

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PEDRO REYNOSO)	
)	
Appellant-Petitioner,)	
)	
v.)	
)	18-2523
SUPERINTENDENT,)	
GRATERFORD-SCI)	
)	
Appellee-Respondent.)	

APPELLANT'S OPENING BRIEF

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STATEMENT OF JURISDICTION

On June 22, 2018, in case 2-16-cv-1721,¹ the Honorable Robert F. Kelly dismissed Mr. Reynoso’s federal habeas petition as untimely.² Judge Kelly refused to grant a certificate of appealability (“COA”) regarding the timeliness issue. On July 7, 2018, Mr. Reynoso appealed.³ On July 10, 2018, he filed an application with this Court requesting a COA regarding the timeliness issue.⁴ On January 8, 2019, the Court granted him a COA on the timeliness issue.⁵ This Court, therefore, has jurisdiction under 28 U.S.C §§ 1291 and 2253.

RELATED CASES

The Commonwealth of Pennsylvania prosecuted Mr. Reynoso and Felo Garcia (CP-51-CR-0746321-1991). While Felo Garcia claims his innocence as well, it is counsel’s understanding Garcia has no state or federal post-conviction petitions pending at this point.

ISSUE PRESENTED

Whether *Reeves* entitles Mr. Reynoso to a remand because he raised a trial counsel ineffectiveness claim based on “new evidence” not presented to the fact-finder.

¹ JA 1-7.

² JA 244.

³ JA 245-246.

⁴ JA 247-285.

⁵ JA 286.

INTRODUCTION

“Society views the conviction of an innocent person as perhaps the most grievous mistake our judicial system can commit.” *Satterfield v. Dist. Attorney Phila.*, 872 F.3d 152, 154 (3d Cir. 2017). Mr. Reynoso is an innocent man convicted of double-murder and serving life in prison. The double-murder, where Carlos Torres and Charles Rivera were gunned down in broad daylight, occurred in Philadelphia on July 23, 1991. The man who committed the double-murder was clean shaven and did not have a mustache. Mr. Reynoso could not have committed the double-murder because he was in the Dominican Republic from July 13, 1991 through July 27, 1991. Mr. Reynoso’s passport confirms this and so do ten people who saw him or were with him in the Dominican Republic between these dates.⁶ Several of these witnesses saw him or were with him on July 23, 1991.⁷

Moreover, Mr. Reynoso and his wife, Catalina, baptized their son, Juan Alexander, in Pimentel on July 27, 1991.⁸ The baptism photographs show Mr. Reynoso with a thick, full mustache only four days after the shooting.⁹ His thick, full mustache proves he could not be the gunman because the gunman was clean shaven and there is no way Mr. Reynoso could have grown a thick, full mustache in only four days.

⁶ JA 563.

⁷ JA 540-550.

⁸ JA 553, 554-555.

⁹ JA 554-555.

While trial counsel knew of all ten alibi witnesses, trial counsel only presented two at trial. Likewise, trial counsel failed to introduce several documents and photographs that placed Mr. Reynoso in the Dominican Republic between July 13, 1991 and July 27, 1991, including (1) a July 17, 1991 property contact,¹⁰ (2) the July 27, 1991 baptism certificate,¹¹ (3) the baptism photographs, which show Mr. Reynoso's thick, full mustache,¹² (4) Mr. Reynoso's gun permit authorization paperwork that Dominican officials approved and signed on July 30, 1991, (5) a copy of Mr. Reynoso's American Airlines ("AA") ticket stubs for his July 13, 1991 flights from Philadelphia to San Juan and from San Juan to Santo Domingo,¹³ and (6) the letter from AA to Mr. Reynoso apologizing for the delayed take off of his Philadelphia to San Juan flight on July 13, 1991.¹⁴ Furthermore, five people have now identified Chuito – aka Rafael Vidal – as the actual gunman.

The issue before this Court is whether a federal court may consider this substantial evidence of innocence when trial counsel knew of this evidence, but unreasonably chose not to present it at trial. Petitioners like Mr. Reynoso, who file untimely federal petitions, can have their substantive federal claims reviewed if they make a strong enough showing of their actual innocence. *McQuiggin v. Perkins*, 569 U.S.

¹⁰ JA 551.

¹¹ JA 553.

¹² JA 554-555.

¹³ JA 558-562.

¹⁴ JA 558-562.

383 (2013). This gateway innocence showing must include “new evidence,” but that merely begs the question of what constitutes “new evidence” under *Schlup v. Delo*, 513 U.S. 298 (1995) and *McQuiggin*.

The District Court said evidence known to trial counsel before trial cannot be considered “new evidence.”¹⁵ The District Court erred based on this Court’s recent precedential decision in *Reeves v. SCI-Fayette*, 897 F.3d 154 (3d Cir. 2018). In *Reeves*, the Court held that evidence is “new” even if trial counsel had, knew about, or could have developed it before trial. *Id.* at 163-164. Specifically, the Court said, “[W]hen 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.” *Id.* at 164.

