IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-1043

JERRY REEVES,
Appellant,

v.

BRIAN COLEMAN, Superintendent, SCI Fayette,
Appellee.

Appeal from the Order of the United States District Court for the Middle District of Pennsylvania (Mannion, J.), No. 3:14-cv-01500-MEM, Dismissing Appellant's Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254

BRIEF FOR *AMICI CURIAE* THE INNOCENCE NETWORK AND THE PENNSYLVANIA INNOCENCE PROJECT IN SUPPORT OF APPELLANT'S REQUEST FOR REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel for *amici curiae* the Innocence Network and the Pennsylvania Innocence Project states that *amici* have no parent corporation and issue no stock because they are non-profit organizations.

Dated: January 16, 2018

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*[1]

The Innocence Network is an association of independent organizations dedicated to providing pro bono legal and/or investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. The 69 current members of the Innocence Network represent hundreds of people in prison with innocence claims in all 50 states, the District of Columbia, and Puerto Rico, as well as Australia, Argentina, Canada, Ireland, Italy, the Netherlands, New Zealand, the United Kingdom, and Taiwan.[2]

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel or person other than *amici curiae* and its counsel authored any part of this brief, or contributed money intended to fund preparation or submission of the brief.

[2] The member organizations include the Actual Innocence Clinic at the University of Texas School of Law, After Innocence, Alaska Innocence Project, Arizona Justice Project, California Innocence Project, Center on Wrongful Convictions, Committee for Public Counsel Services Innocence Program, Connecticut Innocence Project/Post-conviction Unit, Duke Center for Criminal Justice and Professional Responsibility, Exoneration Project, Exoneration Initiative, George C. Cochran Innocence Project at the University of Mississippi School of Law, Georgia Innocence Project, Hawai'i Innocence Project, Idaho Innocence Project, Illinois Innocence Project, Innocence Canada, Innocence Project, Innocence Project Argentina, Innocence Project at University of Virginia School of Law, Innocence Project London, Innocence Project New Orleans, Innocence Project New Zealand, Innocence Project Northwest, Innocence Project of Florida, Innocence Project of Iowa, Innocence Project of Minnesota, Innocence Project of Texas, Irish Innocence Project at Griffith College, Italy Innocence Project, Justicia Reinvindicada (Puerto Rico Innocence Project), Kentucky Innocence Project, Knoops' Innocence Project (the Netherlands), Korey Wise Innocence Project at the University of Colorado Law School, Loyola Law School Project for the Innocent, Michigan Innocence Clinic, Michigan State Appellate Defender Office- Wrongful Conviction Units, Mid-Atlantic Innocence Project, Midwest Innocence Project, Montana Innocence Project, Nebraska Innocence Project, New England Innocence

The Innocence Network and its members are also dedicated to improving the accuracy and reliability of the criminal justice system in future cases. Drawing on the lessons from cases in which the system convicted innocent persons, the Innocence Network advocates study and reform designed to enhance the truth-seeking functions of the criminal justice system to ensure that future wrongful convictions are prevented. Often exonerating the innocent includes identifying those who actually committed crimes for which others were wrongfully convicted. Because wrongful convictions destroy lives and allow those who committed the crimes to remain free, the Innocence Network's objectives both serve as an important check on the awesome power of the state over criminal defendants and help ensure a safer and more just society.

Project, New Mexico Innocence and Justice Project at the University of New Mexico School of Law, North Carolina Center on Actual Innocence, Northern California Innocence Project, Office of the Ohio Public Defender–Wrongful Conviction Project, Ohio Innocence Project, Oklahoma Innocence Project, Oregon Innocence Project, Osgoode Hall Innocence Project (Canada), Pennsylvania Innocence Project, Reinvestigation Project, Rocky Mountain Innocence Center, Sellenger Centre Criminal Justice Review Project (Australia), Taiwan Innocence Project, Thurgood Marshall School of Law Innocence Project, University of Baltimore Innocence Project Clinic, University of British Columbia Innocence Project at the Allard School of Law (Canada), University of Miami Law Innocence Clinic, Wake Forest University Law School Innocence and Justice Clinic, West Virginia Innocence Project, Western Michigan University Cooley Law School Innocence Project, Wisconsin Innocence Project, Witness to Innocence, and Wrongful Conviction Clinic at Indiana University School of Law.

