No. 18-543

IN THE
SUPREME COURT OF THE UNITED STATES

State Correctional Institution at Fayette, the Attorney General of Pennsylvania, and 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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, in the particular factual circumstances of this case, the Third Circuit properly instructed the district court to consider whether the evidence of actual innocence respondent has proffered satisfies the actual-innocence exception, and, if so, to consider his habeas petition on the merits.

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STATEMENT OF THE CASE

1. On May 25, 2006, a man robbed a convenience store in Pennsylvania. In the process, he shot and killed the store's clerk. The crime was captured on the store's security video tape. The video shows that the lone man entered the convenience store, drew a pistol, and aimed it at the store clerk. As the clerk tried to slam closed a bulletproof window, the man blocked the window from closing with the hand holding the gun. The gun discharged, and the bullet struck the clerk's aorta. The clerk rose from the ground and began emptying the cash register as the man hopped onto the counter. But then the clerk lost consciousness, fell over backwards, and died. The man hopped behind the counter, gathered money from the register and the floor, jumped back over the counter, and fled. Pet. App. 2a–3a.

The night of the killing, police investigating the convenience-store killing received a call from a staff person of a prisoner work-release facility nearby. Two inmates had absconded that night, and one of them matched the description of the convenience-store robber. The escapees' names were Michael Holmes and Kai Anderson. Pet. App. 3a.

Shortly afterward, investigators received a second, independent tip about the crime, also involving Kai Anderson. The mother of Anderson's child reported that Anderson called her several times promising to pay long-unpaid child-support money he owed her. She also reported that a lifelong friend of

Anderson's called her on Anderson's behalf and told her that police were looking for Anderson for the convenience-store killing. Pet. App. 3a–4a.

At this point in the investigation, police generated an unrelated lead. An 18-year-old named Jerry Reeves—the respondent here—had been arrested in a local park for throwing a rock that struck a miniature golfer's leg. Pet. App. 22a. While Reeves was in jail, a police officer approached him at random and asked him if he knew anything about the recent convenience-store killing. *Id.* 3a. Reeves, hoping to win his release from jail in time to attend a family get-together, claimed to have witnessed it. *Id.* When the homicide investigator interviewed Reeves a few days later, Reeves claimed that he saw a tall black man commit the crime and flee the scene in a Buick. *Id.* 22a–23a. The investigator knew this was false—the video showed the robber was short and fled on foot. *Id.* 23a. Reeves was charged with, and pled guilty to, hindering prosecution. *Id.* 3a.

The police kept investigating. They found and interviewed Kai Anderson, who denied committing the crime but admitted being in the area that night and claimed another man had spontaneously confessed that he—the other man—had committed the crime. They also interviewed Kenneth Marlow, the friend of Anderson's who had called the mother of his child. Marlow independently confirmed what the prior witnesses had told police. He also told police that Anderson had admitted to robbing the store and killing the clerk. Pet. App. 4a.

A couple weeks later, another witness independently contacted the police and also implicated Kai Anderson. Pet. App. 4a. This witness, an inmate named Jonathan Johnston who had known Anderson for more than 15 years, *id.* 74a, corroborated the other witnesses and told police that Anderson had confessed in detail. Anderson told Johnston that, after the clerk had been shot and fell to the ground, the clerk stood up before falling over again, a fact the police knew from the video was true but had never been released to the public. *Id*. 4a, 27a.

Despite this evidence, the police never charged Kai Anderson with the convenience-store killing, and for several years the investigation went cold. Pet. App. 5a. The investigators' failure to charge Anderson is not explained in their reports, *id.*, nor has the Commonwealth explained it in the years since.

More than three years after the homicide, police again arrested Reeves, along with his girlfriend, for an unrelated incident. Pet. App. 5a. The investigator assigned to the convenience-store-killing case approached him in jail and interviewed him again. *Id.* 5a. Reeves, this time hoping to win the release of his girlfriend, once again lied about witnessing the convenience-store crime. *Id*. This time Reeves claimed he saw two men enter the store, commit the crime, and then flee in a car. *Id*. 29a–30a. The investigators knew this was false because the video showed one man enter and flee on foot. *Id*. But this time the interrogators kept pressing Reeves, and finally Reeves told them that he had robbed the store and killed the clerk. *Id*. 5a.