Reeves is controlling authority in this Circuit. Thus, Mr. Reynoso is entitled to a remand instructing the District Court to determine whether the “new evidence” is “reliable” – as it is defined in *Schlup* and *McQuiggin*. If reliable, the District Court must then be directed “to undertake a holistic assessment of the new, reliable evidence and the evidence presented at trial to determine whether [Mr. Reynoso] has shown it is more likely than not that no reasonable juror would have convicted him.” *Reeves v. SCI-Fayette*, 897 F.3d at 165. If so, the District Court must then “review [Mr. Reynoso’s] ineffective

¹⁵ JA 244.

assistance of counsel claim on the merits under the applicable AEDPA standard of review.” *Id.*

STATEMENT OF FACTS

A. State court proceedings

1. The July 23, 1991 shooting

On July 13, 1991, Mr. Reynoso, his wife, Minerva, and their son, Juan Alexander, flew from Philadelphia to the Santo Domingo, Dominican Republic. They had a layover in San Juan, Puerto Rico before flying into Santo Domingo. Mr. Reynoso’s passport has a Dominican Republic entry stamp dated 13 Jul 1991.¹⁶ Over the next fourteen days, Mr. Reynoso visited family and friends in the Dominican Republic, and on July 27, 1991 he and Minerva had Juan Alexander baptized at a church in Pimentel, which is where Mr. Reynoso owned a home. Mr. Reynoso did not leave the Dominican Republic between July 13, 1991 and July 27, 1991.¹⁷

On July 23, 1991, around 1:19 p.m. in Philadelphia, a car with at least two people inside drove up to Carlos Torres and Charles Rivera and fired shots at both – killing them. Mr. Reynoso, as noted, was in the Dominican Republic. Detectives, though, found two people with checkered pasts - Sarah Robinson and Sam Wilkerson – who witnessed the shooting and identified Mr. Reynoso as the gunman and the man who

¹⁶ JA 505-507.

¹⁷ JA 505-507.

drove up beside Torres and Rivera. They also identified Felo Garcia as the front passenger in the same car.¹⁸

a. Marcus James's statement

By 3:00 p.m. on July 23, 1991, detectives had an eyewitness to the shooting, Marcus James. James said he was standing on the corner of 8th Street and Clearfield Street when he saw a “brown over tan” Oldsmobile cutlass drive east on Clearfield Street, fire several shots, and then drive by him. As it drove by, James said he saw a “Dominican male” he knew to be part of “a group of Dominican drug dealers who operate[d] out of... 3042 N. Darien Street.” James said the cutlass “belong[ed] to the Dominican drug operation” on Darien Street and he had seen it outside 3042 North Darien Street “on numerous occasions.”¹⁹

On July 24, 1991, detectives re-interviewed James. This time James said he saw a black female named “Sarah” standing on the corner of 9th Street and Clearfield Street when the shooting occurred. On July 23, 1991, after James had initially talked with detectives, James said he ran into Sarah and that she had told him “the Dominicans who live, deal drugs, and operate out of 3042 N. Darien Street had killed the two males.” James also said Sarah had told him “she personally knew the person who had shot the two males.”²⁰

¹⁸ JA 505-515.

¹⁹ JA 505-507.

²⁰ JA 505-507.

b. Sarah Robinson's statement

On July 26, 1991, detectives interviewed Sarah Robinson, who said she knew Carlos Torres and Charles Rivera. She knew Torres as Popito. She then described the shooting and said she was on Darien Street, near the intersection of Clearfield Street, when she heard two Dominican males arguing. One was Carlos Torres, the other was someone she knew as Marciano. Robinson heard Marciano say to Torres, in English, "I am going to kill you." Torres then got into his car and told Marciano that "he (Torres) was going to take his drugs." Torres then "drove his [car] twice around the block speeding down the street." After Torres finished his second lap around the block, Robinson heard Marciano yell, "Move everybody off the street, I'm going to catch him on 9th Street, I'm going to kill him."²¹

Robinson said she walked to the corner of 9th Street and Clearfield Street. About ten minutes later, she saw Torres park on the corner. Charles Rivera was in the front passenger's seat of Torres's car. Thirty seconds after Torres had parked, Robinson saw Marciano driving a "tan auto with a beige top." She saw Marciano drive up behind Torres's car and slam on the breaks, blocking Torres's car. Robinson then saw Marciano produce a handgun, point it out the driver's side window, and fire into Torres's car. She saw Rivera get shot several times. She then saw Torres turn the steering wheel as if he were trying to drive off, but Marciano "used his car to ram"

²¹ JA 505-507.

Torres's car. Robinson then saw Marciano point a different gun out the driver's side window and fire several more shots into Torres's car, before speeding off.²²

Robinson said she saw another Dominican male in the front passenger's seat of Marciano's car who she knew as Papitito. Robinson said she had known Marciano for a year and Papitito for several years and she knew both sold drugs from 3042 North Darien Street.²³ She described Marciano as in his 40's, 5'3" to 5'5", medium build, with thick black curly hair that is close cut around the ears with a short "fuzzy tail," and a light complexion, who wears glasses and a "rope chain" earring. She described Papitito as in his 40's, 5'3" to 5'4", husky build, black to dark brown hair with graying on the sides, a short "tape" hairstyle, with a very dark complexion, and a mustache. She said she had seen Papitito that day – July 26, 1991 – around 9 a.m. at the 3042 North Darien Street residence and Marciano at 9:15 a.m. that day.²⁴

c. Sam Wilkerson's statements

On July 31, 1991, detectives interviewed Sam Wilkerson, who said shortly before the shooting he was standing at the corner of 9th Street and Clearfield Street when he saw Carlos Torres – who he knew as Papo – park near the corner. He walked up to Torres and they talked. He said Charles Rivera – who he knew as Charlie Chan – was

²² JA 505-507.

²³ JA 505-507.