The Pennsylvania Innocence Project, one of the Innocence Network's members, works to exonerate those convicted of crimes in the Commonwealth of Pennsylvania that they did not commit, and to prevent innocent people from being convicted.

The Innocence Network and Pennsylvania Innocence Project have a strong professional interest in the resolution of the issues presented in this case. Both *amici* work to ensure that the wrongfully convicted have meaningful access to judicial review and to prevent the continued incarceration of innocent individuals. The Innocence Network and Pennsylvania Innocence Project support the relief requested by Mr. Reeves, and urge this Court to allow consideration of "newly presented" evidence of actual innocence—meaning evidence that was not presented at trial, regardless of whether it was known to trial counsel or could have been discovered prior to trial through the exercise of due diligence—entitling the wrongfully convicted to merits consideration of otherwise time-barred habeas petitions under 28 U.S.C. § 2254. Adoption of a narrower new evidence standard permitting the consideration of only "newly discovered" evidence—meaning, evidence neither available at trial nor discoverable earlier through the exercise of due diligence—would critically inhibit the Innocence Network's and Pennsylvania Innocence Project's ability to help exonerate other individuals convicted of crimes they did not commit whose counsel had evidence of actual innocence but failed to

present such evidence at trial. As explained further below, had such a stringent new evidence standard been adopted nationwide, numerous prior exonerations would not have been possible.

Amici are authorized to file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2) because all parties to this appeal have consented to *amici*'s submission of this brief.

SUMMARY OF ARGUMENT[3]

The purpose of the actual innocence gateway—under which convincing "new evidence" of actual innocence acts as a gateway to allow merits consideration of claims otherwise barred by the Anti-Terrorism and Effective Death Penalty Act of 1996's (AEDPA) one-year statute of limitations—is to ensure that "federal constitutional errors do not result in the incarceration of innocent persons." *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013) (quoting *Herrera v. Collins*, 506 U.S. 390, 404 (1993)). But the overly narrow "newly discovered" standard for evaluating evidence of actual innocence adopted by the district court would result in the very "miscarriage of justice" that the actual innocence gateway

[3] The Innocence Network and the Pennsylvania Innocence Project agree with the position set forth in the brief of the *amici curiae* habeas corpus law professors that "newly presented" evidence is the correct legal standard for evaluating evidence in support of gateway innocence claims. In the interests of efficiency and conservation of resources, those arguments are not repeated here. The Innocence Network and the Pennsylvania Innocence Project also leave to Mr. Reeves and/or other *amici* the question of how the facts of this case entitle Mr. Reeves to habeas relief.

is designed to prevent. The "newly discovered" standard, by definition, would effectively eliminate the actual innocence gateway for untimely Sixth Amendment claims by innocent prisoners alleging that trial counsel was ineffective in failing to procure and present evidence of their innocence.

Under the "newly discovered" evidence standard, a host of significant exonerations of wrongfully convicted individuals never would have occurred. These include exonerations in which scientific evidence of innocence existed at the time of trial, but its significance became clear only in light of subsequent research or shifts in the weight of scientific authority that occurred after the statute of limitations had expired. Only adoption of the "newly presented" standard for evaluating new evidence of actual innocence would further the fundamental fairness considerations that have long governed the writ of habeas corpus's vital, equitable role in preventing unjust incarceration.

ARGUMENT

The district court's adoption of a strict "newly discovered" standard for new evidence of actual innocence sufficient to allow merits consideration of otherwise time-barred claims is wholly inconsistent with the critical considerations of fundamental fairness underlying the writ of habeas corpus. "[H]abeas corpus has traditionally been regarded as governed by equitable principles." *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (internal quotation marks omitted). It has been

"an integral part of our common-law heritage" by providing an avenue for securing relief from wrongful confinement. *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973). The writ is enshrined in the Suspension Clause of the U.S. Constitution, under which "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." U.S. Const., art. I § 9 cl.2. The writ was also expressly recognized by the first Judiciary Act, Act of Sept. 24, 1789, ch. 20 § 14,[4] and in early U.S. court decisions, *see, e.g.*, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 95 (1868) (embracing common-law principle that habeas corpus preserves individual liberty against unjust restraints).

Recent United States Supreme Court decisions continue to ensure "the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." *Herrera*, 506 U.S. at 404. To avoid a "miscarriage of justice" "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the [state law] procedural default." *Murray v. Carrier*, 477 U.S. 478, 495-96 (1986). "The miscarriage of justice exception to cause serves as an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of

[4] A copy of the first Judiciary Act is available on the Library of Congress website: https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html (follow "The Judiciary Act of 1789" hyperlink).

liberty, guaranteeing that the ends of justice will be served in full." *McClesky v. Zant*, 499 U.S. 467, 495 (1991) (internal quotation marks omitted).