Reeves's confession was riddled with claims contradicted by the video of the actual crime. Pet. App. 34a. Reeves said he waited until all the customers had left, but the real killer burst in while a customer was still present. *Id.* 27a n.15, 63a. Reeves said he wore short sleeves and no mask, but the real killer wore a hooded sweatshirt with a bandana over his face. *Id.* 32a–34a. Reeves said he struggled with the clerk, but the real killer never touched the clerk. *Id.* 34a. Reeves said nothing about the sliding bulletproof window and nothing about the clerk falling, standing back up, and falling again. *Id.* 3a, 31a. His confession did not contain any facts only the real killer could have known. *Id.* 7a n.2.

Apart from its errors and gaps, there was another problem with Reeves's confession. The video showed that, throughout the crime, the killer used his right hand. Every action he took—drawing the gun, pointing it at the clerk, blocking the sliding window, and picking up bills from the counter and the floor and the register—the real killer took with his right hand. Reeves is left-handed. Pet. App. 34a–35a.

2. Prosecutors nevertheless charged Reeves with murder and other offenses related to the crime. At his trial, prosecutors presented (among other things) the testimony of the officers who had interrogated Reeves, an audio recording of Reeves's confession, and the store surveillance tape of the crime. Reeves testified and stated he was in Baltimore at the time of the robbery and killing. He explained that the detectives promised to release his then-

girlfriend if he confessed and that the detectives fed him details about the robbery for his taped confession. He asserted only in passing that he is left-handed. Pet. App. 5a, 35a n.29.

Before trial, the Commonwealth had provided Reeves's trial counsel with copies of the police reports about Anderson and Holmes. Pet. App. 5a. But Reeves's lawyer interviewed none of the witnesses Anderson confessed to, and she presented no evidence at all about Anderson or Holmes to the jury. *Id.* The Commonwealth also had provided trial counsel with the video of the crime, but trial counsel did not cross-examine the prosecution's witnesses to point out discrepancies between the video and Reeves's confession or evidence that the actual perpetrator was right-handed. *Id.* 7a n.5. Nor did she present any evidence to support Reeves's bare claim to be left-handed. *Id.*

The jury convicted Reeves of robbery, carrying a firearm without a license, and second-degree murder. Pet. App. 46a. He was sentenced to life in prison without parole. *Id.* The Pennsylvania Superior Court affirmed the conviction and sentence, and Reeves did not petition the Pennsylvania Supreme Court to appeal. *Id.* 47a.

3. Reeves filed a petition for relief under the Pennsylvania Post-Conviction Relief Act (PCRA), claiming his trial counsel was ineffective because she (among other alleged errors) failed to present the evidence indicating Anderson was the perpetrator. Pet. App. 47a. The PCRA court dismissed the petition without a hearing, concluding that Reeves's trial

counsel's failure to present evidence relating to Anderson and Holmes did not prejudice Reeves because Reeves had confessed to the crime and because the security tape corroborated his confession. *Id*. 80a–81a.

The Pennsylvania Superior Court summarily affirmed, and the Pennsylvania Supreme Court denied Reeves's petition for review. Pet. App. 81a–82a.

4. Several months later, acting through new counsel, Reeves filed a federal habeas petition. He renewed his claim that his trial counsel was constitutionally ineffective because she failed to gather and present exculpatory evidence, particularly (i) the police reports containing facts implicating Kai Anderson and (ii) records and witnesses establishing that Reeves is left-handed. Pet. App. 7a.

Reeves conceded that his petition was filed four months beyond the applicable limitations period due to prior counsel's miscalculation of the deadline. But he claimed that this procedural defect was excusable under *McQuiggin v. Perkins*, 569 U.S. 383 (2013), which allows untimely claims for federal habeas relief to proceed when state prisoners make a credible showing of actual innocence. Pet. App. 7a.

The district judge referred the petition to a magistrate judge, who noted that the actual-innocence exception to the timeliness requirements for habeas petitions applies only where the petitioner presents "new" evidence. Pet. App. 101a–102a, 108a–109a (citing *Schlup v. Delo*, 513 U.S. 298, 324

(1995), which first articulated the actual-innocence gateway in the context of procedural default). Even though Reeves had not presented the evidence showing Anderson was the real perpetrator at trial, the magistrate judge ruled that it was not "new" because it had been available to trial counsel. *Id.* 110a–111a. The magistrate judge thus denied an evidentiary hearing and recommended that the district judge dismiss Reeves's petition. *Id.* 111a–112a.