²⁴ JA 505-507.

in the front passenger's seat of Torres's car. He said Torres "talk[ed] about killing the Dominicans" because they had helped lock up his brother-in-law, Jose Colon.²⁵

As Wilkerson spoke with Torres and Rivera, he saw a "small car" pull alongside Torres's car and recognized the driver as Papitito. Wilkerson also saw a Dominican male in the front passenger's seat of Papitito's car, but did not know his name, but said, "[T]hey all live on Darien Street."²⁶ Wilkerson said he also saw "[one] other [Dominican] guy in the back seat" because the man in the back seat had rolled down the back window.²⁷

Wilkerson then saw Papitito fire five to six shots into Torres's car, prompting Wilkerson to run. He heard "more shots" a few seconds later before seeing Papitito drive off.²⁸ When detectives asked Wilkerson "how many people" in Papitito's car had "fired shots," Wilkerson said, "I just saw Papitito – then I ran."²⁹

Wilkerson described Papitito as in his 30's, with a dark complexion and dark hair, but no mustache. On April 1, 1992, Wilkerson viewed an in-person line-up at the Philadelphia detention center. Felo Garcia participated in the line-up as filler #3, but not Mr. Reynoso because, at that time, authorities had yet to arrest him. Wilkerson identified two men in the line-up, neither of which were Felo Garcia.³⁰

²⁵ JA 508-511.

²⁶ JA 508-511.

²⁷ JA 508-511.

²⁸ JA 508-511.

²⁹ JA 508-511.

³⁰ JA 512-515, 840-841.

On May 7, 1992, a week before Felo Garcia's trial began, detectives interrogated Wilkerson yet again, and asked him why he had not identified Felo Garcia as the front passenger in Papitito's car. Wilkerson allegedly said, "I picked the wrong one because I was scared."³¹ Detectives then asked him if he saw "anyone" in the line-up that participated in the shooting. Wilkerson allegedly replied, "He was number 3." Detectives then asked, "The male who was number 3 what part did he take in the shooting?" Wilkerson allegedly responded, "He was one of the guys shooting. He was a passenger in Papitito's car." Detectives then asked, "Did you see him do any shooting?" Wilkerson supposedly replied, "No I just saw Papitito shooting then I ran."³²

2. Pedro Reynoso's arrest

On March 23, 1994, Mr. Reynoso flew into Newark, New Jersey from the Dominican Republic through San Juan. When he presented his passport and paperwork to the INS agent at Newark, the agent checked his computer, learned that the Philadelphia Police Department had a warrant for his arrest, and directed him to a secondary interview line where an INS inspector interviewed him.³³ During the interview, when the inspector asked, "Where were you on 23 July 1991?" Mr. Reynoso

³¹ JA 512-515.

³² JA 512-515.

³³ JA 1063, 1110-1112.

replied, “In Santo Domingo.” The inspector then asked, “How long were you [in Santo Domingo] for that trip?” Mr. Reynoso replied, “Approximately thirteen days.”³⁴

3. Pedro Reynoso’s trial

a. Commonwealth’s evidence

(1). Sam Wilkerson

Shortly before the shooting, Wilkerson testified he was on the corner of 9th Street and Clearfield Street selling marijuana when he saw Torres and Rivera in Torres’s car. He talked to Torres, who had told him he was going to kill the Dominicans because they had something to do with his brother-in-law, Jose Colon’s, arrest.³⁵ As soon as their conversation ended, Wilkerson saw Papitito drive up next to the passenger’s side of Torres’s car, roll down the driver’s side window, and fire six to eight shots into Torres’s car. He then saw Papitito drive off down 8th Street.³⁶

Wilkerson described Papitito’s car as “medium-sized,” “bluish gray,” “old,” and “bigger than a Honda.”³⁷ He saw three people inside Papitito’s car. He said the Dominican male in the front passenger’s seat was Macho – aka Felo Garcia – and that Macho had also fired shots into Torres’s car. He said the Dominican male in the back

³⁴ JA 535-538.

³⁵ JA 731-733, 789.

³⁶ JA 731-733, 735-736, 806, 825-826.

³⁷ JA 829.

seat was Chuito, but Chuito did not have a gun and therefore did not shoot into Torres's car.³⁸

Wilkerson knew Papitito from the neighborhood, knew he lived on Darien Street, and saw him nearly every day doing his "business" at the "worker house" on Darien Street as well as the house "where they kept the material at." After the shooting, he said he never saw Papitito in the neighborhood again.³⁹

When the prosecutor asked him if he could identify anyone in the courtroom as Papitito, Wilkerson did not identify Mr. Reynoso and said, "No, I can't identify him in here." When the prosecutor asked a similar question, Wilkerson did not identify Mr. Reynoso again and said, "I ain't got to point him out." Wilkerson said he refused to identify Papitito in the courtroom because his brother was working for "one of them."⁴⁰

After trial counsel requested a mistrial and the trial court removed the jury, the prosecutor and trial counsel questioned Wilkerson. With the jury removed, Wilkerson identified Mr. Reynoso as Papitito, said he was "sure" of his identification, and said he refused to make an in-court identification because he did not "want nothing to happen" to him or his brother. He said, however, no one had threatened or coerced him not to make an in-court identification.⁴¹ On cross-examination, outside the jury's presence, Wilkerson admitted that prior to identifying Mr. Reynoso as Papitito moments earlier,

³⁸ Based on information developed after trial, Chuito is Rafael Vidal.

³⁹ JA 738-739.

⁴⁰ JA 734, 739, 740, 741.