The actual innocence gateway established by *Schlup v. Delo*, 513 U.S. 298 (1995), is a further recognition of the equitable principles underlying habeas relief. The *Schlup* Court held that a showing of actual innocence may excuse procedural errors where equity so demands, serving as "'a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.'" *Id.* at 315 (quoting *Herrera*, 506 U.S. at 404). And, the *Schlup* actual innocence gateway provides an equitable exception to AEDPA's one-year statute of limitations. *McQuiggin*, 569 U.S. at 386. *Schlup* reiterated that "concern about the injustice that results from the conviction of an innocent person has long been at the core of our criminal justice system." 513 U.S. at 325.

Adoption of a stringent "newly discovered" standard for evaluating evidence of innocence would subvert *Schlup*, which aimed to prevent miscarriages of justice in those "extremely rare" but critical cases, such as Mr. Reeves's, in which a prisoner is able to demonstrate actual innocence. *Id.* at 321. Limiting consideration of "new evidence" of actual innocence to evidence that is "newly discovered," as opposed to "newly presented" evidence, would cut off a pathway to exoneration that has enabled numerous innocent individuals to overturn their

convictions based on evidence that their trial counsel failed to develop and present at trial.

Indeed, the Seventh Circuit rejected the "newly discovered" evidence standard in favor of a "newly presented" standard, and in so doing, affirmed the grant of a habeas petition meeting the *Schlup* gateway standard. *Jones v. Calloway*, 842 F.3d 454, 467 (2016). In his habeas petition, Jones, who had been convicted of murder for a 1999 shooting, alleged ineffective assistance of counsel based on evidence that was not only available at the time of the trial, but that trial counsel knew about and decided not to present to the jury: the "available testimony" of a separately tried co-defendant who "confessed to the crime and has consistently maintained that he—and he alone—shot" the victim, a story that "matched the physical evidence and some (though not all) of the eyewitness testimony." *Id.* at 456, 460. The district court credited the co-defendant's testimony and concluded that it satisfied the actual-innocence gateway. *Id.* at 460. The Seventh Circuit affirmed the district court's grant of Jones's habeas petition, *id.* at 467—a result that would not have been possible under the "newly discovered" standard. As the *Jones* court explained, "[n]ew evidence' . . . does not mean 'newly *discovered* evidence'; it just means evidence that was not presented at trial." *Id.* at 461 (emphasis in original).

Similarly, Daniel Larsen's exoneration in *Larsen v. Adams*, 718 F. Supp. 2d 1201 (C.D. Cal. 2010), would not have been possible under a "newly discovered" evidence standard. Larsen, who had prior convictions, was sentenced in 1999 to twenty-eight years to life imprisonment after being convicted of possessing a dagger. *Id.* at 1205-07. In an untimely habeas petition filed in 2008, Larsen argued that his trial counsel provided ineffective assistance by, among other things, failing to "locate, investigate, and bring to trial exculpatory witnesses and fail[ing] to present evidence of third-party culpability." *Id.* at 1206. In fact, Larsen's counsel "did not present a defense at trial." *Id.* at 1207. During the habeas proceedings, Larsen called, among others, three "extraordinarily exculpatory" witnesses who were never contacted by counsel but who would have agreed to testify had they been asked, and presented two supporting declarations—including one from a man who identified the dagger in question as his own. *Id.* at 1211-15, 1228. All of this evidence was available at the time of the trial, but was not presented to the trial court. *See id.* The *Larsen* district court held that Larsen had satisfied the "actual innocence" gateway requirements. *Id.* at 1206. The prosecution then dismissed the charge.[5] As in *Jones*, Larsen's successful habeas

[5] National Registry of Exonerations, *Daniel Larsen*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4350 (last visited Jan. 9, 2018).

petition was possible only because the court in his case properly considered newly presented evidence.

