant to Fed. R. App. P. 28(j). *See* Appellant's May 28, 2018 Rule 28(j) Letter.

32. *Compare* Murder Exonerations in the U.S., The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.

is comparable. Nearly half of individuals who have been exonerated with DNA evidence following a conviction for murder in Pennsylvania had confessed to those murders.[33]

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aspx (click "Murder" in "Crime" field; click "Present" button in the "DNA" field) *with* Murder Exonerations in U.S. with False Confessions, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (click "Murder" in "Crime" field; click "Present" button in "False Confession" field; click "Present" button in the "DNA" field). As of May 28, 2018, nationally, the Registry has recorded 195 individuals that were convicted of murder in cases involving DNA evidence and that have since been exonerated. Of those exonerees, 43 percent, or 84 individuals, gave false confessions. These statistics were supplied by counsel in his May 28, 2018 Rule 28(j) letter. *See supra* note 8; Appellant's May 28, 2018 Rule 28(j) Letter 1-2.

33. *Compare* Murder Exonerations in Pennsylvania, The National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (click "Pennsylvania" on interactive map; click "Murder" in "Crime" field) *with* Murder Exonerations in Pennsylvania with False Confessions, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (click "Pennylvania" on interactive map; click "Murder" in "Crime" field; click "Present" button in "False Confession" field; click "Present" button in the "DNA" field). The Registry has recorded 9 individuals that were convicted of murder in Pennsylvania and have since been exonerated in cases that involved DNA evidence. Of those exonerees, 44 percent, or 4 individuals, gave false confessions.

As Brandon L. Garrett writes, there is a "new awareness among scholars, legislators, courts, prosecutors, police departments, and the public that innocent people falsely confess, often due to psychological pressure placed upon them during police interrogations." Garrett, *The Substance of False Confessions*, 62

In referring to this data, I do not, of course, suggest that police should have completely ignored Reeves's confession. Rather, I refer to it simply to underscore that Reeves's confession does not negate his arguments under *Schlup*. I have already noted that absent the detective's inexplicable failure to pursue leads pointing to Anderson and the equally puzzling three-year gap in this investigation, there would have been no incriminating statement from Reeves.

II.

Reeves has now spent eight years in prison for this armed robbery and murder conviction, a fact that will hopefully inform the speed with which subsequent courts address his now likely procedurally-cognizable habeas claim.

Stan. L. Rev. 1051, 1052-53 (2010). Reeves's "trembl[ing]," tear-filled confession certainly bore the markings of such psychological distress. App. 198. He even attempted suicide in his cell just prior to having given the confession.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED MAY 16, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1043

JERRY REEVES,

Appellant,

v.

FAYETTE SCI; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA; THE DISTRICT ATTORNEY OF DAUPHIN COUNTY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
(D.C. No. 3-14-cv-01500)
District Judge: Hon. Malachy E. Mannion

Argued on May 16, 2018

Before: McKee, Shwartz, and Cowen, *Circuit Judges.*

JUDGMENT

This case came to be considered on the record from the United States District Court for the Middle District

of Pennsylvania and was argued before the Panel on May 16, 2018.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Order of the District Court entered on December 22, 2016 is hereby VACATED AND REMANDED. Costs shall not be taxed in this matter. All of the above in accordance with the Opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: July 23, 2018

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF PENNSYLVANIA, DATED DECEMBER 22, 2016

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:14-1500

JERRY REEVES,

Petitioner,

v.

BRIAN COLEMAN,

Respondent.

(MANNION, D.J.)
(SCHWAB, M.J.)

ORDER

In light of the memorandum issued this same day, **IT IS HEREBY ORDERED THAT** Judge Schwab's report, (Doc . 38), is **ADOPTED IN ITS ENTIRETY**. Petitioner's objections to the report, (Doc. 40), are **OVERRULED**. The petition for habeas corpus is **DISMISSED**. No certificate of appealability shall issue. The Clerk is directed to **CLOSE** this case.

Appendix C

s/_____
MALACHY E. MANNION
United States District Judge

Date: December 22, 2016

APPENDIX D — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED DECEMBER 22, 2016

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 3:14-1500

JERRY REEVES,

Petitioner,

v.

BRIAN COLEMAN,

Respondent.

December 22, 2016, Decided
December 22, 2016, Filed

MALACHY E. MANNION,
United States District Judge. SCHWAB, M.J.

MEMORANDUM

Petitioner, Jerry Reeves, an inmate confined in the Smithfield State Correctional Institution, Huntingdon, Pennsylvania, filed, through counsel, a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254 which was superseded by an amended petition. (Doc. 1, Doc. 11). Petitioner attacks his 2010 second-degree murder

conviction and life sentence without parole imposed by the Court of Common Pleas for Dauphin County, Pennsylvania. By Report and Recommendation dated October 17, 2016, Magistrate Judge Schwab recommended that petitioner Reeves' petition for writ of habeas corpus be dismissed as untimely. She determined that petitioner did not identify any possible basis for equitable tolling and that he failed to meet the requirements of a claim of actual innocence. (Doc. 38).

On November 7, 2016, petitioner filed objections to Judge Schwab's report with a brief in support attached. (Doc. 40, Doc. 40-1). To overcome AEDPA's statute of limitations, petitioner alleges newly discovered evidence of actual innocence and he claims that Judge Schwab "failed to analyze his actual innocence in light of all the evidence, old and new." Petitioner relies, in part, on *McQuiggin v. Perkins*, __ U.S. __, 133 S.Ct. 1924, 185 L. Ed. 2d 1019 (2013) (Supreme Court "[held] that actual innocence, if proved, serves as a gateway through which a petitioner may pass whether the impediment is a procedural bar,[ ], or, [ ], expiration of the statute of limitations.").

For the reasons discussed below, the court will **ADOPT** Judge Schwab's report and **OVERRULE** petitioner's objections since petitioner fails to meet the threshold requirements that his evidence is in fact "new" and by convincing the court that "in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." Id. at 1928 (citations omitted).

Appendix D

I. STANDARD OF REVIEW

When objections are timely filed to the report and recommendation of a magistrate judge, the district court must review de novo those portions of the report to which objections are made. 28 U.S.C. §636(b)(1); *Brown v. Astrue,* 649 F.3d 193, 195 (3d Cir. 2011). Although the standard is de novo, the extent of review is committed to the sound discretion of the district judge, and the court may rely on the recommendations of the magistrate judge to the extent it deems proper. *Rieder v. Apfel*, 115 F.Supp.2d 496, 499 (M.D.Pa. 2000*)* (citing *United States v. Raddatz*, 447 U.S. 667, 676, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980)).

For those sections of the report and recommendation to which no objection is made, the court should, as a matter of good practice, "satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." Fed. R. Civ. P. 72(b), advisory committee notes; *see also Univac Dental Co. v. Dentsply Intern., Inc.*, 702 F.Supp.2d 465, 469 (M.D.Pa. 2010) (citing *Henderson v. Carlson*, 812 F.2d 874, 878 (3d Cir. 1987) (explaining that judges should give some review to every report and recommendation)). Nevertheless, whether timely objections are made or not, the district court may accept, not accept, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. 28 U.S.C. §636(b)(1); Local Rule 72.31.

II. BACKGROUND

Since Judge Schwab stated the complete procedural and factual history of this case, (Doc. 38, at 2-19), and since the petitioner did not object to it, the court will not repeat it herein and it will be adopted. *See Butterfield v. Astrue*, 2010 U.S. Dist. LEXIS 109517, 2010 WL 4027768, *3 (E.D.Pa. Oct. 14, 2010) ("To obtain *de novo* determination of a magistrate[ ] [judge's] findings by a district court, 28 U.S.C. §636(b)(1) requires both timely and specific objections to the report.") (quoting *Goney v. Clark*, 749 F.2d 5, 6 (3d Cir.1984)). The court will briefly address the background and restrict its discussion below to the relevant background as it pertains to the petitioner's objections. The facts of this case are also thoroughly discussed in the amended petition as well as the briefs of the parties and, the history is substantiated by the exhibits. (Doc. 11, Doc. 15, Doc. 34, Doc. 34-1, Doc. 35).

Following a jury trial which concluded on June 23, 2010, petitioner was found guilty in the Court of Common Pleas of Dauphin County, of murder of the second-degree, robbery-inflict serious bodily injury and, firearms not to be carried without a license in relation to an armed robbery on May 25, 2006. On the same date, Reeves was sentenced to life in prison without parole.

Reeves did not file any post-sentence motions with the Dauphin County Court.

On July 22, 2010, Reeves filed a timely Notice of Appeal of his judgment of sentence to the Pennsylvania

Superior Court. On July 1, 2011, the Superior Court of Pennsylvania affirmed Reeves' judgment of sentence. Reeves did not file a petition for allowance of appeal to the Pennsylvania Supreme Court. Thus, on July 31, 2011, Reeves' judgment of sentence became final.

From July 31, 2011 through July 29, 2012, Reeves did not have any properly filed appeal pending with any state court. On July 30, 2012, petitioner filed a petition for relief under the Pennsylvania Post Conviction Relief Act ("PCRA"), 42 Pa.C.S.A. §§9541, *et seq.*, with the Dauphin County Court. On November 26, 2012, the Dauphin County Court, sitting as the PCRA court, dismissed Reeves' PCRA petition without an evidentiary hearing.

On December 7, 2012, Reeves filed a notice of appeal with the Pennsylvania Superior Court regarding the dismissal of his PCRA petition. On November 7, 2013, the Superior Court affirmed the Dauphin County Court's order dismissing Reeves' PCRA petition.

Reeves then filed a petition for allowance of appeal to the Pennsylvania Supreme Court regarding the dismissal of his PCRA petition and it was denied on March 25, 2014.

On July 31, 2014, petitioner filed the instant petition for writ of habeas corpus under §2254. (Doc. 1). On November 7, 2014, petitioner filed an amended habeas petition. (Doc. 11). The respondent filed a response and support brief, (Doc. 34, Doc. 34-1), arguing, in part, that the habeas petition was untimely under the one year statute of limitations of the Antiterrorism and Effective

Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. §2244(d)(1)(A). Reeves filed a traverse, (Doc. 35), and alleged newly discovered evidence of actual innocence. He relied on §2244(d)(1)(D) of the AEDPA and contended that he was entitled to an exception to the AEDPA's time limitations since his habeas petition was filed one year from "the date on which the factual predicate of the claim ... could have been discovered through ... due diligence."

Judge Schwab filed the instant report, (Doc. 38), on October 17, 2016. Petitioner filed objections and an attached brief on November 7, 2016. (Doc. 40, Doc. 40-1).

III. DISCUSSION

A state prisoner requesting habeas corpus relief pursuant to 28 U.S.C. §2254 must adhere to a statute of limitations that provides, in relevant part, as follows:

> (d)(1) A one-year period of limitations 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 for seeking such review . . .
>
> (d)(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)(1)-(2)(emphasis added); *see generally*, *Jones v. Morton*, 195 F.3d. 153, 157 (3d Cir. 1999). Thus, under the plain terms of §2244(d)(1)(A), the period of time for filing a habeas corpus petition begins to run when direct review processes are concluded. *See Harris v. Hutchinson*, 209 F.3d 325, 327 (4th Cir. 2000). ("[T]he AEDPA provides that upon conclusion of direct review of a judgment of conviction, the one year period within which to file a federal habeas corpus petition commences, but the running of the period is suspended for the period when state post-conviction proceedings are pending in any state court.")(emphasis in original); *Fields v. Johnson*, 159 F.3d 914, 916 (5th Cir. 1998)(per curiam); *Hoggro v. Boone*, 150 F.3d 1223, 1226 (10th Cir. 1998). It is not the conclusion of state post-conviction collateral review processes that starts the running of the limitations period. *See Bunnell v. Yukins*, No. 00-CV-73313, 2001 U.S. Dist. LEXIS 3155, 2001 WL 278259, *2 (E.D. Mich. Feb 14, 2001)("Contrary to Petitioner's assertion, the limitations period did not begin to run anew after the completion of his post-conviction proceedings.").