⁴¹ JA 745-746, 748, 749, 750.

he had never been shown a photo array or an in-person line-up that included Mr. Reynoso or his photograph, and asked if anyone in the photo array or line-up was Papitito. Thus, he had never identified Mr. Reynoso as Papitito before trial. After the jury returned, Wilkerson identified Mr. Reynoso as Papitito and said he had not identified him earlier because he was concerned about his brother.⁴²

On cross-examination, trial counsel impeached Wilkerson with his July 31, 1991 statement, May 7, 1992 statement, and May 14, 1992 testimony at Felo Garcia's trial.

In his July 31, 1991 statement, Wilkerson said he only saw Papitito shooting and no one else. On direct-examination, though, Wilkerson said he had seen Papitito and Macho shooting. When trial counsel highlighted the inconsistency, Wilkerson said he must have been "nervous" when detectives interviewed him.⁴³

In his July 31, 1991 statement, Wilkerson also said he only saw one gun – a "big black gun."⁴⁴ When Wilkerson informed trial counsel that he told detectives he had seen two guns, trial counsel had Wilkerson view his statement, and then asked him where in his statement two guns are mentioned. Wilkerson agreed that his statement mentioned nothing about seeing two guns. When trial counsel asked why he had failed to mention such an important detail, Wilkerson replied, "I can't recall what I said back there in them days."⁴⁵

⁴² JA 752, 754, 770.

⁴³ JA 805-808, 809.

⁴⁴ JA 508-511.

⁴⁵ JA 830-831.

On cross-examination, Wilkerson said he had told detectives the passenger in back seat of Papitito's car was named Chuito. Wilkerson, though, agreed with trial counsel that Chuito's name appears nowhere in his July 31, 1991 statement. Wilkerson then said he mentioned Chuito's name to detectives before detectives began taking notes and this had to be why Chuito's name appears nowhere in his statement.⁴⁶

Trial counsel also impeached Wilkerson with his testimony from Felo Garcia's trial. Wilkerson said only Papitito shot into Torres's car. He said Macho (Felo Garcia) did not have a gun. Trial counsel showed Wilkerson his testimony from Felo Garcia's trial, where he said Macho had a gun, and asked him why his direct-examination testimony conflicted with his testimony at Felo Garcia's trial. Wilkerson replied, "Maybe I was nervous, sir. Look, you trying to make me look like I'm a liar. For real, I'm going to tell you exactly what happened." When trial counsel asked a similar question a short while later, Wilkerson said, "I can't tell you. I don't remember why."⁴⁷

Trial counsel also impeached him with the fact he had misidentified two other men at the April 1, 1992 line-up. Wilkerson admitted he had misidentified two men but said he had purposely picked the wrong men. According to Wilkerson, just before he was about to view the line-up, two Dominican males, who were "supposed to be

⁴⁶ JA 835-837.

⁴⁷ JA 809-814, 816-817, 826.

going in the line-up,” walked freely into the line-up room where he (Wilkerson) was waiting and asked him if he “want[ed] some money.”⁴⁸

This prompted trial counsel to ask, “People walked from the street into a Philadelphia County prison and had a conversation with an inmate, you, who was going to stand in a line-up; is that what you’re saying?” Wilkerson replied, “Yes, sir.”⁴⁹ When trial counsel asked if he had “reported” the two men to jail officials, Wilkerson replied,

I reported it to my CO. I reported it to my sergeant. I reported it to the police officer from Homicide that was there, and then before the case with Garcia it came up because they thought I was lying about it and they checked it out and they found out that they walked straight on in from out in the street into the prison and came and gave conversation with us.⁵⁰

When trial counsel asked if he had immediately reported these two men to the correctional officer inside the line-up viewing room, Wilkerson said,

The officer was not – when me and Denaro was on the side over there, we was handcuffed, okay? They came right into the visiting room, okay? Now, nobody was supposed to have been coming into the visiting room. We were supposed to pick them out of the line-up. They were supposed to get in the line-[up]. They were supposed to be on the opposite side of the glass. They came in. [The correctional officer] that brought us in was not around us at that time. They were over there by the door and they was talking, having conversations, all right? They [i.e., the two Dominican men] came in and... sat down and then they came over and they

⁴⁸ JA 841.

⁴⁹ JA 843.

⁵⁰ JA 843.

started [talking] to us. They was not allowed to come. They wasn't even supposed to have been in that room with us.⁵¹

Trial counsel followed-up by asking, "So what is the answer to my question?" Wilkerson replied, "I did tell them, sir, after I picked out—I picked one of the persons that came outside, came from the outside and I picked the other guy. I knew who the guy was."⁵² Trial counsel then asked if he had told the detective administering the line-up, who was in the viewing room when these two men supposedly walked in, about what the two men had offered him. Wilkerson said, "No, I did not. I told my CO."⁵³

Still confused, trial counsel asked, "Why didn't you tell Detective Wynn who was conducting the line-up that two people standing in that line[-up] had walked in, offered money and you were scared? Why not?" Wilkerson replied,

What happened was – now, what happened was after we came in... they asked us who we picked. I put down the thing. And then when I walked over to the thing, my CO came over and that's when I told my CO. I said that two of the ones that was in the line-up came over and was talking to us about and was offering money, sir. I did report it, if that is what you want to know.⁵⁴

Trial counsel then impeached Wilkerson with his May 7, 1992 statement. Once Wilkerson reviewed this statement, trial counsel asked, "And you didn't go to the police right after the line-up or the detectives and tell them, listen, I was concerned, people

⁵¹ JA 844.