The district judge adopted the magistrate judge's report and recommendation; he also issued an opinion of his own denying relief and denying a certificate of appealability. Pet. App. 44a, 55a–61a.

5. The Third Circuit granted a certificate of appealability and vacated and remanded. Consistent with the law in several other courts of appeals, it held that at least "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." Pet. App. 17a.

The Third Circuit acknowledged that the Eighth Circuit—in an opinion predating this Court's elaboration of the actual-innocence gateway in *McQuiggin*—declared "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.'" Pet. App. 12a (quoting *Amrine v. Bowersox*, 238 F.3d 1023, 1028

(8th Cir. 2001)). But the Third Circuit reasoned that, even if that rule is generally correct, it does not apply in the "limited" situation "where the underlying constitutional violation claimed is ineffective assistance of counsel premised on a failure to present [exculpatory] evidence." *Id.* 17a (quotation marks and citations omitted). Otherwise, the "new" evidence requirement could make it impossible to vindicate such ineffective-assistance claims and thereby "lead to the 'injustice of incarcerating an innocent individual.'" *Id.* 16a (quoting *McQuiggin*, 569 U.S. at 393).

Applying its legal holding to the facts of Reeves's case, the Third Circuit held that the alternate-perpetrator evidence was new, "given that it was known but not presented allegedly due to his counsel's ineffective assistance." Pet. App. 19a. It accordingly instructed the district court to determine whether the new evidence was reliable and then, if so, to "determine whether Reeves has shown it is more likely than not that no reasonable juror [presented with that evidence] would have convicted him." *Id.* 19a–20a. If the district court determines that Reeves has made such a showing, then the Third Circuit has instructed it to "review his ineffective assistance of counsel claim on the merits under the applicable AEDPA standard of review." *Id.* 20a.

Judge McKee concurred. He agreed with the majority's analysis and holding regarding the actual-innocence gateway. Pet. App. 21a. But he wrote "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." *Id.*

6. The district court's remand proceedings are stayed pending resolution of the Commonwealth's petition for a writ of certiorari seeking review of the Third Circuit's interlocutory decision.

REASONS FOR DENYING THE PETITION

A. The Third Circuit's Decision Does Not Conflict With Authority From Any Other Court Of Appeals.

As the Third Circuit observed, AEDPA allows an equitable exception to its one-year limitations period where the petitioner makes "a credible showing of actual innocence." *See McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). To make this showing, the habeas petitioner must present "new reliable evidence," *Schlup v. Delo*, 513 U.S. 298, 324 (1995), demonstrating that it is "more likely than not any reasonable juror would have reasonable doubt" of his guilt, *House v. Bell*, 547 U.S. 518, 538 (2006). *See McQuiggin*, 569 U.S. at 399.

The Commonwealth claims that the circuits are split on whether the "new" evidence component of this actual-innocence gateway requires the evidence to be "newly discovered or whether it is sufficient that the evidence was not presented to the fact-finder at trial." Pet. 13. But, for starters, the Third Circuit adopted neither of these categorical rules. Instead, it held only

that evidence is new for purposes of the actual-innocence gateway "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." Pet. App. 17a. In that "limited" context, allowing the ineffective-assistance claim to proceed even though the evidence was available at trial is necessary to "avoid[] [the] inequity that could lead to the 'injustice of incarcerating an innocent individual.'" *Id.* 16a (quoting *McQuiggin*, 569 U.S. at 393); *see also Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010) (stressing the "narrow" and "limit[ed]" nature of this rule).

The Commonwealth is also wrong that *Amrine v. Bowersox*, 238 F.3d 1023 (8th Cir. 2001), conflicts with the decision below. While the state prisoner in *Amrine* sought relief based on ineffective assistance of counsel, he did not claim that the evidence of his actual innocence was not presented at trial because of his lawyer's deficient performance. *See id.* at 1029 & n.3. Nor did the Eighth Circuit opine whether its general rule that evidence is "new" only if it was not available at trial would apply in that special circumstance.