As indicated above, section 2244(d)(2) operates to exclude only the time within which a "properly filed application" for post conviction relief is pending in state court. Thus, when a petition or appeal has concluded and is no longer pending, the one (1) year statute of limitations starts to run and the time is counted. A "properly filed application" for post conviction relief under §2244(d)

(2) is one submitted according to the state's procedural requirements, such as rules governing time and place of filing. *Lovasz v. Vaughn*, 134 F.3d 146, 148 (3d Cir. 1998). The Third Circuit Court of Appeals has defined "pending" as the time during which a petitioner may seek discretionary state court review, whether or not such review is sought. *Swartz v. Meyers*, 204 F.3d 417 (3d Cir. 2000). "Pending," however, does not include the period during which a state prisoner may file a petition for writ of certiorari in the United States Supreme Court from the denial of his state post-conviction petition. *Stokes v. District Attorney of the County of Philadelphia*, 247 F.3d 539, 2001 WL 387516, at *2 (3d Cir., 2001). Likewise, the statute of limitations is not tolled under §2244(d)(2) for the time during which a habeas petition is pending in federal court. *Jones*, 195 F.3d at 158.

The AEDPA statute of limitations also may be subject to equitable tolling. The Third Circuit has held that the federal habeas statute of limitations is subject to equitable tolling only in extraordinary circumstances. *See Merritt v. Blaine*, 326 F.3d 157, 161 (3d Cir. 2003). In *Merritt*, the Court of Appeals set forth two general requirements for equitable tolling: "(1) that the petitioner has in some extraordinary way been prevented from asserting his or her rights; and (2) that the petitioner has shown that he or she exercised reasonable diligence in investigating and bringing the claim." *Id.* (internal citations and quotations omitted).

Appendix D

A. Statutory Tolling

In this case, because petitioner Reeves did not file a petition for allowance of appeal with the Pennsylvania Supreme Court with respect to his direct appeal, his conviction became final on July 31, 2011, or 30 days after the Pennsylvania Superior Court affirmed petitioner's conviction and sentence. *See* 42 Pa.C.S.A. §9545(b)(3); Pa.R.App.P. 903; Pa.R.Crim.P. 720(A)(3). Thus, the clock for filing a federal habeas petition began running on August 1, 2011 since petitioner did not have any properly filed appeal pending, and the clock continued to run uninterrupted for a full 365 days until Reeves filed his PCRA petition on July 30, 2012. As respondent notes, since 2012 was a leap year, Reeves' PCRA petition was timely filed.

Reeves' PCRA petition was finally denied on March 25, 2014 when the Pennsylvania Supreme Court denied his petition for allowance of appeal. As such, Reeves had until March 26, 2014 to file a timely §2254 habeas corpus petition since one year had already run on his AEDPA statute of limitations. *Burns v. Morton*, 134 F.3d 109, 111 (3d Cir. 1998). Petitioner's PCRA petition did not toll an already expired statute of limitations. *See Long v. Wilson*, 393 F.3d 390, 395 (3d Cir. 2004).The instant petition was not filed until July 31, 2014, more than four months after the limitations period expired. Thus, Reeves' petition for habeas corpus under §2254 is barred by the statute of limitations, and should be dismissed as untimely, unless the statute of limitations is subject to statutory or equitable tolling.

As noted above, the one-year statute of limitations ran from August 1, 2011 for 365 days until Reeves filed his PCRA petition on July 30, 2012. There was no tolling during this time. His federal petition was then untimely by over four months. Consequently, the AEDPA statute of limitations is not subject to statutory tolling.

B. Equitable Tolling

The court must next examine whether the AEDPA statute of limitations should be equitably tolled to consider the petition timely filed. *Robinson v. Johnson*, 313 F.3d 128, 134 (3d Cir. 2002), *cert. denied*, 540 U.S. 826, 124 S. Ct. 48, 157 L. Ed. 2d 49 (2003)(citing *Miller v. New Jersey State Dep't of Corr.*, 145 F.3d 616, 617-618 (3d Cir. 1998). The limitation period may be tolled when the principles of equity would make the rigid application of a limitation period unfair. *Holland v. Florida*, 560 U.S. 631, 130 S.Ct. 2549, 2560, 177 L. Ed. 2d 130 (2010)("Now, like all 11 Courts of Appeals that have considered the question, we hold that §2254(d) is subject to equitable tolling in appropriate cases."); *Satterfield v. Johnson*, 434 F.3d 185, 195 (3d Cir. 2006); *Jones v. Morton*, 195 F.3d 153, 159 (3d Cir. 1999).

To be entitled to equitable tolling, [Petitioner] must show "'(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way' and prevented timely filing." *Holland*, 130 S.Ct. at 2562 (quoting *Pace*, 544 U.S. at 418); *Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079, 166 L. Ed. 2d 924, (2007) (quoting *id.*). Courts must be sparing in their use

of equitable tolling. *Seitzinger v. Reading Hosp. & Med. Ctr.*, 165 F.3d 236, 239 (3d Cir. 1999). In fact, the United States Court of Appeals for the Third Circuit has held that equitable tolling is proper "only in the rare situation where [it] is demanded by sound legal principles as well as the interests of justice." *United States v. Midgley*, 142 F.3d 174, 179 (3d Cir.1998).

Initially, insofar petitioner argues in the alternative that he is entitled to equitable tolling under *Martinez v. Ryan*, 566 U.S. 1, 132 S. Ct. 1309, 182 L. Ed. 2d 272 (2012), (Doc. 40-1, at 10-12), this claim is without merit. Petitioner states that his "[p]rior counsel had a clear conflict of interest preventing them from raising their own prior ineffectiveness to excuse the procedural default of [his] federal claims." He states that he was still represented by his ineffective post-conviction counsel one year after his conviction became final and that he is entitled to equitable tolling based on *Martinez*, 566 U.S. 1, 132 S.Ct. 1309, 182 L. Ed. 2d 272. He also submitted an affidavit from his PCRA counsel averring that an unnamed associate miscalculated the deadline to file his §2254 habeas petition and that his prior counsel's miscalculation of his deadline is another ground for equitable tolling.

The Supreme Court does not state in *Martinez* that a blanket allegation of the ineffectiveness of PCRA counsel can constitute a basis for equitable tolling of the habeas statute of limitations. *See Evans v. Corbett*, Civil No. 13-1562, 2014 U.S. Dist. LEXIS 126585, M.D.Pa. (Sept. 10, 2014) (Mannion, J.); *Wise v. Rozum*, 2013 U.S. Dist. LEXIS 153925, 2013 WL 579659, *4 (M.D.Pa. Oct. 28,

2013)(Mannion, J.)("*Martinez* does not recognize a new time-bar excuse, but only a limited and equitable excuse for procedural default.") (collecting cases). In fact, as respondent recognizes, (Doc. 34 at 13), the *Martinez* decision did not allow for equitable tolling of the AEDPA deadline. *Id.; see also Capers v. Walsh*, 2012 U.S. Dist. LEXIS 159062, 2012 WL 5389513, at *4 (E.D. Pa. Oct. 5, 2012)(citing *Martinez*, 132 S.Ct. at 1315 (limiting decision to issue of whether there was cause for prisoner's procedural default on collateral review); *Kingsberry v. Maryland*, 2012 U.S. Dist. LEXIS 77746, 2012 WL 2031991, at *1 (D.Md. June 4, 2012) ("*Martinez* did not address equitable tolling in the context of ineffective assistance of counsel and provides no relief here."); and *Peeples v. Citta*, 2012 U.S. Dist. LEXIS 52895, 2012 WL 1344819, at *6 n. 10 (D.N.J. Apr. 16, 2012) *(Martinez* does not provide a basis for equitable tolling). *See also Vogt v. Coleman*, 2012 U.S. Dist. LEXIS 99767, 2012 WL 2930871, at *4 (W.D. Pa. July 18, 2012) ("*Martinez* did not provide that post-conviction counsel's ineffectiveness could establish an exception to or equitable tolling of AEDPA's one-year statute of limitations for filing a federal habeas corpus petition") (collecting cases) and *Stromberg v. Varano*, 2012 U.S. Dist. LEXIS 95877, 2012 WL 2849266. at *5 n. 37 (E.D.Pa. July 11, 2012) ("*Martinez* is not controlling in this case because the Court denied the petition as time-barred, not procedurally defaulted. Furthermore, the consideration of procedurally defaulted claims does not alleviate a petitioner's burden to overcome [the one-year] statute of limitations or to prove the merits of his case").

Thus, *Martinez* does not excuse petitioner Reeves' failure to seek federal review of his claims in a timely fashion. *Evans, supra; Wise, supra*. Moreover, as respondent points out, despite the alleged miscalculation of the habeas filing deadline, Reeves' PCRA counsel filed Reeves' PCRA petition after the entire one year AEDPA statute of limitations ran.

Next, the court will address the primary bases petitioner advances in support of his contention that he is entitled to equitable tolling. Specifically, petitioner claims that he had presented new evidence to establish his actual innocence entitling him to equitable tolling. He relies in part on *McQuiggin*. "*McQuiggin* held that a claim of actual innocence, if proven, provides an equitable exception to the one-year statute of limitations." *Williams v. Patrick*, 2014 U.S. Dist. LEXIS 74949, 2014 WL 2452049, *2 (E.D.Pa. June 2, 2014) (citing *McQuiggin*, 133 S.Ct. at 1928).[1] "That exception applies only to a 'severely confined category' of cases: those where the petitioner produces new evidence sufficient to show that 'it is more likely than not that no reasonable juror would have convicted [the petitioner].'" 2014 U.S. Dist. LEXIS 74949, [WL] at *9 (citing *McQuiggin*, 133 S.Ct. at 1933; *Schlup v. Delo*, 513 U.S. 298, 329, 115 S.Ct. 851, 130 L. Ed. 2d 808 (1995)). A petitioner must meet a demanding standard to utilize the actual innocence exception to the AEDPA statute of limitations. Indeed, in *McQuiggin*, 133 S.Ct. at 1928, the Supreme Court cautioned "that tenable actual-innocence gateway pleas are rare."

1. The court notes that in *Williams v. Patrick* the Third Circuit denied petitioner a certificate of appealability on April 20, 2015.

Appendix D

In *Williams*, 2014 U.S. Dist. LEXIS 74949, 2014 WL 2452049, *10, the court stated:

> In *Hubbard v. Pinchak*, the Third Circuit established a two-part test for assessing whether a petitioner's claim of actual innocence may act as a procedural gateway under *Schlup*. 378 F.3d 333, 340 (3d Cir. 2004); see also *Pirela v. Vaughn*, No. 01-4017, 2014 U.S. Dist. LEXIS 38122, 2014 WL 1199345, at *11 (E.D.Pa. Mar. 24, 2014). First, a court must determine "whether the [petitioner] has presented 'new reliable evidence ... not presented at trial" which supports his allegations of constitutional error. *Hubbard*, 378 F.3d at 339-40 (quoting *Schlup*, 513 U.S. at 324). The "new" evidence presented may be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence that was not presented at trial. *Schlup*, 513 U.S. at 324. "[W]ithout any new evidence of innocence, even the existence of a concededly meritorious constitutional violation is not in itself sufficient to establish a miscarriage of justice that would allow a habeas court to reach the merits of a barred claim." *Hubbard*, 378 F.3d at 338 (quoting *Schlup*, 513 U.S. at 316). For purposes of satisfying this first step, evidence is not "new" if it was available at trial. Id. at 340. A petitioner's choice not to present available evidence at trial to the jury does not open the gateway. Id.

The second inquiry to be addressed if the evidence is in fact "new" is whether "it is more likely than not that no reasonable juror would have convicted [petitioner] in the light of the new evidence." 2014 U.S. Dist. LEXIS 74949, [WL] at 11 (citing *McQuiggin*, 133 S.Ct. at 1935; *Schlup*, 513 U.S. at 327).