The same is true for wrongfully convicted individuals exonerated or granted habeas relief on the basis of scientific evidence or expert testimony that their defense counsel chose not to present to the jury. In *United States v. Hebshie*, 754 F. Supp. 2d 89 (D. Mass. 2010), the court held that defense counsel had made several errors that prejudiced the defendant's arson trial. "Despite ample reasons for defense counsel to be on notice of serious problems with the government's expert evidence—[including] from their own investigation—they did not request a *Daubert* hearing as to anything." *Id.* at 113 (internal footnote omitted). Specifically, the district court determined that defense counsel:

> *knew* that there were problems in the [] cause-and-origin investigation and the [] laboratory analysis that undermined their validity; they *knew* that the failure to take a control sample in this case was inconsistent with the scientific method and [applicable National Fire Protection Association guide]; they *knew* that the investigation of the basement was inadequate, or at least, not fully documented; and they *knew* or should have known that the canine evidence was supposed to be admitted for only a limited purpose, namely, assisting in the selection of samples that have a higher probability of laboratory confirmation than samples selected without the canine's assistance, and that testimony beyond those purposes was potentially prejudicial.

Id. at 113-14 (emphasis in original). And, by the time of Hebshie's trial, "the public and professional literature reflected increasing scrutiny of arson evidence by

experts in both the scientific and legal fields as well as by the public at large." *Id.* at 114. After his conviction was set aside, the prosecution dismissed the charges.[6] Had the statute of limitations expired in *Hebshie,* thus requiring the defendant to rely on the actual innocence gateway, application of a "newly discovered" standard would have barred exoneration.

Likewise, in *Dobson v. Maryland,* No. 20-K-09-9572, Memo., Statement of Reasons, & Order Regarding Petition for Post Conviction Relief, slip op. (Md. Cir. Ct., Kent Cnty., Apr. 7, 2014),[7] a Maryland circuit court ordered a new trial for a daycare provider whose counsel "decided to forego the utilization of any experts" even though he had known "shortly after he was retained that a successful defense would necessitate securing a medical expert to testify at trial." *Id.* at 10, 16-17. The Maryland circuit court vacated Dobson's conviction, concluding that "at least two witnesses were available to testify at [the defendant's] trial to refute the testimony of the State's experts." *Id.* at 25.

People v. Caldavado, 26 N.Y.3d 1034 (2015), is remarkably similar. In that case, the New York Court of Appeals ordered a hearing on the defendant's claim that she received ineffective assistance of counsel at her trial, where she was

[6] National Registry of Exonerations, *James Hebshie*, http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3857 (last visited Jan. 9, 2018).

[7] A copy of the *Dobson* decision can be found at https://onsbs.files.wordpress.com/2014/04 /dobson-v-md-sbs-pcr-kent-county-2014-04-07.pdf.

convicted of first-degree assault and endangering the welfare of a child in her care. *Id.* at 1035-37. The *Caldavado* court held that the defendant was entitled to an opportunity to present evidence that counsel could have, but failed, to present expert testimony, even though "casting doubt on the prosecution's medical proof [was] the crux of the defense." *Id.* at 1036.

In *Commonwealth v. Dougherty*, No. 2674 EDA 2012, slip op. (Pa. Super. Ct. Dec. 30, 2013),[8] the Pennsylvania Superior Court ordered a new trial for a defendant convicted of two counts of first-degree murder and one count of arson whose trial counsel was ineffective in failing to retain a consulting or testifying expert on fire science. *Id.* at 21. At trial, the prosecution expert witness's scientific evidence and conclusions were "the fulcrum" and "lynchpin" to the whole case against Dougherty. *Id.* at 15 (internal quotation marks omitted). The Pennsylvania Superior Court agreed with the lower court that treatises "available at the time of the investigation and fourteen years later at trial" described theories that would have rebutted the prosecution expert's conclusions about the points of origin of the fire. *Id.* at 12 (internal quotation marks omitted). Dougherty would not have been granted a new trial but for this newly presented, but previously available, fire science evidence.

[8] A copy of the *Dougherty* decision can be found at http://www.pacourts.us/assets/opinions/Superior/out/j-s29032-13m%20-%201016637181856017.pdf#search=%22dougherty 2674%22.