Amrine does not conflict with the decision below for the additional reason that it was issued more than a decade before this Court decided *McQuiggin* (and also several years before *House*). In *McQuiggin*, the Court explained that the actual-innocence gateway is designed to ensure that procedural rules do not perpetuate "the injustice of incarcerating an innocent individual." 569 U.S. at 393. The Court recognized that "untimeliness . . .

does bear on the credibility of evidence proffered to show actual innocence." *Id.* at 400–01. But it held that courts evaluating an actual-innocence claim should "[c]onsider[] a petitioner's diligence" in asserting that claim "not discretely, but as part of the assessment whether actual innocence has been convincingly shown." *Id*. In other words, *McQuiggin* establishes—contrary to the categorical rule petitioner ascribes to the Eighth Circuit—that evidence can be "new" for purposes of the actual-innocence exception *even if* it could have been discovered at the time of trial through reasonable diligence. In that circumstance, the failure to discover it simply goes to the weight of that evidence.[1]

B. The Question Presented Is Seldom Outcome-Determinative.

This Court's review is also unnecessary because the question presented seldom arises, and even when it does, it rarely determines whether habeas cases are allowed to proceed.

1. This Court has repeatedly noted that "habeas corpus petitions that advance a substantial claim of actual innocence are extremely rare." *Schlup*,

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[1] The Fifth Circuit has issued two recent opinions involving the actual-innocence gateway. *See, e.g.*, *Hancock v. Davis*, 906 F.3d 387 (5th Cir. 2018), *pet'n for cert filed* (No. 18-940); *Fratta v. Davis*, 889 F.3d 225 (5th Cir. 2018). But, as the Third Circuit noted (Pet. App. 12a-13a), the Fifth Circuit has still not yet decided "whether 'new reliable evidence' for the purpose of the *Schlup* actual-innocence gateway must be newly discovered, previously unavailable evidence or, instead, evidence that was available but not presented at trial." *Hancock*, 906 F.3d at 389 n.1; *Fratta*, 899 F.3d at 232. Much less has the Fifth Circuit confronted a case involving the situation here, where the evidence proffered to satisfy the gateway was available at trial but not introduced due to ineffective assistance of counsel.

513 U.S. at 321. That is because, in this context, "'actual innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). A petitioner cannot establish actual innocence "unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *McQuiggin*, 569 U.S. at 386 (quoting *Schlup*, 513 U.S. at 329). This standard is "demanding" and "permits review only in the 'extraordinary' case." *House*, 547 U.S. at 538 (quoting *Schlup*, 513 U.S. at 327). Petitioners can "seldom" colorably advance such a claim, much less prevail on it. *McQuiggin*, 569 U.S. at 386.

2. Fewer still are cases in which the question whether "new" evidence for purposes of the actual-innocence gateway includes evidence that was available but not presented at trial is outcome-determinative. In the Third Circuit, Reeves noted without contradiction from the Commonwealth that he was aware of only three petitioners in the several circuits that are willing to consider such evidence who have ever passed through the gateway. Appellant's CA3 Br. 42 & n.24 (citing *Cleveland v. Bradshaw*, 693 F.3d 626, 642 (6th Cir. 2012); *Rivas v. Fischer*, 687 F.3d 514, 552 (2d Cir. 2012); *Souter v. Jones*, 395 F.3d 577, 602 (6th Cir. 2005)). When petitioners proffer such evidence, it is much more common for courts to reject attempts to invoke the gateway on the ground that, even assuming the disputed evidence may be

considered, the evidence does not make out a sufficient showing of innocence. *See, e.g.*, *Amrine*, 238 F.3d at 1028; *Houck*, 625 F.3d at 95.

C. This Petition Is A Subpar Vehicle To Address The Actual-Innocence Gateway.

Even if there were a true conflict over the question presented, this petition would not present an appropriate opportunity to resolve it because the case is in an interlocutory posture. The Third Circuit vacated the district court's order dismissing Reeves's habeas petition and remanded for further proceedings to determine whether the evidence of actual innocence respondent has proffered satisfies the actual-innocence exception, and, if so, to consider his habeas petition on the merits. Pet. App. 19a–20a. That procedural posture "alone furnishe[s] sufficient ground for the denial" of certiorari. *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). *If* Reeves persuades the lower courts that his proffered evidence of actual innocence is sufficiently reliable and weighty, and *if* he prevails on his Sixth Amendment ineffective-assistance claim, the Commonwealth can then seek certiorari again. The Commonwealth could renew the argument it makes in this petition, along with any others it wishes to press. *See Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

D. The Third Circuit's Narrow Decision Remanding For Further Proceedings Is Correct.

Whatever the definition of "new" evidence for purposes of the actual-innocence gateway may be as a general matter, evidence that was available but not introduced at trial because the petitioner received ineffective assistance of counsel must be included within it. As the Third Circuit recognized, any contrary rule would pose an intolerable roadblock to vindicating defendants' Sixth Amendment right to effective representation.