In his objections, petitioner argues that Judge Schwab failed to properly analyze his alleged new evidence he offered to support his claim of actual innocence in light of all of the evidence, old and new, and that she improperly focuses on each piece of new evidence "in isolation." Petitioner states that Judge Schwab failed to properly weigh his evidence that Kai Anderson was the real killer. No doubt that Judge Schwab did consider this evidence and stated that "while Reeves presents strong evidence pointing to Kai Anderson as an alternative suspect, that evidence is also not new evidence under the actual innocence standard given that [his] trial counsel had that evidence in her possession at the time of trial." (Doc. 38 at 47). Judge Schwab specified the evidence petitioner's trial counsel had, including Anderson's confessions, and then concluded that his "trial counsel did not fail to develop that evidence." Rather, Judge Schwab stated that Reeves' trial counsel chose not to present the evidence at trial. (Id.). Respondent also points out that the police reports regarding Anderson were available to Reeves and his trial counsel prior to and during trial. Respondent further states that at trial Reeves could not even corroborate his own alibi and his allegation that he was in Baltimore at the time of the shooting since he admitted on cross exam that he was at work at the Hershey Factory in Harrisburg at

the relevant time. (Doc. 34 at 9-10). Thus, under the above stated first step, evidence regarding Anderson was not new since it was available at trial.

Judge Schwab also considered Reeves' history of depression and his suicide attempts, including the attempt on the day of his confession, and stated that his suicide attempt on the day of his confession was not new evidence since his trial counsel knew about it at the time of trial and had the hospital record in her possession. Judge Schwab concluded that "even assuming that those records [regarding Reeves' history of depression and his suicide attempts] constitute new evidence, they do not meet the high bar of showing actual innocence given Reeves' confession and the [store surveillance] video." (Doc. 38 at 47). Also, as respondent states, "these facts were apparent to Reeves and could have been discovered prior to trial through the exercise of his own diligence." (Doc. 34 at 9).

Judge Schwab further considered Reeves' history of lying and she found that it was "not so probative of innocence that no reasonable juror would have convicted the petitioner if that evidence were presented." Judge Schwab also considered the news article about the murder which Reeves claimed shows that the facts he provided in his confession were contained in the article and available to the public. (Doc. 38 at 47-48). Respondent indicates that even before Reeves saw the store surveillance video on the day of the incident,[2] he correctly identified in his

2. The court notes that the store surveillance video was submitted in DVD format by petitioner's counsel, (Doc. 20), and, that the court viewed it and finds it supports Judge Schwab's conclusions in her report.

confession the color of the clothes he wore and the fact that he "approached the store" after everyone left the store. Further, Reeves correctly stated that he pulled a gun from his front waistband of his pants which was verified in the video. Other details of the incident in the store as reflected in the video were detailed in Reeves' confession, including the struggle by the victim (Thakur) and the fact that the gun fired when the victim tried to close the bulletproof window to the cash register. (Doc. 34 at 10). None of this alleged new evidence, considering the record as a whole, meets the high standard Reeves must show to be entitled to the actual innocence exception to the AEDPA statute of limitations.

Additionally, Reeves states that he presented new evidence that he is left-handed and the killer is right-handed. Judge Schwab considered this evidence and stated that it was doubtful this constitutes new evidence, but she stated that "even assuming that it is new evidence, it does not show that Reeves is actually innocent" and that the store video is not conclusive on this issue. She indicates that "the jury did hear that Reeves is left handed and it viewed the video." (Doc. 38 at 48-49). Respondent also states that the store video shows the person with the gun alternates between hands when holding the gun and, that the person used his left hand and arm when he went over the store counter. More significantly, when the person in the video was holding Thakur at gun point, he was holding the gun in his left hand and did not change hands until Thakur was shot. (Doc. 34 at 11-12).

Thus, the court agrees with Judge Schwab's determination that even if the evidence was really "new",

petitioner failed to satisfy the second step of the inquiry by showing that "it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence." *McQuiggin*, 133 S.Ct. at 1935 (quoting *Schlup*, 513 U.S. at 327). Therefore, the court finds that petitioner Reeves failed to demonstrate actual innocence regarding his habeas claims under the *McQuiggin* standard.

As such, Reeves is not entitled to equitable tolling under all of the circumstances of this case. The court finds that Judge Schwab correctly determined that petitioner Reeves failed to establish he is entitled to the actual innocence exception to the AEDPA statute of limitations. Thus, petitioner did not act in a reasonably diligent fashion. Accordingly, his habeas petition is time-barred.

IV. CERTIFICATE OF APPEALABILITY

When a district court denies a habeas petition on procedural grounds without reaching the underlying constitutional claims, a certificate of appealability should issue only if (1) the petition states a valid claim for the denial of a constitutional right, and (2) reasonable jurists would find it debatable whether the district court was correct in its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). In this case, reasonable jurists could not disagree that the instant petition is time-barred. It is statutorily barred, and neither statutory nor equitable tolling apply to the petition. Thus, a COA will not issue in this case.

Also, the court agrees with Judge Schwab, (Doc. 38 at 49), and finds that petitioner is not entitled to an evidentiary hearing since his alleged new evidence fails to meet the high standard of demonstrating his actual innocence. *See United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992)(The court is required to conduct an evidentiary hearing to ascertain the facts "unless the motion and files and records of the case show conclusively that the movant is not entitled to relief.").

V. CONCLUSION

In light of the foregoing, Judge Schwab's report, (Doc. 38), will be **ADOPTED**, and petitioner Reeves' objections, (Doc. 40), will be **OVERRULED**. The petition for writ of habeas corpus will be **DISMISSED** as untimely, and the case will be **CLOSED**. An appropriate order will follow.

/s/ Malachy E. Mannion
MALACHY E. MANNION
United States District Judge

Date: December 22, 2016

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA, FILED OCTOBER 17, 2016

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL NO: 3:14-CV-01500

JERRY REEVES,

Petitioner

v.

SUPERINTENDENT BRIAN COLEMAN,

Respondent

(Judge Mannion)
(Magistrate Judge Schwab)

October 17, 2016, Submitted
October 17, 2016, Filed

REPORT AND RECOMMENDATION

I. Introduction.

In this habeas corpus case, the petitioner, Jerry Reeves, is challenging his 2010 conviction and sentence

from the Court of Common Pleas of Dauphin County, Pennsylvania. Reeves claims that his trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment. Because Reeves's petition for a writ of habeas corpus is barred by the statute of limitations, we recommend that it be denied.

II. Background and Procedural History.

A. The Trial and Sentence.

Reeves was convicted of murder, robbery, and carrying a firearm without a license. The Pennsylvania Superior Court aptly summarized the testimony at trial:

> On May 25, 2006, after making sure any customers had left the premises, [Reeves] entered the City Gas and Diesel convenience store between 12:30 a.m. and 1:00 a.m. He walked up to the clerk's counter and pulled a semiautomatic pistol from the front of his pants. He pointed it through the open, bullet proof counter window at the on duty clerk, Hitender Thakur. [Reeves] demanded money from the cash register. Hitender refused. There was a brief struggle and [Reeves] fired the weapon, hitting Hitender in the upper right chest. Hitender remained on his feet and attempted to remove the money from the cash register, but fell to the ground seconds later. Hitender died almost immediately from a gunshot wound to the chest, which pierced his heart and

punctured his aorta. [Reeves] jumped over the counter and emptied the cash register. He then fled the store.

That night had not been the first time [Reeves] was at City Gas and Diesel. In fact, by his own admission, [Reeves] had been to the store numerous times and was familiar with the clerks on duty. Nishant Rana, another clerk at the store and Hitender's friend, testified that [Reeves] came to the store almost every day. Occasionally, [Reeves] did odd jobs for the clerks in exchange for Black and Mild cigars. Following the night of Hitender's death, Nishant never saw [Reeves] at the store again.

State Trooper Curtis Salak, who was a patrol officer with the Harrisburg City Police at the time, was the first to arrive on the scene following the shooting. He was dispatched to the convenience store. As he approached he observed a white male in the street flagging him down. A brief conversation with the white male alerted Trooper Salak that someone inside the store had been shot. He parked his vehicle, secured the scene and entered the store. There he observed Hitender lying on the floor behind the counter. He jumped through the open, bulletproof window at the counter, and attempted to render aid. Hitender was lying on his back with his eyes open and did not appear to be breathing. His chest and shirt

were covered with blood, and there was a pool of blood on the floor around him. Other officers began arriving on the scene. Trooper Salak called for medical assistance. They then opened the secured door which led behind the counter to give EMS access to Hitender. He also spoke with Sansay Ghanur, a friend of Hitender's who arrived at the store at approximately 1:10 a.m., immediately after Hitender was shot.

William Kimmick, a forensic investigator with the Harrisburg Police, arrived on the scene at approximately 1:20 a.m. By that time, other officers were already on the scene and EMS had departed. Investigator Kimmick testified that Investigator Kunkle, who is no longer with the Harrisburg Police Department, arrived at the scene at approximately 2:20 a.m. or 2:30 a.m. Investigator Kunkle took photographs of the crime scene. They collected a 20 dollar bill from the floor under the register as well as the video surveillance tape from the store. Investigator Kimmick testified that the cash register drawer was open and empty except for some coins. He observed blood on the cash register and on the floor directly beneath the cash register. They processed the counter, window and door to the clerk's area for fingerprints. However, Karen Lyda, another forensics expert with the Harrisburg Police Department, testified that none of the prints that were collected matched [Reeves]'s fingerprints.

> Lyda was also present for Hitender's autopsy. There, she collected the bullet from Hitender's body which she sent to the Pennsylvania State Police for processing. There, Corporal David A. Krumbine, an expert in firearms and tool markings, determined that the bullet was a .25 caliber. He testified that it was most likely fired from a semiautomatic pistol.
>
> Police also identified Derrick Small, another individual seen on the video tape in the store prior to the shooting. Xavier [Henry], a witness for the Commonwealth, testified that on the night of Hitender's death he had driven Small to the City Gas and Diesel. He also identified a picture of Small. Detective Christopher Krokos, who was familiar with Small from past interactions, identified Small in the surveillance video that was played for the jury. He was seen leaving the store moments before [Reeves] entered.[1]
>
> The Commonwealth also presented testimony regarding [Reeves]'s confession to police as well as the conflicting statements he made to officers and detectives prior to making his confession. [Reeves]'s first contact with police occurred at the end of May, 2006. Shortly after the homicide, [Reeves] had a conversation with

1. Henry testified that Small died a year or two before trial. *Doc. 34-17* at 78.

Officer Derrick Fenton of the Harrisburg City Police. During that conversation, [Reeves] told Officer Fenton that he had information about the City Gas and Diesel homicide, and that he could provide the name of the individual responsible. Officer Fenton testified that [Reeves] stated he was a witness to the crime. [Reeves] claimed he was standing across the street at the time of the shooting, and told Officer Fenton that he saw an individual named Jermaine Taylor enter the store and rob it. [Reeves] further claimed that Taylor exited the store following the shooting and got into a dark colored car with tinted windows and left the area. He claimed that there were other people sitting in the car. When Detective Krokos later spoke with [Reeves] regarding the homicide on May 30, 2006, [Reeves] changed his story. [Reeves] told Detective Krokos that he did not know anything about the City Gas and Diesel homicide. Further, [Reeves] claimed that he told Officer Fenton that he was a witness because he was under arrest at the time and he was hoping that police would let him go to be with his family over the Memorial Day holiday if he provided them with information. Detective Krokos further testified that [Reeves] admitted to fabricating the story and that, to his knowledge, the individual named Jermaine Taylor did not actually exist. [Reeves] also told Detective Krokos that he had been lying when he stated he saw the shooting. However,

[Reeves] did tell the detective that he had heard the shooting from his house. Detective Krokos typed [Reeves]'s statement from that day and [Reeves] signed the back of it.