Similarly, in *Wisconsin v. Edmunds*, 308 Wis. 2d 374, 392 (Wis. Ct. App. 2008), the Wisconsin Court of Appeals ordered a new trial based on expert medical testimony undermining the prosecution's argument that a child had been shaken to death by the defendant. The court held that defense counsel had failed to call out-of-state experts who could have offered an opinion challenging the expert testimony presented by the prosecution at trial. *Id.* at 384. Wisconsin subsequently dismissed all charges.[9]

The critical importance of "newly presented" evidence of actual innocence, even when considered together with any "newly discovered" evidence, is illustrated by the case of *Lisker v. Knowles*, 651 F. Supp. 2d 1097 (C.D. Cal. 2009). In *Lisker,* the court conditionally granted the defendant's habeas petition pending a new trial based on the totality of new evidence that entitled him to pass through the *Schlup* innocence gateway. *Id.* at 1101, 1141. Lisker's new evidence included evidence that his trial "counsel performed deficiently when he failed to present evidence already in his possession"—namely, an analysis of the shoe prints at the murder scene, extensive evidence pointing to another suspect, the weather

[9] National Registry of Exonerations, *Audrey Edmunds*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3201 (last visited Jan. 9, 2018). Although the *Edmunds* court characterized the evidence as "newly discovered," 308 Wis. 2d at 391, the testimony was in fact only "newly presented," as the court acknowledged that the witnesses could have been identified and called at the time of trial.

and visibility on the day of the murder, evidence contradicting the prosecution's theory of motive, and investigatory misconduct. *Id.* at 1119-24, 1134-40. Lisker presented additional newly discovered evidence resulting from a post-conviction investigation of a possible alternate suspect, including phone and motel records contradicting an alternate suspect's story, that individual's criminal history, and other evidence tying the alternate suspect to the crime. *Id.* at 1130-32. Had the court considered only the newly discovered evidence, it might have reached a different result. Yet the prosecutors subsequently dismissed the charges against Lisker. *Lisker v. City of Los Angeles*, 780 F.3d 1237, 1238 (9th Cir. 2015).

Habeas relief was likewise granted to Lisa Marie Roberts on the basis of both newly presented and newly discovered evidence, after which prosecutors dropped all charges.[10] To support her allegation of ineffective assistance of counsel, Roberts presented evidence that had been available at the time of the trial, but had not been shown to the jury, including cell tower evidence and witnesses who could identify another suspect who was with the victim before the murder took place. *Roberts*, 13 F. Supp. 3d at 1092-96.[11] As in *Lisker*, the district court in

[10] *See Roberts v. Howton*, 13 F. Supp. 3d 1077, 1116 (D. Ore. 2014); National Registry of Exonerations, *Lisa Roberts*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4443 (last visited Jan. 9, 2018).

[11] Roberts also presented newly discovered evidence tying another suspect's DNA to the crime, and evidence of that suspect's history of violence and connection to the victim. 13 F. Supp. 3d at 1089-92.

Roberts considered "all of the evidence," including the newly presented evidence, in concluding that Roberts had "made a colorable showing of actual innocence sufficient to overcome the untimeliness of the petition." *Id.* at 1097.

If courts considered only "newly discovered" evidence of innocence, numerous other exonerations by state courts would also have been impossible. For example, Pennsylvania courts have repeatedly considered "newly presented evidence" in awarding post-conviction relief. In 2016, the Pennsylvania Superior Court ordered Donte Rollins, who had been convicted of attempted murder with serious bodily injury, released because his trial counsel failed to "present or investigate alibi evidence, including witness testimony, video footage of what appears to be [Rollins] several miles away from the shooting, sales receipts potentially placing him far away from the shooting, and cell phone records indicating multiple calls on his phone at the time of the shooting." *Commonwealth v. Rollins*, No. 3499 EDA 2016, slip op. at 1-2, 4 (Pa. Super. Ct. Dec. 20, 2016).[12] All of this evidence was available to trial counsel at the time of the trial, and in fact much of it was in the possession of his counsel, who had shown to the jury some video footage showing that Rollins was not at the crime scene at the time of the

[12] A copy of the *Rollins* decision can be found at http://www.pacourts.us/assets/opinions/Superior/out/j-s99001-16jo%20-%2010292552714757451.pdf#search=%22rollins 3499%22.

attempted murder.[13] Refusal to consider Rollins's newly presented evidence of innocence would have resulted in a serious miscarriage of justice.