1. "[I]t is through counsel that the accused secures his other rights." *Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986). Accordingly, the Sixth Amendment guarantees not only the effective assistance of counsel itself but also a fair opportunity to seek relief on that basis. *See Martinez v. Ryan*, 566 U.S. 1, 9-14 (2012). If tolerating a lawyer's ineffective assistance would otherwise make it impossible for a habeas petitioner to seek relief on such grounds, then, "as an equitable manner," courts may not rely on the very ineffective assistance at issue to deny relief on procedural grounds. *Id.* at 14 (ordinary procedural default rule does not apply to ineffective assistance claim when petitioners received ineffective assistance during earlier proceeding at which they could have raised such claims); *see also Lackawanna Cty. Dist. Attorney v. Coss*, 532 U.S. 394 (2001) (recognizing exception to general rule barring habeas petitioners from challenging legitimacy of prior convictions used to enhance their sentences for when they received ineffective assistance during that prior proceeding).

The Third Circuit correctly perceived that closing the actual-innocence gateway to state prisoners who failed to present evidence of their innocence at trial because they had ineffective trial counsel would create a similar inequity. A petitioner whose counsel was diligent and discovered evidence of actual innocence years after trial "could invoke the actual innocence gateway." Pet. App. 17a. But if the same evidence was timely produced to trial counsel, "but counsel did not present it to the jury" because counsel was ineffective, the same petitioner could not seek relief under the actual-innocence exception. *Id.*; *see also Gomez v. Jaimet*, 350 F.3d 673, 679–80 (7th Cir. 2003). There is no legitimate basis for differentiating between these two hypothetical petitioners; the petitioner who received ineffective counsel should at least have equal legal ability to seek relief from an unjustified conviction. *See, e.g.*, *McQuiggin*, 569 U.S. at 393 (procedural rules must be "[s]ensitiv[e] to the injustice of incarcerating an innocent individual"); *see also* Judge Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L REV. 142, 142 (1970) (arguing that collateral attack is most appropriate when a prisoner has "a colorable claim of innocence").

2. Defining "new" evidence to mean evidence not presented at trial also comports with this Court's precedent regarding the actual-innocence gateway. *See* Pet. App. 13a-16a. In *Schlup*, the petitioner contended "that his trial counsel was ineffective for failing to interview and to call witnesses who

could establish Schlup's innocence." 513 U.S. at 306. This Court explained that the petitioner was required to "support his allegations of constitutional error with new reliable evidence . . . that was not *presented* at trial." *Id.* at 324 (emphasis added). This phrasing—which this Court has repeated numerous times, *see id.* at 330; *see also Calderon v. Thompson*, 523 U.S. 538, 559 (1998)—strongly suggests that any evidence that is newly presented in habeas proceedings satisfies the actual-innocence exception. Pet. App. 14a; *see also Gomez*, 350 F.3d at 679. If the Court wished to require that evidence in this context be newly *available*, it would have said so.

Indeed, the "new" evidence proffered in *Schlup* and *House* included evidence that was available at trial but, because the petitioners received ineffective assistance of counsel, was not introduced. *See Schlup*, 513 U.S. at 310 n.21; *House*, 547 U.S. at 540–54. Yet this 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." Pet. App. 14a. To the contrary, *Schlup* instructed courts to consider evidence that was "wrongly excluded" from trial—a category of evidence that itself is broader than evidence that was unavailable at trial. 513 U.S. at 327–28.

3. Finally, there is no need for an overly strict limitation "on the sort of evidence that may be considered in the probability determination" that the actual-innocence gateway requires. *Gomez*, 350 F.3d at 679. The actual-

innocence gateway is no more than that—a gateway. Satisfying the gateway does not itself afford relief from a conviction, but instead merely provides a mechanism "to have [a habeas petitioner's] otherwise barred constitutional claim considered on the merits," *Schlup*, 513 U.S. at 315 (quotation omitted). Furthermore, the substantive showing that the gateway requires is "demanding." *McQuiggin*, 569 U.S. at 386; *see also supra* Part C.2. In these circumstances, there is no good reason to restrict the body of evidence that is relevant to the actual-innocence gateway beyond requiring that it was not introduced at trial—at least when it was not introduced because the petitioner received ineffective assistance of counsel. *Gomez*, 350 F.3d at 679.

CONCLUSION

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

Respectfully submitted.

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