[Reeves] spoke to police about the homicide again on July 29, 2009. At that time, Detective Donald Heffner, Detective Hector Baez and Detective Krokos were present for the interview. The detectives read [Reeves] his *Miranda* rights and confirmed that he was not under the influence of any drugs or alcohol. Further, they determined that he was not suffering from any medical problems at the time of the interview. Detective Heffner and Detective Baez both testified that in the early stages of the interview, [Reeves] claimed he was a witness to the homicide and that he was sitting across the street on a porch when Ferred Ray and Joseph Baldwin and an unknown third male arrive[d] at the City Gas and Diesel. [Reeves] told the detectives that Baldwin and the unknown male entered the store, while Ray remained outside. [Reeves] stated that he heard a gunshot, and that the two men exited the store. [Reeves] told the detectives that the three got into a car and fled the scene. As the interview progressed, [Reeves] told the detectives that he was actually right in front of the store with Ray, Baldwin and the unidentified male. He stated that Ray was the individual that walked into the store. [Reeves] told the detectives that, when he

heard the gunshot, he ran from the scene and did not know what happened to the other three men. Detective Heffner testified:

> During the course of the conversation, where he was saying he was closer and closer to the store. He was putting himself physically closer to the store he became more serious. At one point right before he said that he had committed this crime he began to tremble and he began to cry. . . . It came to a point where we actually said we are going to interview these other guys you just named. What are they going to say about it? That is kind of where he broke down and he said, no, I did this.

[Reeves] confessed to the homicide, stating that it was an accident and that he needed the money. Following the initial confession, [Reeves] gave his consent for the detectives to [record] his statement. The audio-recording of the confession was played for the jury.

[Reeves] took the stand and stated that he did not rob or shoot Hitender. He stated he was picked up by police at approximately 2:30 a.m on July 29, 2009. [Reeves] testified that, at the time he spoke with detectives later that day, he had various health problems. Specifically,

[Reeves] stated he was light headed and was vomiting up blood at the time. However, none of the detectives observed any of [Reeves]'s alleged medical issues. Further, on the audiotape of the confession, [Reeves] stated he was not suffering from any medical problems. [Reeves] further claimed that one of the reasons he confessed to the homicide was because detectives told him that they would take him to the hospital only if he confessed. [Reeves] also claimed that, on top of his other medical issues, he was also suffering from a hangover from the night before.

. . .

Besides his alleged medical problems, [Reeves] also testified that another reason he spoke with police was because the detectives promised to help him out by letting his girlfriend go free. She had been picked up at the same time [Reeves] was arrested.

Despite his contentions that police fed him details of the homicide, [Reeves] provided them to the police during his taped confession. [Reeves] also stated that he did not rob or murder Hitender and that he was in Baltimore at the time of the crime. However, [Reeves] was unable to state the exact timeframe in which he was in Baltimore or explain how he learned the details of the homicide upon his alleged return

> to Harrisburg.[2] Further, James Thornton, a rebuttal witness for the Commonwealth, testified that he spoke with [Reeves] regarding his Baltimore alibi while at Dauphin County Prison:
>
> > Well, I happened to be sitting there, and it was maybe four individuals sitting around where I was and they were talking, and one individual was saying they almost got me, man. And I called for some help. He needs an alibi. So the individual told me that he had a friend in Baltimore he was going to give a thousand dollars and get him to say he was down there.
>
> Thornton identified the individual speaking as [Reeves].

Commonwealth v. Reeves, No. 2159 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 135, 2013 WL 11250902, at *1-4 (Pa. Super. Ct. Nov. 7, 2013) (quoting "Trial Court Memorandum Opinion Pursuant to Pennsylvania Rule of Appellate Procedure 1925(a)," docketed in this case as *Doc. 34-4*).[3]

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2. Reeves actually testified that when he returned from Baltimore, he heard people talking about the murder. *Doc. 34-17* at 210.

3. In addition to the above testimony, two friends of Reeves's father testified at trial as character witnesses; they testified that they never heard that Reeves was violent. *See Doc. 34-17* at 158-171

On June 23, 2010, the jury convicted Reeves of murder in the second degree, robbery, and carrying a firearm without a license. *See Doc. 34-17* at 254-255. That same day, Judge Cherry sentenced Reeves to life imprisonment without parole on the murder conviction, a concurrent five-to-ten year sentence on the robbery conviction, and a concurrent one-to-two year sentence on the firearm conviction. *Id.* at 265.

B. Direct Appeal.

Reeves appealed to the Pennsylvania Superior Court raising three claims: (1) the trial court erred in denying his motion to suppress his confession because he did not knowingly, intelligently, and voluntarily waive his Fifth Amendment rights; (2) the trial court erred by refusing to allow him to present his father as an alibi witness; and (3) the trial court erred in allowing the jury to view the surveillance video for a second time after they had already begun to deliberate. *See Doc. 34-7* at 1 (*Commonwealth v. Reeves*, No. 1193 MDA 2010, slip op. at 3 (Pa. Super. Ct. July 1, 2011)). Lenora M. Smith, Esquire, who had represented Reeves at trial, withdrew as counsel, and the court appointed Brian P. Platt, Esquire to represent Reeves. *Id.* at 1. Platt, however, later petitioned to withdraw as counsel, and he submitted an *Anders*[4] brief

4. *Anders v. California*, 386 U.S. 738, 744, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) (holding that if court-appointed direct appeal counsel conscientiously determines that there is no merit to the defendant's appeal, counsel should request permission to withdraw and file a "brief referring to anything in the record that might arguably support the appeal").

contending that Reeves's appeal was frivolous. *Id.* On July 1, 2011, the Superior Court granted Platt's petition to withdraw and affirmed Reeves's judgment of sentence. *Id.* It rejected the three claims that Reeves's had raised on appeal. *Id.* at 3-11. Reeves did not appeal to the Pennsylvania Supreme Court. *See Doc. 1* at ¶9(g).

C. PCRA Proceedings.

On July 30, 2012, Reeves, then represented by Justin McShane and Jenna M. Fliszar, filed a Post-Conviction Relief Act (PCRA) petition. *See Doc. 34-8* and *Doc. 11* at 8. Reeves claimed that Smith was ineffective at trial by (1) failing to present evidence of viable alternative suspects and, in particular, evidence that Kai Anderson murdered Hitender Thakur; (2) failing to present expert testimony regarding false confessions; (3) failing to exercise minimal due diligence and thereby precluding evidence of an alibi to be fully presented to the jury; (4) failing to object to the surprise testimony of James Thornton; and (5) failing to give proper notice of an alibi defense, resulting in Reeves's father being precluded from testifying as to Reeves's alibi. *Doc. 34-8* at 6-29. Reeves requested an evidentiary hearing in connection with his PCRA petition, and he listed witnesses that he intended to call at a hearing along with a brief description of the subject of their testimony. *Id.* at 32-34.

1. Claim Regarding Alternative Suspects.

In connection with his PCRA petition, Reeves contended that although the police identified multiple

suspects during the investigation, they failed to properly investigate those suspects, and, instead, the police sought to confirm their belief that Reeves's was the perpetrator. According to Reeves, trial counsel failed to call witnesses, question officers, or present any evidence to the jury that other suspects were identified. More Specifically, Reeves pointed to Kai Anderson as an alternate suspect. According to Reeves, Smith had the following information in her possession but she failed to use it at trial.

a. Johnston's Statement.

Reeves pointed to a statement that Johnathon Johnston made to Detective Krokos in June of 2006. *See Doc. 34-8* at 38-54. In that statement, Johnston told Krokos that while he was in the Dauphin County Prison with Kai Anderson, who he had known for 15 years, Anderson told him the following regarding the robbery of the gas station on State Street. *Id.* at 38-39. Anderson and Michael Holmes escaped from the Dauphin County Work Release Center, and they planned to rob some people to get money. *Id.* at 43 & 46. Anderson "left the work release center on 5/24/06 because he had a charge of robbery" on the West Shore "and he owed the guy 1200 and they [were] planning to rob the gas station so that he could pay the guy back so he wouldn't have that charge." *Id.* at 38. More specifically, Anderson said that he left the work release center because in connection with the West Shore robbery, he had told authorities that his name was Kai Shockley, but "they had him in Dauphin County as Kai . . . Anderson and once they found out that he was Kai Shockley and he knew he was getting in trouble for that

robbery . . . he left that work release so he can go gather up the money to pay the guy." *Id.* at 41.

Anderson told Johnston that he, "Mike Holmes and Mike Holmes' brother and another guy . . . robbed [the gas station on State St.] and he was up against the wall so the cameras couldn't see him while Mike Holmes' brother" "went in and did the shooting." *Id.* at 38. According to Anderson, Holmes's brother, who was the only one small enough to go through the window in the counter, was supposed to just go in and get the money, but he had the gun "between his waist and his stomach," the gun went off, the guy fell, got back up, and fell again after which Holmes's brother jumped on the counter and went through the "little spot," got the money, and came back out. *Id.* at 50 & 51. Anderson said that all he could see was the spark from the gun when it went off. *Id.*

After the robbery, Anderson contacted Kenny Marlow, explained to him what had happened, and told Marlow to call Danielle, who was the mother of Anderson's child, and tell her that he got into some trouble in Oklahoma. *Id.* at 39 & 43. But Marlow told Danielle "everything that really happened." *Id.* at 43 & 47. And so Anderson wanted Johnston's wife to scare Danielle, who had already been contacted by the police, into not telling the police what she knew. *Id.* at 39-40. Anderson told Johnston that he used the money from the robbery to pay "the guy 1200" and the charges from the West Shore were dropped. *Id.* at 44. After the police showed Anderson the tape of the murder, Anderson "knew he could beat it he just needed somebody to talk to his baby's mom so she . . . don't say

nothing and get scared because the cops already tried to scare her." *Id.* at 46-47.

b. Clark and Ignazzito's Statements.

Reeves also pointed to a police report by Detective Robert Fegan, who on May 29, 2006, spoke with Kimberly Ann Clark—Danielle Ignazzito's mother. *See Doc. 34-8* at 56-58. According to that report, Clark reported that Danielle has a child to Kai Anderson, that Anderson had been calling Danielle several times a day, that Anderson told Danielle that he was on the run or wanted, and that Danielle got information that led her to believe that Anderson took part in the homicide and robbery. *Id.* at 56. Clark told Fegan that Danielle spoke about calling the police, but she had not done so because she was "a bit afraid." *Id.* Fegan later contacted the work release center and learned that the center had already alerted the detective division that Anderson had escaped and that other inmates noted that Anderson fit the physical description of the shooter. *Id.* at 58.

Reeeves further pointed to a report by Detective Krokos in which he states that on May 29, 2006, he called and spoke with Kimberly Clark and Danielle Ignazzito. *Doc. 34-8* at 60. Krokos relates that Danielle told him that in the early morning of May 27, 2006, Kai Anderson called her several times. *Id.* He told her that he had a lot of money to give her for their child. *Id.* Danielle also told Krokos that Kenneth Marlow called her on behalf of Anderson and told her that Anderson was in trouble and he fled to Ohio with Michael Holmes. *Id.* He also told her

that the police were looking for Anderson in reference to the homicide. *Id.*

c. Marlow's Statement.

Reeves also pointed to a police report of Detective Krokos regarding his interview of Kenneth Marlow and Marlow's signed statement. *Doc. 34-8* at 62 and *Doc. 34-8* at 64-65. Marlow told Krokos that "some time" after the robbery and homicide, he met up with Anderson and Anderson told him that he went to a friend's house, got a gun, went to City Gas and Diesel, robbed the store, and shot and killed the clerk. *Doc. 34-8* at 62 and *Doc. 34-8* at 64. According to Marlow, Anderson then asked him to call Danielle, and Marlow did so telling Danielle that he was calling on Anderson's behalf, that Anderson was in another state, that Anderson was involved in the robbery and homicide at the City Gas and Diesel, and that Anderson would contact her in the near future. *Doc. 34-8* at 62 and *Doc. 34-8* at 64. Marlow also told Krokos that he had seen Anderson with guns in the past. *Doc. 34-8* at 62.

d. Anderson's Statement.