The case of Shaurn Thomas involved an even more egregious failure by trial counsel to present available exculpatory evidence. *See Thomas v. Pa. Bd. of Probation & Parole*, No. 235 M.D. 2015, slip op. at 3 n. 3 (Pa. Commw. Ct. Jan. 7, 2016).[14] Thomas was convicted of murder even though he was *in court* for another matter at the time of the murder. *Id.* Although his trial counsel could have called any of the attorneys, court officers, or other witnesses to attest to this fact, only one witness was called to verify Thomas's signature on a court subpoena signed that day.[15] Twenty-four years into Thomas's sentence, he was released after the Philadelphia District Attorney's office agreed that the evidence against him did not support his conviction.[16]

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[13] Julie Shaw, The Inquirer, *Was Wrong Man Convicted in '06 Strawberry Mansion Shooting That Paralyzed Boy?* (Oct. 20, 2016), http://www.philly.com/philly/news/20161021_Was_wrong_man_ convicted_in__06_Strawberry_Mansion_shooting_that_paraylzed_boy_.html.

[14] A copy of the *Thomas* decision can be found at https://www.courtlistener.com/pdf /2016/01/07/s._thomas_v._pa_bpp.pdf.

[15] National Registry of Exonerations, *Shaurn Thomas*, https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=5154.

[16] *See* Chris Palmer & Will Bunch, The Inquirer, *After Hearing, Inmate Imprisoned 24 Years Released* (May 23, 2017), http://www.philly.com/philly/news/crime/Hearing-makes-freedom-imminent-for-inmate-43-in-prison-24-years.html.

Likewise, Marshall Hale was released last July after serving 33 years for a rape he did not commit only due to newly presented evidence. *See Commonwealth v. Hale*, No. 2940 EDA 2014, non-precedential slip op. (Pa. Super. Ct. Sept. 23, 2016).[17] After the witness identified Hale as the perpetrator at trial, Hale was convicted, even though the blood evidence of the prosecutor's own forensics expert who testified at trial demonstrated that Hale was innocent. *Id.* at 4-8. Hale challenged his conviction based on a new expert's review of raw data from the blood testing that was available, but not presented, to the jury. *Id.* at 13-17. Although Hale characterized this evidence as "newly discovered," the Commonwealth of Pennsylvania opposed the petition on the ground that the evidence "merely reinterpreted earlier data." *Id.* at 18. The Superior Court remanded the case for a new hearing to "allow a thorough vetting of the disputed scientific principles and findings advanced by the parties." *Id.* at 30. After remand, the Philadelphia district attorney agreed to vacate Hale's conviction and withdraw all charges.[18]

Taken together, these cases, along with Mr. Reeves's, illustrate how adoption of a "newly presented" standard for evidence of actual innocence, rather

[17] A copy of the *Hale* decision can be found at http://www.pacourts.us/assets/opinions/Superior/out/j-a05008-16m%20-%201028210899604556.pdf#search=%22hale 2940%22.

[18] Pennsylvania Innocence Project Blog, Marshall Hale Case Profile, *Update – Marshall Is Home* (July 2017), http://innocenceprojectpa.org/marshall_ hale/.

than the "newly discovered" standard, would alleviate the "injustice that results from the conviction of an innocent person [that] has long been at the core of our criminal justice system" and that the *Schlup* actual innocence gateway was designed to address. 513 U.S. at 324-25. Many wrongfully convicted defendants receive ineffective assistance from trial counsel who fail to pursue or to present key exculpatory evidence that demonstrates the defendants' actual innocence, but fall short of being "newly discovered." It would be a manifest injustice to bar consideration of such evidence.

CONCLUSION

For all the reasons detailed above, the Innocence Network and Pennsylvania Innocence Project urge this Court to grant Mr. Reeves's request for reversal of the district court's dismissal of his writ of habeas corpus, and permit consideration of "newly presented" evidence of actual innocence.

Dated: January 16, 2018

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify the following:

1. The undersigned counsel for *amici curiae* is a member of the bar of this Court.

2. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) by containing 4,218 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). The brief also complies with the typeface and style requirements of Federal Rules of Appellate Procedure 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font.

3. The text of the electronic brief and ten paper copies mailed to the Court pursuant to Third Circuit Rule 31.1(b)(3) are identical.

4. The electronic file of this brief was scanned with McAfee anti-virus software and no virus was detected.

Dated: January 16, 2018

/s/ Melissa H. Maxman
Melissa H. Maxman

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2018, the foregoing *amici curiae* brief was filed and served on all counsel of record through this Court's CM/ECF system, and, pursuant to Federal Rule of Appellate Procedure 25(a)(2)(B) and Third Circuit Rules 25.1 and 31.1, ten paper copies have been mailed through a third-party commercial carrier for delivery to the Clerk of Court within three days.

Dated: January 16, 2018

/s/ Melissa H. Maxman
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