⁵² JA 844.

⁵³ JA 845.

⁵⁴ JA 845.

offering money, I picked out the wrong people; did you, sir?” Wilkerson replied, “No, I did not.” When trial counsel highlighted the fact he had waited nearly forty days to inform detectives of the line-up incident, Wilkerson admitted he had not immediately contacted detectives, but said, “I reported it to my CO on that day and to... the sergeant at my prison.”⁵⁵

Wilkerson told trial counsel he was not incarcerated on May 7, 1992, when he spoke with detectives regarding the line-up incident. He said he had been out of jail for two weeks before the May 7th interview, which prompted trial counsel to ask why he had not immediately reported the line-up incident to detectives if he felt so concerned and threatened by the incident. Wilkerson replied, “I didn’t think I was going to end up coming back period, at all.”⁵⁶

(2). Sarah Robinson

On July 23, 1991, at 1 p.m., Robinson was selling fake marijuana at the corner of 9th Street and Clearfield Street.⁵⁷ Sometime that afternoon, she saw Carlos Torres (aka Popito) in a car near the intersection of 9th Street and Clearfield Street. She saw Charles Rivera seated in the front passenger’s seat of Torres’s car.⁵⁸ She then saw Torres, seated inside his car, speaking to some people at the corner, including Edgar, Ivan, and Sam Wilkerson. Seconds later, she saw a car swerve around the corner and stop at the

⁵⁵ JA 848-849.

⁵⁶ JA 851.

⁵⁷ JA 964-965.

⁵⁸ JA 1110-1111.

intersection's stop sign. The car was blue with a black vinyl top and tinted back and side windows. She approached the car to see if its occupants wanted to buy marijuana. She said the driver's side window was down, which allowed her to see who was in the front seat. As she neared the car, she saw Papitito in the driver's seat and Marciano in the front passenger's seat. She said Papitito had on glasses.⁵⁹ She did not know if someone was seated in the back seat because the back tinted windows were up. When she saw Papitito, she walked away. She recognized Papitito because she had known him from the neighborhood for a "few years" and saw him "once or twice a day."⁶⁰

A "split second" after seeing saw Papitito in the car, she saw and heard the following:

After I saw [Papitito], he passed past [sic] me, I heard something say pow, pow, pow, and then that's when the passenger – the young guy got shot first, and then when he went to swerve the car out, then another gun came out with holes in it and started shooting again.⁶¹

Robinson then backtracked and said she heard and saw Torres and Papitito arguing immediately before the shooting but said she did not understand their argument because "it was all in Spanish."⁶² After the shooting, she said people in the neighborhood had explained to her what Torres and Papitito had been arguing about. According to Robinson, "Papitito said he was going to kill Popo (Carlos Torres) for

⁵⁹ JA 975.

⁶⁰ JA 938, 941, 942, 943, 944, 945.

⁶¹ JA 940.

⁶² JA 987.

something that he took or something. Something was took [sic].”⁶³ When trial counsel asked, “You didn’t hear any English words spoken; is that correct, just Spanish?” Robinson said she only heard Spanish. When trial counsel asked, “You sure?” Robinson said, “I didn’t hear nothing but they were arguing [in] Spanish. I didn’t know the Spanish part. I didn’t understand it.”⁶⁴

Robinson said she saw two guns “coming out” the driver’s side window of Papitito’s car. The first gun was a “black little gun,” while the second one was “long” and had “holes” in “the barrel.”⁶⁵ She heard “pow, pow” at first, then heard four more shots.⁶⁶ She said Papitito drove “real fast” down Clearfield Street after the shooting.⁶⁷

Robinson identified Papitito as Mr. Reynoso and Marciano as Felo Garcia.⁶⁸ She said she did not see Chuito in Papitito’s car.⁶⁹

Trial counsel impeached Robinson with her July 26, 1991 statement, April 24, 1994 preliminary hearing testimony, and May 13, 1992 testimony from Felo Garcia’s trial.

In her July 26, 1991 statement, Robinson said that after Torres and Marciano (Felo Garcia) had argued, Torres drove around the block twice. The second time

⁶³ JA 988.

⁶⁴ JA 988.

⁶⁵ JA 940, 947.

⁶⁶ JA 946.

⁶⁷ JA 940-941.

⁶⁸ JA 956.

⁶⁹ JA 976.

around, she claimed she heard Marciano yell, “Move everybody off the street, I’m going to catch him on 9th Street, I’m going to kill him.”⁷⁰ On direct-examination, though, she said it was actually Papitito (Mr. Reynoso) and not Marciano (Felo Garcia) who had yelled, “Move everybody off the street, I’m going to catch him on 9th Street, I’m going to kill him.” When trial counsel highlighted this significant discrepancy, Robinson said, “I had the names mixed up.” When trial counsel asked, “Well you knew the different people, correct?” she said, “I know the two separate people, I just didn’t know their names.”⁷¹

In other words, Robinson flipped the names in her July 26, 1991 statement. In her statement, Marciano was the gunman, but she meant to say Papitito. And vice versa. When she said Papitito in her statement, she meant to say Marciano. Thus, Papitito was the non-mustached gunman, while Marciano was the mustached accomplice.⁷²

On direct-examination, Robinson said there were multiple people on the corner the day of the shooting and that she knew some of them, including Edgar, Ivan, and Sam Wilkerson. At the preliminary hearing, though, Robinson said she did not know the people on the street corner. When trial counsel highlighted the inconsistency and

⁷⁰ JA 505-507.