Reeves also pointed to a report from Detective Krokos in which he interviewed Kai Anderson on May 31, 2006, after Anderson was arrested on a warrant. *Doc. 34-8* at 67-69. Anderson denied any involvement with the robbery or homicide, but he told Krokos that on the night of the robbery he and Michael Holmes saw Isiah Richmond walking in the areas or Linden and Walnut Streets. *Id.* at 67. According to Anderson, Richmond said: "I'm

hungry. I had to pop someone around the corner at the gas station. They should have just given me the money." *Id.* Anderson then purportedly asked Richmond for money and Richmond gave him twenty dollars. *Id.* When Krokos asked why Kenneth Marlow would call Danielle and tell her that you had been involved in the robbery and homicide, Anderson admitted that he spoke to Marlow but he denied telling Marlow that he was involved with robbery and homicide. Rather, according to Anderson, he told Marlow to call Danielle and to tell her that he was in Ohio because Danielle's mother did not like him and would help get him captured if she knew he was still in the area. *Id.*

e. Richmond's Statement.

Following Krokos's interview with Kai Anderson, Isiah Richmond was arrested on a warrant and charged with drug and firearm offenses. *Doc. 34-8* at 71. On June 2, 2006, Detectives Krokos and Heffner interviewed Richmond, who said that he recently started smoking crack due to the death of his newborn child. *Id.* Richmond initially denied knowing anything about the robbery/homicide except what he had heard in the news, but he later told the detectives that he received a phone call from someone named Darvey, who told him that a friend of his had told him that he was there when the incident occurred. *Id.* Richmond would not elaborate on who Darvey was. *Id.* Richmond denied speaking to Kai Anderson or Michael Holmes. *Id.* He did admit that he had "done shootings in the past," but, again, he would not elaborate. *Id.* He also said that he had let other people use his gun in the past, but

no one had used it in the last month. *Id.* The report noted that Richmond was "not very cooperative" and "would not account for his whereabouts on the night of the robbery/homicide." *Id.* at 71-72.

According to Reeves, trial counsel was ineffective because she failed to investigate, interview, or call Johnston, Clark, Ignazzito, or Marlow as witnesses or elicit testimony from Detective Krokos and Fegan about the statements those individuals gave about Anderson or about the statement from Anderson. *Doc. 34-8* at 6-16.

2. The PCRA Decision.

On October 10, 2012,[5] Judge Cherry issued a Memorandum Opinion and Order notifying Reeves of his intent to dismiss the PCRA petition and advising Reeves that he may respond to the proposed dismissal within 20 days. *See Doc. 34-10*. As to the claim that trial counsel was ineffective by failing to present evidence of viable alternative suspects, Judge Cherry concluded that most, if not all, of Jonathon Johnson's testimony would have been inadmissible hearsay. *Id.* at 5. He recognized that Pa.R.E. 804 provides that generally a statement made by an unavailable declarant that is against the

5. Although Judge Cherry's order is dated October 9, 2012, it apparently was not docketed until October 10, 2012. *See Doc. 34-10*. The Superior Court of Pennsylvania used the date of October 10, 2012, to refer to this Order and the accompanying Opinion, *see Commonwealth v. Reeves*, No. 2159 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 135, 2013 WL 11250902, at *5-6 (Pa. Super. Ct. Nov. 7, 2013), and we do so as well.

declarant's interest is admissible but that "in a criminal case, a statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." *Id.* at 6. But he determined that assuming that Kai Anderson was not available to testify at trial, Reeves did not present "any other testimony or evidence to corroborate the alleged statement made by Mr. Anderson to Mr. Johnston." *Id.*

Similarly, Judge Cherry determined that Kenneth Marlow's testimony about what Kai Anderson told him would have been inadmissible hearsay. *Id.* at 8. He further determined that the testimony of Danielle Ignazzito and Kimerly Ann Clark would have been inadmissible because it would have been irrelevant. *Id.* at 7. Judge Cherry also concluded that trial counsel was not ineffective by failing to cross-examine Detective Krokos about the statements of Ignazzito and Clark because their statements were irrelevant and that trial counsel was not ineffective by failing to cross-examine Krokos about the statements given by Johnston and Marlow because those statements were inadmissible hearsay. *Id.* at 8-9.

Reeves filed a response to the proposed dismissal arguing, among other things, that the court should hold an evidentiary hearing on the PCRA petition and that the testimony of Johnston, Marlow, and Ignazzito would be admissible. *See Doc. 34-11.* On November 26, 2012, Judge Cherry denied the PCRA petition without holding a hearing. *Doc. 34-12* at 1-6 (*Commonwealth v. Reeves*, 3869 CR 2009 (Ct. Com. Pl. Dauphin Cty. Nov.

26, 2011). With respect to the claim that trial counsel was ineffective by failing to present evidence of viable alternative suspects and, in particular, evidence that Kai Anderson was the murderer, Judge Cherry determined that, even assuming that the testimony regarding Kai Anderson was admissible, Reeves could not establish that he was prejudiced by the absence of such evidence at trial given his confession and the video of the murder, which, according to Judge Cherry, corroborated Reeves's confession. *Id.* at 2-3.

3. PCRA Appeal.

Reeves, represented by McShane, Fliszar, and Theodore Tanski, Esquire appealed the denial of his PCRA petition to the Pennsylvania Superior Court arguing that the trial court abused its discretion by denying the PCRA petition without holding an evidentiary hearing. *Doc. 34-13* at 1-32 Reeves raised three claims of ineffective assistances of counsel: (1) trial counsel failed to present viable alternative suspects at trial; (2) false confession phenomenon evidence was not presented; and (3) trial counsel failed to file a notice of alibi and to properly present his alibi at trial. *Id.*

Adopting both the October 10, 2012, and the November 26, 2012, opinions of the PCRA court, the Pennsylvania Superior Court affirmed the denial of the PRCA petition. *Commonwealth v. Reeves*, No. 2159 MDA 2012, 2013 Pa. Super. Unpub. LEXIS 135, 2013 WL 11250902, at *1 (Pa. Super. Ct. Nov. 7, 2013). On March 25, 2014, the Pennsylvania Supreme Court denied Reeves's petition for

review, *Commonwealth v. Reeves*, 624 Pa. 696, 87 A.3d 815 (2014).

D. The Federal Habeas Petition.

On July 31, 2014, Reeves, through new counsel, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in this Court. He later filed an amended petition. He claims that trial counsel was ineffective by failing to investigate and present exculpatory evidence at trial. *Doc. 11* at 13. In his amended petition, Reeves does not clearly enumerate his claims of ineffectiveness, but based on a section of the amended petition titled "What the Jury Never Heard," we construe Reeves to be claiming that Smith was ineffective because: (1) she did not develop and present evidence that Reeves was left-handed and she failed to cross examine the interrogators to point out to the jury that the killer was right-handed; (2) she did not identify for the jury glaring contradictions and omissions between Reeves's confession and the video and she left Reeves "utterly unprepared with these facts when he testified, ensuring that he crumbled all over again"; (3) she did not obtain news coverage of the crime to find out if Reeves's confession contained facts that were public; (4) she made no use at trial of the hospital record that she had in her file showing that Reeves was hospitalized right after his confession because he had tried to strangle himself with his shirt earlier that morning; (5) she did not obtain Reeves's past mental health evaluations and hospitalizations, which would have shown his history of suicide attempts, depression, and uncontrolled lying, which would have put his confession in a different light; and (6)

although she had police reports in her file that detailed that Kai Anderson had escaped from a work-release center and he had confessed to Johnston, Marlow, and Ignazzito and she had a transcript of Johnston's interview, she did not interview any of those individuals and she made no use of the documents that she had. *Doc. 11* at 22-24.[6]

The respondent filed a response to the petition, *see doc. 34*, and Reeves filed a reply, *see doc. 35*.

III. Discussion.

The respondent contends that Reeves's petition is barred by the statute of limitations and that Reeves procedurally defaulted his claims in state court. As discussed below, we conclude that the petition is barred by the statute of limitations. Given that conclusion, we need not address whether Reeves procedurally defaulted all of his claims in state court. Nor do we address the merits of Reeves's claims.

Habeas corpus petitions are subject to the one-year statute of limitations set forth in 28 U.S.C. § 2244(d):

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6. Although in his original petition, Reeves claimed that trial counsel was ineffective by failing to challenge his "false confession" and by failing to investigate and present evidence of an alibi, *see doc. 1* at 6-8, in his amended petition, Reeves specifically disclaims that he is arguing that counsel was ineffective by failing to retain a false-confession expert or by failing to present alibi evidence, *see doc. 11* at 24.

Appendix E

(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.

28 U.S.C. § 2244(d)(2) provides for statutory tolling while properly filed post-conviction or collateral review proceedings are pending.

For a state prisoner who, like Reeves, did not seek review of his conviction in the Pennsylvania Supreme Court, the judgment becomes final on the date that the time for seeking such review expired. *See Gonzalez v. Thaler*, 565 U.S. 134, 132 S. Ct. 641, 646, 181 L. Ed. 2d 619 (2012) (holding "that, for a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' on the date that the time for seeking such review expires"). Here, the Pennsylvania Superior Court affirmed Reeves's conviction on July 1, 2011. *See Commonwealth v. Reeves*, 32 A.3d 256 (Pa. Super. Ct. 2011). Reeves had thirty days to seek allowance of appeal from the Pennsylvania Supreme Court, *see* Pa.R.A.P. 1113, but he did not do so. And so his conviction became final on July 31, 2011, the date when his time for seeking allowance of appeal expired. Under 28 U.S.C. §2244(d)(1)(A), the statute of limitations ran from August 1, 2011, until July 30, 2012, when Reeves filed his PCRA petition—a period of 364 days. In accordance with § 2244(d)(2), the statute was tolled from July 30, 2012, when he filed his PCRA petition, until March 25, 2014, when the Pennsylvania Supreme Court denied his petition for allowance of appeal regarding the denial of his PCRA petition. The statute began to run again on March 26, 2014 and expired one day later on March 27, 2014. As Reeves did not file the habeas petition in this case until July 31, 2014, more than four months later, absent tolling or an equitable exception to the statute of limitations, the petition is untimely under § 2244(d)(1)(A).

Reeves admits that his petition is untimely under § 2244(d)(1)(A). He explains that he did not file within one year of his conviction becoming final because his PCRA counsel "grossly miscalculated the deadline." *Doc. 11* at 10. In fact, by a letter dated March 26, 2014, informing Reeves that the Pennsylvania Supreme Court denied his petition for review, PCRA counsel told Reeves that "[t]he deadline to files starts 90 days from today's final ruling and runs for 1 year." *Doc. 15-11*. This is also what PCRA counsel told Reeves's father. *Doc. 15-10* at ¶21. Although Reeves admits that his petition is untimely under § 2244(d)(1)(A), he argues that his petition is timely under either 2244(d)(1)(B) or 2244(d)(1)(D). He also contends that his petition is timely because the statute of limitations should be equitably tolled based on his counsel's mistake in calculating the statute of limitations. Further, he contends that his petition is timely under the "actual innocence" exception to the statute of limitations.

A. 28 U.S.C. § 2244(d)(1)(B).

Reeves contends that his petition is timely under 28 U.S.C. § 2244(d)(1)(B), which provides that the statute of limitations begins on "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." Reeves's argument under § 2244(d)(1)(B) relies, in part, on *Martinez v. Ryan*, a case in which the Supreme Court held that, under certain circumstances, the procedural default of a claim of ineffective assistance of trial counsel may be excused where the default was caused

by the ineffective assistance of counsel in post-conviction collateral proceedings. 566 U.S. 1, 132 S.Ct. 1309, 1315-21, 182 L. Ed. 2d 272 (2012). Specifically, the *Martinez* Court held that:

> [A] procedural default will not bar a federal habeas court from hearing a substantial claim of ineffective assistance at trial if, in the [state] initial-review collateral proceeding, there was no counsel or counsel in that proceeding was ineffective.

Id.

Reeves contends that his PCRA counsel was ineffective, that his PCRA counsel still represented him when the federal habeas statute of limitations expired,[7] that PCRA counsel had a conflict of interest that prevented him from raising his own ineffectiveness to excuse, under *Martinez*, the procedural default of Reeves's federal claim, and that, therefore, the federal statute of limitations did not begin to run until he obtained new, conflict-free counsel, and that he filed his habeas petition just two days after that period began to run.

Reeves's argument in this regard falters at the outset because he did not have a constitutional or federal statutory right to the effective assistance of PCRA counsel. *See Pennsylvania v. Finley*, 481 U.S. 551, 555,

7. Justin McShane states in his declaration that he was retained by Reeves on August 23, 2011, and he continued to represent Reeves until July 29, 2014. *Doc. 15-10* at ¶2.

107 S. Ct. 1990, 95 L. Ed. 2d 539 (1987) ("We have never held that prisoners have a constitutional right to counsel when mounting collateral attacks upon their convictions, . . . and we decline to so hold today."); *Cf Martinez*, 566 U.S. 1, 132 S. Ct. 1309, 1315-16 1319, 182 L. Ed. 2d 272 (2012) (holding that "[i]nadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial," but declining to hold that there is a constitutional right to counsel during postconviction collateral proceedings). Thus, the actions or inactions of PCRA counsel do not constitute a state-created impediment to the filing of his habeas petition. *See Johnson v. Florida Dep't of Corr.*, 513 F.3d 1328, 1331 (11th Cir. 2008) (concluding that delayed appointment of Johnson's original state post-conviction counsel and the ineffective assistance of that counsel did not constitute an impediment created by the State because there is no right to counsel on state collateral proceedings); *Castagno v. Grady*, No. CIV.A. 12-3333, 2013 U.S. Dist. LEXIS 102908, 2013 WL 3811201, at *6 (E.D. Pa. July 23, 2013) (concluding that "[i]t is well-settled that there is no federal constitutional right to counsel during post-conviction proceedings," and that PCRA Court's refusal to appoint counsel and the ineffectiveness of initial PCRA counsel were not state actions that violated the petitioner's federal or constitutional rights under 28 U.S.C. § 2244(d)(1)(B)); *Cf Lawrence v. Florida*, 549 U.S. 327, 337, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007) (stating in connection with a discussion of equitable tolling that "a State's effort to assist prisoners in postconviction proceedings does not make the State accountable for a prisoner's delay" and

that "[i]t would be perverse indeed if providing prisoners with postconviction counsel deprived States of the benefit of the AEDPA statute of limitations").

Reeves contends, however, that his PCRA counsel had a conflict of interest that prevented him from raising his own ineffectiveness to excuse under *Martinez* the procedural default of Reeves's claims. He further contends that that conflict of interest was a state-created impediment in violation of the Constitution that prevented him from timely filing his habeas petition, that impediment was not removed until he obtained new counsel, and he filed this habeas petition just two days after obtaining new counsel. Thus, he argues his petition is timely under 28 U.S.C. § 2244(d)(1)(B). In support of this argument, Reeves cites *Gray v. Pearson*, 526 F. App'x 331, 332 (4th Cir. 2013) and *Juniper v. Davis*, 737 F.3d 288, 289 (4th Cir. 2013), in which the United States Court of Appeals for the Fourth Circuit held that in light of *Martinez*, the petitioners, who were represented by the same counsel in the federal habeas case as in state collateral proceedings, were entitled to the appointment of new conflict-free counsel. The Fourth Circuit found "it ethically untenable to require counsel to assert claims of his or her own ineffectiveness in the state habeas proceedings in order to adequately present defaulted ineffective-assistance-of-trial-counsel claims under *Martinez* in the federal habeas proceedings." *Juniper*, 737 F.3d at 290. And it held that "if a federal habeas petitioner is represented by the same counsel as in state habeas proceedings, and the petitioner requests independent counsel in order to investigate and pursue claims under *Martinez* in a state

where the petitioner may only raise ineffective assistance claims in an 'initial-review collateral proceeding,' qualified and independent counsel is *ethically required. Id.* (italics in original).

Gray and *Juniper* do not support Reeves's argument that his petition is timely under § 2244(d)(1)(B). Unlike *Gray* and *Juniper*, which were capital cases, where the appointment of counsel for indigent defendants is mandated by statute, *see* 18 U.S.C. 3599(a)(2), this case is not a capital case, and there is no statutory or constitutional right to the appointment of federal habeas corpus counsel in non-capital cases. Further, as Reeves is represented in this case by different counsel than represented him in the PCRA proceedings, there is no conflict of interest here. And neither *Gray* nor *Juniper* involved the statute of limitations.[8]

8. In addition to *Gray* and *Juniper*, Reeves cites two district court opinions that deal with counsel operating under a conflict of interest—*Sigmon v. Byars*, C/A No. 8:13-cv-01399-RBH-JDA, 2014 U.S. Dist. LEXIS 190320 (D.S.C. Jan. 17, 2014), and *Bergna v. Benedetti*, No. 3:10-CV-00389-RCJ, 2013 U.S. Dist. LEXIS 96148, 2013 WL 3491276, at *1 (D. Nev. July 9, 2013). *Sigmon* was also a capital case where, at least initially, the same counsel that represented the petitioner in state collateral proceedings represented him in the federal habeas case. And *Bergna*, although not a capital case, was a case involving habeas counsel's conflict of interest. As with *Gray* and *Juniper*, neither *Sigmon* nor *Bergna* addressed the statute of limitations. Further, as set forth above, Reeves's counsel in this habeas case is not operating under the conflict of interest that was at issue in *Sigmon* and *Bergna*.

Moreover, to the extent that Reeves relies on *Martinez*, his contention fails because *Martinez* did not deal with the statute of limitations; it addressed procedural default of state claims. And *Martinez* does not provide a basis for equitable tolling of the statute of limitations. *See, e.g., Smith v. PA State Attorney Gen.*, No. 3:13-CV-0897, 2016 U.S. Dist. LEXIS 19464, 2016 WL 688037, at *7 n. 11 (M.D. Pa. Feb. 17, 2016) (noting that petitioner reliance on *Martinez* to establish equitable tolling of the statute of limitations is misplaced); *Mays v. Pitkins*, No. CV 3:14-0827, 2015 U.S. Dist. LEXIS 170447, 2015 WL 9304266, at *4 (M.D. Pa. Dec. 22, 2015) ("Martinez does not excuse Petitioner's failure to seek federal review of his claims in a timely fashion."); *Barnes v. Harlow*, No. 1:13-CV-1411, 2015 U.S. Dist. LEXIS 54406, 2015 WL 1912613, at *4 (M.D. Pa. Apr. 27, 2015) (joining the "plethora of district court opinions finding that the *Martinez* decision did not allow for equitable tolling of the AEDPA deadlines in the context of ineffective assistance of counsel"); *Shirey v. Giroux*, No. 3:CV-11-1693, 2014 U.S. Dist. LEXIS 158695, 2014 WL 5825309, at *8 (M.D. Pa. Nov. 10, 2014) ("[I]t has been recognized that *Martinez* does not constitute an exception to the one year statute of limitations for filing a federal habeas corpus petition."); *Williams v. Walsh*, No. 3:CV-12-1364, 2013 U.S. Dist. LEXIS 155557, 2013 WL 5874815, at *4 (M.D. Pa. Oct. 30, 2013) ("*Martinez* did not provide that post-conviction counsel's ineffectiveness could establish an exception to, or equitable tolling of, AEDPA's one-year statute of limitations for filing a federal habeas corpus petition."); *Wise v. Rozum*, No. CIV.A. 3:12-1360, 2013 U.S. Dist. LEXIS 153925, 2013 WL 5797659, at *5 (M.D. Pa. Oct. 28, 2013) (holding that *Martinez* does not

excuse a habeas petitioner's failure to seek federal review in a timely fashion). Thus, *Martinez* does not provide a basis for tolling the statute of limitations.

In sum, the ineffectiveness of PCRA counsel did not constitute an impediment created by State action in violation of the Constitution or laws of the United States to Reeves filing a habeas corpus application. Accordingly, Reeves's petition is not timely under 28 U.S.C. § 2244(d)(1)(B).

B. 28 U.S.C. § 2244(d)(1)(D).

Reeves also contends that his petition is timely under 28 U.S.C. § 2244(d)(1)(D), which provides that the statute of limitations begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." "By its language, the one-year period of limitation commences under section 2244(d)(1)(D) when the factual predicate of a claim could have been discovered through the exercise of due diligence, not when it actually was discovered." *Schlueter v. Varner*, 384 F.3d 69, 74 (3d Cir. 2004). Due diligence requires "reasonable diligence" considering the circumstances. *Id.*; *Wilson v. Beard*, 426 F.3d 653, 660-61 (3d Cir. 2005) (stating that "whether a habeas petitioner has exercised due diligence is context-specific"). The "factual predicate" of a claim "constitutes the 'vital facts' underlying" the claim. *McAleese v. Brennan*, 483 F.3d 206, 214 (3d Cir.2007) (quoting *Schlueter*, 384 F.3d at 74). "Section 2244(d)(1)(D) provides a petitioner with a later accrual date than section 2244(d)(1)(A) only 'if

vital facts could not have been known.'" *Schlueter*, 384 F.3d at 74 (quoting *Owens v. Boyd*, 235 F.3d 356, 359 (7th Cir. 2000)). The statute of limitations "begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Owens*, 235 F.3d at 359. The petitioner "has the burden of showing due diligence under section 2244(d)(1)(D)." *Champney v. Beard*, No. CIV 1:CV-04-0502, 2010 U.S. Dist. LEXIS 278, 2010 WL 28654, at *14 (M.D. Pa. Jan. 5, 2010), *aff'd on other grounds, Champney v. Sec'y Pa. Dep't of Corr.*, 469 F. App'x 113 (3d Cir. 2012).

Here, Reeves argues that the factual predicate of his claim is certain "new" evidence that his PCRA counsel failed to develop. *Doc. 11* at 12-13. Although Reeves does not clearly enumerate this "new" evidence in his amended petition, he references the evidence of his purported innocence that he narrated at the outset of his amended petition. *See Doc. 11* at 10. In addition to referring to the video of the murder and his confession, which were presented at trial, we distill the "new" evidence that Reeves is presenting as falling within the following four categories: (1) evidence that Reeves is left handed, which includes declarations from his former foster sister, his former foster mother, his baseball coach, and his adoptive father as well as a psychological report from 1997 observing that Reeves is left handed; (2) a news article about the murder; (3) Reeves's history of depression and suicide attempts, including his attempt to strangle himself the morning of his confession; (4) his history of lying, as set forth in the declaration of his adoptive father as well as records from Lehigh County Children and Youth Services

and records relating to his placement in foster care; and (5) evidence pointing to Kai Anderson as a suspect, including his escape from a nearby work release center close to the time of the murder, statements by inmates at the work release center that Anderson fit the description of the killer, and the statements made by Johnston, Marlow, and Ignazzito regarding Anderson as well as Anderson's own statement to the police. *Id.* at 1-8.[9]

According to Reeves, he could not have through reasonable diligence discovered this purportedly "new" evidence while he was still represented by the very lawyers who failed to develop the evidence. *Id.* at 13. And,

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9. In his reply, Reeves asserts that the evidence of his actual innocence consists of:

- Evidence that the actual killer used his right hand to carry out every important act during the crime, but Reeves is left-handed;
- Evidence that Reeves's confession contradicted key known facts and omitted the facts the real killer was least unlikely to forget;
- Evidence that the few facts his confession got right were reported publicly;
- Evidence that Reeves had a long history of lying, depression, and suicide attempts, and that he tried to strangle himself the morning before he falsely confessed; and
- Evidence that a man who escaped from custody hours before the shooting confessed his role in the crime to three different people, describing the killing in chilling, accurate detail.