⁷¹ JA 1000.

⁷² JA 990, 1016-1017, 1018-1019, 1025-1028

had her review the preliminary hearing testimony, Robinson said the court reporter must have misheard her.⁷³

Robinson reiterated that she saw into Papitito's car because the front driver's side window was down when it had stopped at the corner stop sign. At Felo Garcia's trial, though, she said she could not see into Papitito's car because the driver's side window was up. When trial counsel highlighted the inconsistency and had her review the testimony, she said the court reporter must have also misheard her again. When trial counsel asked, "The court reporter made another two mistakes?" Robinson replied,

... I mean, somebody get shot in cold blood. I got eyes. I can see. I'm not dumb or stupid or anything like that. I know what I said. I can get upset up here, you can get me upset but you're not going to change my mind. I know what the man did and I saw what he did. Nothing I can do about it. He did it. He did it. Damn. Broad daylight. Now, come on now.⁷⁴

Regarding the argument between Torres and Papitito that preceded the shooting, Robinson testified that Torres had exited his car and confronted Papitito. At Felo Garcia's trial, though, she said neither Torres nor Papitito had exited their cars during the argument.⁷⁵

⁷³ JA 968-970.

⁷⁴ JA 976-977.

⁷⁵ JA 1001-1002.

On direct-examination, Robinson said she arrived at the corner of 9th Street and Clearfield Street in the early morning. At Felo Garcia's trial, though, she said she had woken-up at 1 p.m. and went directly to the corner. When trial counsel questioned her about the discrepancy, she again said the court reporter must have misheard her.⁷⁶

On direct-examination, Robinson said she never saw anyone in Papitito's car give Papitito a gun. At Felo Garcia's trial, though, she said the opposite.⁷⁷

Robinson also admitted she had consumed a "cap" of crack shortly before the shooting. At Felo Garcia's trial, though, Robinson denied taking any drugs, including cocaine and marijuana, before the shooting, but said she used cocaine after the shooting. When trial counsel asked her why she had testified differently at Felo Garcia's trial, Robinson said her memory at the time, *i.e.*, May 1992, was not as good as it was now, *i.e.*, June 1996.⁷⁸

On direct-examination, Robinson said she did not know Charles Rivera. In her July 26, 1991 statement, though, she said she had known Carlos Torres and Charles Rivera for two years.⁷⁹ When trial counsel showed her the statement, she said, "I didn't say I knew both of them." When trial counsel noted her signature on the statement, she denied it was her signature.⁸⁰

⁷⁶ JA 956-958.

⁷⁷ 1005-1006 (quoting NT, Garcia Trial, 5/13/1992, p. 176). Counsel has been unable to obtain a copy of Felo Garcia's trial transcripts.

⁷⁸ JA 595-562.

⁷⁹ JA 988 (quoting JA 505-507).

⁸⁰ JA 989-990.

On direct-examination, Robinson said Papitito drove off after the initial argument with Torres. At the April 24, 1994 preliminary hearing, though, Robinson said she saw Papitito walk into a house on Darien Street after the argument.⁸¹ When trial counsel asked about the discrepancy, she said, “I didn’t understand what you were saying.” Robinson then changed her testimony and said she had, in fact, seen Papitito walk into the house on Darien Street after the initial argument.⁸²

In her July 23, 1991 statement, Robinson said she heard Marciano (*i.e.*, Papitito) yell, in English, “I’m going to kill you” to Torres. When trial counsel asked if this aspect of her statement was true, she said no because she did not speak or understand Spanish and said detectives had told her what Marciano (*i.e.*, Papitito) had said to Torres.⁸³

At the April 24, 1994 preliminary hearing, Robinson said she did not speak Spanish, but said because her sister spoke Spanish and was with her at the time of the shooting, her sister had told her what Marciano (*i.e.*, Papitito) and Torres had argued about. At trial, when trial counsel confronted her with her preliminary hearing testimony, she again claimed the court reporter must have “made up” this part of her testimony.⁸⁴

⁸¹ JA 1000 (quoting NT, Prelim. Hrg., 4/21/1994, p. 26).

⁸² JA 1002.

⁸³ JA 990-991.

⁸⁴ JA 991-993.

In her July 26, 1991 statement, Robinson had described Papitito's car as tan with a beige top. On direct-examination, though, she had described Papitito's car as blue with a black top. When trial counsel identified the inconsistency, Robinson denied telling detectives that Papitito's car was tan with a beige top, alleged that detectives had changed her statement, and said she had told detectives Torres's car was tan with a beige top, not Papitito's.⁸⁵

On direct-examination, Robinson denied she had a bench warrant out for her arrest on July 23, 1991. At Felo Garcia's trial, though, she said she had a bench warrant pending against her and this was why she had refused to talk with detectives on July 23, 1991. When trial counsel confronted her with her testimony from Felo Garcia's trial, she admitted that there was a bench warrant for her arrest on July 23, 1991 and this was why she initially refused to speak with detectives.⁸⁶

Trial counsel asked, "[A]fter you testified against Mr. Garcia you got out of jail, right?" Robinson said, "Yes."⁸⁷ At the time of her testimony in May 1992, she had an "open" auto theft charge. Robinson, though, said the Commonwealth did not promise her "anything in that particular case" to entice her to testify against Felo Garcia or Mr. Reynoso. Her next court date for the 1992 auto theft charge, though, was set for August

⁸⁵ JA 1016-1021.

⁸⁶ JA 971-974.