Doc. 35 at 2-3.

thus, Reeves contends, the statute of limitations did not begin to run under § 2244(d)(1)(D) until he obtained new counsel. *Id.* Reeves's reasoning is circular. Also, Reeves focuses on the specific pieces of evidence that support his claims, thus confusing the distinction between facts and evidence to support those facts. *See McAleese*, 483 F.3d at 214 (stating that "McAleese has confused the facts that make up his claims with evidence that might support his claims" and citing *Johnson v. McBride*, 381 F.3d 587, 589 (7th Cir. 2004) ("A desire to see more information in the hope that something will turn up differs from 'the factual predicate of [a] claim or claims' for purposes of § 2244(d)(1)(D).")). Moreover, Reeves either knew or could have discovered through due diligence shortly after trial the evidence that he points to as "new" evidence.

Reeves contends that his trial counsel was ineffective by not pointing out that he was left handed and that the video purportedly showed that the murderer was right handed.[10] The factual predicate of this claim is what trial counsel failed to do at trial, the video, and the fact that Reeves was left handed, all of which Reeves knew by the end of trial. While Reeves points to additional evidence that he was left handed, that is evidence that supports his claim not the factual predicate of the claim. *See Champney v. Sec'y Pa. Dep't of Corr.*, 469 F. App'x 113, 117 (3d Cir.

10. At the trial, trial counsel did elicit from Reeves that he was left handed. *Doc. 34-17* at 182. Although the parties submitted a transcript of the trial, the closing arguments of counsel are not included within the transcript, *see doc. 34-17*, possibly because they were not recorded or not transcribed. Thus, we do not know what, if anything, trial counsel told the jury about Reeves being left handed.

2012) ("The FBI report may have provided greater evidentiary support for Champney's claim, but it did not alert Champney to the claim itself. Champney's Petition was untimely because he filed it more than one year after recognizing the vital facts . . . underlying his claim.").

Reeves also contends that his trial counsel was ineffective by not identifying for the jury glaring contradictions and omissions between his confession and the video and by leaving him "utterly unprepared with these facts when he testified, ensuring that he crumbled all over again." *Doc. 11* at 22. The factual predicate of this claim is what trial counsel failed to do at trial, the video, and Reeves's testimony at trial all of which Reeves knew by the end of trial.

Reeves contends that his trial counsel was ineffective by not pointing out that, in his confession, Reeves did not provide any facts that were not available to the public at the time. The factual predication for this claim is what trial counsel did at trial, the contents of the confession, and the contents of the public information reported regarding the murder, all of which were known or could have been discovered through reasonable diligence by the end of the trial. While Reeves points to a particular news article, that article is evidence that supports his claim not the factual predicate of the claim. Moreover, if he did not know the contents of the news article, he could have discovered the contents through the exercise of reasonable diligence.

Reeves also contends that his trial counsel was ineffective by failing to use at trial hospital records that

she had in her file showing that Reeves was hospitalized right after his confession because he had tried to strangle himself with his shirt earlier that morning. The factual predicate of this claim is what counsel did at trial as well as Reeves's suicide attempt, all of which were known to Reeves by the end of trial.

Reeves contends that his trial counsel was ineffective by failing to obtain his past mental health evaluations and hospitalizations, which would have shown his history of suicide attempts, depression, and uncontrolled lying, and which would have put his confession in a different light. The factual predicate of this claim is what counsel did at trial, Reeves's history, and his confession, all of which Reeves knew or with due diligence could have discovered by the end of trial or shortly thereafter. *See Govan v. Wenerowicz*, No. 1:CV-13-2774, 2014 U.S. Dist. LEXIS 127222, 2014 WL 4536347, at *6 (M.D. Pa. Sept. 11, 2014) (concluding that habeas petition untimely under § 2244(d)(1)(D) because despite evidence that Govan was committed to a mental-health facility as a juvenile and was placed in several foster homes, Govan did not allege when he discovered that evidence or why he could not have discovered that evidence earlier than he did through the exercise of due diligence).

Finally, Reeves contends that his trial counsel was ineffective by not presenting evidence regarding Kai Anderson being an alternate suspect at trial. The factual predicate of this claim is what trial counsel failed to do at trial, and the police reports pointing to Anderson as the murderer. Reeves asserts that his trial counsel had

those reports at the time of trial. *See Doc. 11* at 23 (Trial counsel "had in her file the police reports that detailed Kai Anderson's escape and his confessions to Johnston, Marlow, and Ignazzito. . . . She also had a transcript of Johnston's interview by detectives."). Thus, Reeves knew the factual predicate of this claim at the time of trial.

In sum, because the factual predicate of Reeves's claims were known or could have been discovered through the exercise of due diligence by the end of trial or shortly after trial, Reeves's petition is not timely under § 2244(d)(1)(D).

C. Equitable Tolling.

Reeves also contends that his petition is timely because he is entitled to equitable tolling of the statute of limitation. 28 U.S.C. § 2244(d) functions as a statute of limitations and is subject to equitable tolling in appropriate cases. *Holland v. Florida*, 560 U.S. 631, 645, 130 S. Ct. 2549, 177 L. Ed. 2d 130 (2010). "The decision to equitably toll § 2244(d) '"must be made on a case-by-case basis."' *Munchinski v. Wilson*, 694 F.3d 308, 329 (3d Cir. 2012) (quoting *Holland*, 560 U.S. at 650). "There are 'no bright lines in determining whether equitable tolling is warranted in a given case.'" *Id.* Instead, equitable tolling is proper when the principles of equity make the rigid application of the limitations period unfair. *Miller v. New Jersey State Dept. of Corrections*, 145 F.3d 616, 618 (3d Cir. 1998). But "courts need to be 'sparing in their use of' the [equitable tolling] doctrine." *Pabon v. Mahanoy*, 654 F.3d 385, 399 (3d Cir. 2011) (quoting *Jones v. Morton*,

195 F.3d 153, 159 (3d Cir.1999)). A petitioner is entitled to equitable tolling only if he shows that (1) he pursued his rights diligently, and (2) some extraordinary circumstance stood in his way and prevented him from timely filing. *Holland*, 560 U.S. at 649.

In this case, Reeves has not shown a basis for equitable tolling of the statute of limitations. Reeves asserts that the statute of limitations should be equitably tolled because of his PCRA counsel's mistake in calculating the statute of limitations. But "[i]n non-capital cases, attorney error, miscalculation, inadequate research, or other mistakes have not been found to rise to the 'extraordinary' circumstances for equitable tolling." *Fahy v. Horn*, 240 F.3d 239, 244 (3d Cir.2001). Nevertheless, "[o]ne potentially extraordinary circumstance is where a prisoner is 'effectively abandoned' by his attorney." *Jenkins v. Superintendent of Laurel Highlands*, 705 F.3d 80, 89 (3d Cir. 2013) (quoting *Holland*, 130 S.Ct. at 2564) (quoting *Nara v. Frank*, 264 F.3d 310, 320 (3d Cir. 2001)). Here, Reeves has not shown that his attorney abandoned him. Rather, PCRA counsel erred in the calculation of the statute of limitation, which is not sufficient to justify equitable tolling. *See Lawrence v. Florida*, 549 U.S. 327, 336-37, 127 S. Ct. 1079, 166 L. Ed. 2d 924 (2007) ("Attorney miscalculation is simply not sufficient to warrant equitable tolling, particularly in the postconviction context where prisoners have no constitutional right to counsel."); *Barnes v. Harlow*, No. 1:13-CV-1411, 2015 U.S. Dist. LEXIS 54406, 2015 WL 1912613, at *4 (M.D. Pa. Apr. 27, 2015) (holding that petitioner, who relied on his PCRA counsel's erroneous advice that he had one year after his PCRA

petition was denied to file his federal habeas, did not show an extraordinary circumstance warranting equitable tolling of the statute of limitations). Accordingly, equitable tolling does not save Reeves's petition from being barred by the statute of limitations.

D. Actual Innocence.

Reeves also contends that the statute of limitations does not bar his petition because he is actually innocent. Actual innocence is an equitable exception to the statute of limitations. *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1933, 185 L. Ed. 2d 1019 (2013). Thus, "actual innocence, if proved, serves as a gateway through which a petitioner may pass" despite the expiration of the statute of limitations. *Id.* at 1928. The standard for establishing actual innocence, however, is demanding. *Id.* at 1936. It requires "new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995). The standard is not met unless the petitioner '"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.'" *McQuiggin*, 133 S.Ct. at 1928 (quoting *Schlup*, 513 U.S. at 329). "Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful." *Schlup*, 513 U.S. at 324; *see also Calderon v. Thompson*, 523 U.S. 538, 559, 118 S. Ct. 1489, 140 L. Ed. 2d 728 (1998) ("We have often emphasized "the narrow scope" of the exception."); *Sistrunk v. Rozum*,

674 F.3d 181, 192 (3d Cir. 2012) ("*Schlup* sets a supremely high bar.")

In considering a claim of actual innocence, the court "must consider 'all the evidence,' old and new, incriminating and exculpatory, without regard to whether it would necessarily be admitted under 'rules of admissibility that would govern at trial.'" *House v. Bell*, 547 U.S. 518, 538, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006) (quoting *Schlup*, 513 U.S. at 327-328, quoting in turn Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U.Chi.L.Rev. 142, 160 (1970)). "The court's function is not to make an independent factual determination about what likely occurred, but rather to assess the likely impact of the evidence on reasonable jurors. *Id.* An actual innocence claim involves evidence that the trial jury did not have before it, and, therefore, the inquiry requires the court to assess how reasonable jurors would react to the overall, newly supplemented record. *Id.* This inquiry may require the court to make assessments regarding the credibility of witnesses. *Id.* at 539. In sum, "[p]roving actual innocence based on new evidence requires the petitioner to demonstrate (1) new evidence (2) that is reliable and (3) so probative of innocence that no reasonable juror would have convicted the petitioner." *Sistrunk*, 674 F.3d at 191.

Here, whether Reeves has presented a colorable showing of actual innocence depends on the definition of "new evidence." Reeves contends that new evidence is any evidence that was not presented at trial. The respondent, on the other hand, contends that new evidence is evidence

that was not available at trial and that could not have been discovered earlier through due diligence.

The seminal case of *Schlup v. Delo*, 513 U.S. 298, 324, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995), does not provide a clear answer to the question whether new evidence is evidence that is newly discovered or merely newly presented. As the Eighth Circuit has recognized, *Schlup* can be read to support either interpretation:

> We start with Justice Stevens's majority opinion in *Schlup:* "To be credible, [an actual innocence] 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, 115 S.Ct. 851 (emphasis added). Considered in isolation, this language could support either the . . . narrow "newly discovered" theory or [the] broader "newly presented" theory, but other passages in Justice Stevens's opinion suggest that a habeas petitioner may pass through the *Schlup* gateway without "newly discovered" evidence if other reliable evidence is offered "that was not presented at trial." *E.g., id.* at 327-28, 115 S.Ct. 851 (adopting Judge Friendly's assertion that "actual innocence" review must incorporate "*all evidence*, including that alleged to have been admitted illegally (but with due regard to

any unreliability of it) and *evidence tenably claimed to have been wrongfully excluded* or to have become available only after the trial" (emphasis added) (*quoting* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L.Rev. 142, 160 (1970))); *id.* at 330, 332, 115 S.Ct. 851 (describing a petitioner's burden of production in terms of "newly presented evidence").

Justice O'Connor's separate concurring opinion, however, prevents us from readily concluding that only "newly presented evidence" is required under *Schlup*. Justice O'Connor delivered a crucial vote and wrote separately "to explain, in light of the dissenting opinions, what [she] underst[ood] the Court to decide and what it d[id] not." *Id.* at 332, 115 S.Ct. 851. Her "understand[ing]" is that:

> The Court holds that, in order to have an abusive or successive habeas claim heard on the merits, a petitioner who cannot demonstrate cause and prejudice 'must show that it is more likely than not that no reasonable juror would have convicted him' in light of *newly discovered* evidence of innocence.