⁸⁷ JA 980.

28, 1996, two months after she had testified against Mr. Reynoso, and her case was dismissed at that court date.⁸⁸

(3). Elaine Wooten

The Commonwealth seized Mr. Reynoso's passport, which contained two Dominican Republic stamps indicating he had entered the Dominican Republic on July 13, 1991 and departed on July 27, 1991.⁸⁹ The shooting occurred on July 23, 1991.

On June 5, 1996, three weeks before trial, the Commonwealth sent his passport to the INS lab and asked it to examine all the date stamps to determine if any were counterfeit.⁹⁰ Elaine Wooten examined the passport, including the July 13th and July 27th stamps.⁹¹ Wooten received the request on June 5, 1996, examined the passport on June 5th and 6th, and memorialized her findings and opinions in a June 6, 1996 report.⁹² In her report, she opined that the 27 Jul 1991 stamp, *i.e.*, the #51 travel cachet, did "not conform to genuine specimens at the INS/FDL and was found to be counterfeit."⁹³ In regards to the 13 Jul 1991 stamp, *i.e.*, the #66 travel cachet, Wooten reported it "was not possible to make a determination regarding" its "genuineness" because the

⁸⁸ JA 946-947.

⁸⁹ JA 854.

⁹⁰ JA 854-855, 888.

⁹¹ JA 867-868.

⁹² JA 853, 888-889.

⁹³ JA 583.

“INS/FDL reference collection does not contain specimens from these stamping devices.”⁹⁴

At trial, Wooten said that before examining the passport, she knew Mr. Reynoso had proffered it as alibi evidence, but she denied knowing what date stamps represented the alibi dates.⁹⁵ On cross-examination, though, Wooten said she knew Mr. Reynoso’s arrest date to be March 23, 1994, which prompted trial counsel to ask, “How did you learn that if you didn’t know the dates of alibi?” After the prosecutor objected, trial counsel rephrased the question and Wooten claimed that an “Immigration person” had told her about Mr. Reynoso’s arrest date, but only after she had completed her examination and report.⁹⁶

Wooten said of all the date stamps in Mr. Reynoso’s passport, she only identified one as being counterfeit – the 27 Jul 1991 stamp, *i.e.*, the #51 travel cachet.⁹⁷ On cross-examination, though, Wooten, conceded that the INS lab did not have an identical sample of the passport stamp the Dominican Republic used in 1991.⁹⁸ Wooten also admitted that once she had concluded that the 27 Jul 1991 date stamp was counterfeit, she never contacted the Department of State in the Dominican Republic to have Dominican officials and experts examine what she believed to a counterfeit Dominican

⁹⁴ JA 583.

⁹⁵ JA 886.

⁹⁶ JA 902-903.

⁹⁷ JA 878-885.

⁹⁸ JA 895.

Republic date stamp.⁹⁹ When trial counsel asked why she did not contact Dominican officials, Wooten said,

Wooten: Because the stamp is no longer in service so they couldn't compare it to the genuine stamp.

Counsel: Are you saying that in your opinion the Dominican authorities would not be able to render an opinion to this country whether or not the suspect listing of 27 July 1991, was genuine or whether it was counterfeit because the stamp is no longer in service? Is that what you're saying?

Wooten: If they don't have the stamp I'm not sure what they would compare it with.

Counsel: You don't have the stamp either, do you?

Wooten: No, I don't have the stamp.¹⁰⁰

b. Pedro Reynoso's two alibi witnesses

(1) Martha Alamonte

Martha Alamonte testified and said she has known Mr. Reynoso since birth. She knew his family and first met him shortly after his birth in the Dominican Republic.¹⁰¹ She moved to Philadelphia in 1980. Once a year, her and her husband traveled to the Dominican Republic to visit her mother. In 1991, she flew to the Dominican Republic on July 13, 1991 with her husband, Miguel, and Mr. Reynoso. They had a layover in San Juan, Puerto Rico before flying into Santo Domingo on July 13, 1991. She said

⁹⁹ JA 907.

¹⁰⁰ JA 908.

¹⁰¹ JA 1144-1147.

they ran into Father Ramon Alejo de la Cruz at the San Juan airport and that Father de la Cruz was also flying to Santo Domingo. Father de la Cruz flew from San Juan to Santo Domingo with her, Miguel, and Mr. Reynoso. She and Miguel stayed in the Dominican Republic until August 2, 1991. She produced her passport which had Dominican Republic entry and exit date stamps of July 13, 1991 and August 2, 1991.¹⁰²

She said her and Mr. Reynoso's family are from a small town called Pimentel and that Mr. Reynoso's family lived behind the lone church in Pimentel. She said she saw Mr. Reynoso every day during her trip, including July 23, 1991, because she had frequently visited with Mr. Reynoso's family during her trip, including Mr. Reynoso's mother who was sick at the time. Martha recalled Mr. Reynoso's family celebrating Juan Alexander's baptism while they were in the Dominican Republic and said she did not see or hear about Mr. Reynoso leaving the Dominican Republic on or before July 23, 1991 and returning shortly thereafter. She was sure Mr. Reynoso was in the Dominican Republic on July 23, 1991.¹⁰³

(2) Father Ramon Alejo de la Cruz

Father Ramon Alejo de la Cruz testified and said he lives Bariba, Dominican Republic, which is twenty-two kilometers from Pimentel. He was born in Pimentel and was Pimentel's priest at St. John's the Parish from 1990 to 1995. He said he had known

¹⁰² JA 1146-1151, 1152, 1168-1169.