Id. (emphasis added). Justice O'Connor clearly employs the term "newly discovered." Thus, her

> opinion could constitute *Schlup*'s holding. See *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (stating that when "a fragmented Court" made its decision without a unifying rationale, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976))). On the other hand, it might be considered only to rebut the dissenter's objections without formulating controlling law.

Griffin v. Johnson, 350 F.3d 956, 961-62 (9th Cir. 2003).

"[C]ourts disagree about whether the evidence must also be "newly discovered"—not available at the time of trial—or includes all "newly presented" evidence—all evidence that was not presented to the jury during trial." Wayne R. LaFave, *et al.*, 7 Crim. Proc. § 28.4(e) n.107(4th ed.); *compare Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997) (holding that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence"); with *Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003) (holding that "[a]ll *Schlup* requires is that the new evidence is reliable and that it was not presented at trial"; *Griffin*, 350 F.3d at 963 (holding that "habeas petitioners may pass *Schlup*'s test by offering 'newly presented' evidence of actual innocence").

Appendix E

The Third Circuit generally follows the former definition of new evidence—i.e., that it must be newly discovered. *See Hubbard v. Pinchak*, 378 F.3d 333, 340 (3d Cir. 2004) ("A defendant's own late-proffered testimony is not 'new' because it was available at trial. Hubbard merely chose not to present it to the jury. That choice does not open the gateway."); *Goldblum v. Klem*, 510 F.3d 204, 226 n.14 (3d Cir. 2007) (assuming for the sake of argument that the evidence presented by the petitioner was new, even though the court had serious doubts about that and noting that "[e]vidence is not 'new' if it was available at trial, but a petitioner 'merely chose not to present it to the jury'") (quoting *Hubbard*, 378 F.3d at 340)); *Sistrunk v. Rozum*, 674 F.3d 181, 189 & 191 (3d Cir. 2012) (stating that under § 2244(d)(1)(D) "evidence that is 'previously known, but only newly available' does not constitute 'newly discovered evidence,'" and finding that Sistrunk's evidence was not new under that standard and then appearing to apply that same standard to Sistrunk's claim of actual innocence by stating "as discussed, Sistrunk's evidence is not 'new'").

The Third Circuit has recognized, however, that in certain situations that definition can place a petitioner in a catch 22. In *Houck v. Stickman*, the Third Circuit discussed what is new evidence of actual innocence in the context of a claim that counsel was ineffective for failing to discover the evidence:

> In *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997), a case on which respondents heavily rely, the Court said that "evidence is new only if it was not available at trial and

could not have been discovered earlier through the exercise of due diligence." Respondents urge that we use this definition and conclude that Houck did not tender new evidence in the District Court as he could have discovered his newly presented affidavit evidence for use at the trial through the exercise of due diligence. Houck is almost compelled to agree in part with respondents because in his petition in the District Court he claimed that his trial counsel was ineffective because he should have discovered and then presented this evidence at the trial. Of course, if this evidence had not been reasonably available before trial, trial counsel would not have been ineffective for failing to discover it and Houck's underlying ineffective assistance claim should have failed as, indeed, it did, though for jurisdictional and procedural reasons.

Yet arguably it is unfair to a petitioner to apply the *Amrine* statement of the law in cases in which the petitioner claims that he had had ineffective assistance of counsel by reason of his attorney not discovering exculpatory evidence when the petitioner is relying on that very evidence as being the evidence of actual innocence in a gateway case to reach the ineffective assistance of counsel claim. As we have indicated, the rule that *Amrine* sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was

not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for *Schlup* purposes.

We are not the first Court to recognize the petitioner's dilemma in the situation that we have described, for the Court of Appeals for the Seventh Circuit in *Gomez v. Jaimet* indicated that: "Particularly in a case where the underlying constitutional violation claimed is the ineffective assistance of counsel premised on a failure to present evidence, a requirement that new evidence be unknown to the defense at the time of trial would operate as a roadblock to the actual innocence gateway." 350 F.3d 673, 679-80 (7th Cir.2003). The *Gomez* Court dealt with the problem by regarding evidence as new even if it was not newly discovered as long as it was "not presented to the trier of fact . . . ." *Id.* at 680. Consequently, the *Gomez* Court indicated that a court can evaluate newly presented evidence in making a determination of whether the evidence is strong enough to establish the petitioner's actual innocence. *Id.*

We believe, however, that *Gomez*'s definition of "new" may be too expansive as it seems to go beyond what is needed to remedy the particular problem that that Court identified because it is not anchored to a claim that there had been ineffective assistance of counsel by reason of counsel's failure to present evidence

> of the petitioner's innocence. On the other hand, the *Amrine* definition of what is new evidence may be too narrow as its adoption would mean that evidence that was not discovered by an ineffective counsel could not be new evidence even though the petitioner was relying on that very failure as the basis for his claim. Overall we are inclined to accept the *Amrine* definition of new evidence with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new provided that it is the very evidence that the petitioner claims demonstrates his innocence.

625 F.3d 88, 93-94 (3d Cir. 2010) (footnotes omitted). Yet, *Houck*'s discussion of the definition of new evidence was dicta because the Court concluded that even if the affidavits at issue there constituted new evidence they did not meet the high bar set for establishing actual innocence. *Id.* at 95.

Despite being dicta, we think *Houck* is persuasive evidence of how the Third Circuit would rule if presented with the issue. Thus, we follow the *Houck* standard, i.e., to qualify as new evidence under that actual innocence exception, the evidence must be newly discovered "with the narrow limitation that if the evidence was not discovered for use at trial because trial counsel was ineffective, the evidence may be regarded as new, provided that it is the very evidence that the petitioner claims demonstrates his innocence." *Houck*, 625 F.3d at 94. But given the Third

Circuit's earlier decision in *Hubbard* that evidence that the defendant chose not to present at trial is not new evidence, we do not read *Houck* expansively to cover evidence that defense counsel discovered prior to trial but merely failed to present at trial. Thus, we will not consider evidence as new if the evidence was available at the time of trial and Reeves or his counsel knew about such evidence. *See Glenn v. Wynder*, No. CIV.A. 06-513, 2012 U.S. Dist. LEXIS 133821, 2012 WL 4107827, at *45 (W.D. Pa. Sept. 19, 2012) (concluding that *Houck*'s "narrow limitation" on the definition of new evidence as newly discovered evidence was inapplicable there "because Petitioner's claim is that counsel was ineffective for failing to present, not discover, evidence that was already known"); *see also, Teagle v. Diguglielmo*, 336 F. App'x 209, 213 (3d Cir. 2009) (concluding that information in the statements of two witnesses was not "new" because "it was available at trial and defense counsel chose not to present it"); *Evans v. York Cnty. Dep't of Prob. & Parole*, No. 3:14-CV-2333, 2015 U.S. Dist. LEXIS 115630, 2015 WL 5099278, at *8-*9 (M.D. Pa. Aug. 31, 2015) (Nealon, J.) (concluding that "evidence [that] was available to Petitioner's trial counsel, but was not presented during trial" was not new); *Myers v. Pennsylvania*, No. 1:14-CV-299, 2014 U.S. Dist. LEXIS 150151, 2014 WL 5311905, at *7 (M.D. Pa. Oct. 16, 2014) (Jones, J.) (concluding that an affidavit from a witness was not new evidence as that witness was "available to trial counsel and PCRA counsel" and "[t]he decision not to call an alleged witness was presumably a reasonable tactical decision and sound trial strategy" and "[t]hus, Petitioner has not presented reliable, newly-discovered evidence, i.e., evidence that was not known at the time of trial").

Here, the video of the murder and Reeves's confession are not new evidence, as they were the focus of Reeve's trial. Further, while Reeves presents strong evidence pointing to Kai Anderson as an alternative suspect, that evidence is also not new evidence under the actual innocence standard given that trial counsel had that evidence in her possession at the time of trial. *See Doc. 11* at 23 ("She had in her file the police reports that detailed Kai Anderson's escape and his confessions to Johnston, Marlow, and Ignazzito. . . . She also had a transcript of Johnston's interview by detectives."). Thus, trial counsel did not fail to develop that evidence. Rather, for whatever reason, she chose not to present it.

Further, the evidence that Reeves attempted suicide on the morning of his confession is not new evidence as Reeves certainly knew about it at the time of trial and his trial counsel "had in her file the hospital record showing that Reeves was hospitalized right after his confession, and that the reason why was the Reeves had tried to strangle himself with a shirt that morning." *Doc. 11* at 23. While Reeves also points to records that show that he had a history of depression and suicide attempts, even assuming that those records constitute new evidence, they do not meet the high bar of showing actual innocence given Reeves's confession and the video. Similarly, the evidence showing Reeves history of lying is not so probative of innocence that no reasonable juror would have convicted the petitioner if that evidence were presented.

Reeves points to a news article about the murder, which Reeves contends supports his assertion that facts

that he provided in his confession were reported publicly. We do not know whether this article was in trial counsel's possession at the time of trial. But assuming for the sake of argument that it was not and that the article is new evidence, it does not meet the high standard required to show actual innocence.

Reeves points to declarations from his former foster sister, his former foster mother, his baseball coach, and his adoptive father as well as a psychological report from 1997 observing that Reeves is left handed. The respondent argues that this additional evidence that Reeves is left-handed is cumulative of Reeves own testimony at trial to that effect. It is doubtful that this evidence of Reeves's being left handed can be considered new evidence, but even assuming that it is new evidence, it does not show that Reeves is actually innocent. While we agree with Reeves that evidence from others is more convincing than evidence from the defendant, this additional evidence that Reeves is left handed does not meet the high standard required to show actual innocence. Further, while Reeves contends that "[t]here is not a shadow of a doubt that the killer was right-handed," *doc.* 11 at 2, the video is not so conclusive. Moreover, the jury did hear that Reeves is left handed and it viewed the video. Thus, we cannot say that no reasonable juror would have convicted him had it heard this additional evidence.

Reeves contends that an evidentiary hearing regarding his actual innocence is not necessary because the existing record is sufficient to show that he is actually innocent. *Doc. 35* at 16. In the alternative, however,

Reeves contends that if the Court finds the current record insufficient to show that he is entitled to relief, the Court should hold a hearing. *Id.* Given the above analysis, we conclude that an evidentiary hearing is not necessary because even accepting as true the evidence that may be considered new under the *Houck* standard, such evidence along with the evidence that was presented at trial does not meet the high bar of showing actual innocence.

In sum, Reeves's habeas petition is barred by the statute of limitations, and there is no basis to equitably toll the statute of limitations or for an equitable exception to the statute of limitations. Accordingly, we recommend that the court deny the petition.

IV. Recommendation.

For the foregoing reasons, we recommend that Reeves's petition for a writ of habeas corpus be **DENIED** because it is barred by the statute of limitations.

The Parties are further placed on notice that pursuant to Local Rule 72.3:

> Any party may object to a magistrate judge's proposed findings, recommendations or report addressing a motion or matter described in 28 U.S.C. § 636 (b)(1)(B) or making a recommendation for the disposition of a prisoner case or a habeas corpus petition within fourteen (14) days after being served with a copy thereof. Such party shall file with the

clerk of court, and serve on the magistrate judge and all parties, written objections which shall specifically identify the portions of the proposed findings, recommendations or report to which objection is made and the basis for such objections. The briefing requirements set forth in Local Rule 72.2 shall apply. A judge shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge, however, need conduct a new hearing only in his or her discretion or where required by law, and may consider the record developed before the magistrate judge, making his or her own determination on the basis of that record. The judge may also receive further evidence, recall witnesses or recommit the matter to the magistrate judge with instructions.

Submitted this 17th day of October, 2016.

/s/ Susan E. Schwab
Susan E. Schwab
United States Magistrate Judge