¹⁰³ JA 1151-1156, 1158.

Mr. Reynoso since he (Mr. Reynoso) was a child because their families are both from Pimentel.¹⁰⁴

In 1991, he went on a 50-day vacation to Puerto Rico. On July 13, 1991, the day he flew back to Santo Domingo from San Juan, he ran into Mr. Reynoso and Martha and Miguel Alamonte at the San Juan Airport. He talked with them at the airport before taking the same flight back to Santo Domingo with them. He produced his passport which had a Dominican Republic stamp date of July 13, 1991.¹⁰⁵

On July 19, 1991, Mr. Reynoso and his wife visited him at the church and had asked him to baptize Juan Alexander. He declined their request because of his schedule, but had Father Dionisio perform the baptism on July 27, 1991, which he attended. He produced the baptism certificate that identified the baptism date as July 27, 1991. Trial counsel, though, did not enter the baptism certificate as a substantive exhibit.¹⁰⁶

Besides seeing Mr. Reynoso on July 19, 1991 and July 27, 1991, Father de la Cruz saw him several times between July 13th and July 27th.¹⁰⁷ On July 17, 1994, after Mr. Reynoso's arrest, he wrote a letter to detectives informing them that Mr. Reynoso could not have been involved in the July 23, 1991 shooting because he was in the Dominican Republic at the time.¹⁰⁸

¹⁰⁴ JA 1177-1180.

¹⁰⁵ JA 1181.

¹⁰⁶ JA 1184-1187.

¹⁰⁷ JA 1187-1192.

¹⁰⁸ JA 1194-1196.

Trial counsel had also obtained and knew of multiple documents and photographs that placed Mr. Reynoso in the Dominican Republic between July 13, 1991 through July 27, 1991, but he did not present these documents and photographs at trial: (1) a July 17, 1991 property contact,¹⁰⁹ (2) the July 27, 1991 baptism certificate,¹¹⁰ (3) the baptism photographs that show Mr. Reynoso's thick mustache,¹¹¹ (4) Mr. Reynoso's gun permit paperwork that Dominican officials had approved and signed on July 30, 1991,¹¹² (5) a copy of Mr. Reynoso's American Airlines ("AA") ticket stubs for his July 13, 1991 flights from Philadelphia to San Juan and from San Juan to Santo Domingo,¹¹³ and (6) the letter AA had mailed to Mr. Reynoso apologizing for the delayed take off of his flight from Philadelphia to San Juan on July 13, 1991.¹¹⁴

The jury convicted Mr. Reynoso of first-degree murder.

4. Direct appeal

Mr. Reynoso appealed. In his opening brief, he alleged, *inter alia*, trial counsel was ineffective for failing to interview and call an eyewitness named Edward Sanchez.¹¹⁵ On August 27, 1991, a month after the shooting, detectives interviewed Sanchez, who said a man named Chuito was the gunman. Sanchez's statement was part of the

¹⁰⁹ JA 551-552.

¹¹⁰ JA 553.

¹¹¹ JA 554-555.

¹¹² JA 556-557.

¹¹³ JA 558-562.

¹¹⁴ JA 558-562.

¹¹⁵ JA 292-314.

discovery provided to trial counsel, but trial counsel did not interview or present Sanchez as a defense witness.¹¹⁶ On September 14, 1998, the Pennsylvania Superior Court issued its opinion and said had Sanchez testified, his testimony would not have changed the outcome of Mr. Reynoso's trial because his testimony would have been "cumulative" of Martha Alamonte's and Father de la Cruz's testimony.¹¹⁷ On April 29, 1999, the Pennsylvania Supreme Court denied Mr. Reynoso's discretionary appeal.

5. Initial-review PCRA petition

a. PCRA court

On March 7, 2000, Mr. Reynoso filed a timely *pro se* initial-review PCRA petition.¹¹⁸ He completed and filed the standard "Motion for Post Conviction Collateral Relief" form distributed by the Pennsylvania Department of Corrections. In the "I am eligible for relief" section, Mr. Reynoso checked off the following boxes:

¹¹⁶ JA 292-314.

¹¹⁷ JA 315-322.

¹¹⁸ JA 342-350.

4. I AM ELIGIBLE FOR RELIEF BECAUSE OF:

- (I) A violation of the constitution of Pennsylvania or laws of this Commonwealth or the constitution of the United States which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (II) Ineffective assistance of counsel which, in the circumstances of the particular case, so undermined the truth-determining process that no reliable adjudication of guilt or innocence could have taken place.
- (III) A plea of guilty unlawfully induced where the circumstances make it likely that the inducement caused an individual to plead guilty.
- (IV) The improper obstruction by Commonwealth officials of the petitioner's right of appeal where a meritorious appealable issue existed and was properly preserved in the trial court.
- (V) A violation of the provisions of the constitution, law or treaties of the United States which would require the granting of federal habeas corpus relief to a state prisoner.
- (VI) The unavailability at the time of trial of exculpatory evidence that has subsequently become available and that would have affected the outcome of the trial if it had been introduced.

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On the next page, he raised the following state and federal claims:

¹¹⁹JA 343.

5. THE FACTS IN SUPPORT OF THE ALLEGED ERROR(S) UPON WHICH THIS MOTION IS BASED ARE AS FOLLOWS: (State facts clearly and fully; argument, citations, or discussions of authorities shall not be included.)

(A) I know the following facts to be true of my own personal knowledge:

Issue 1. The verdict convicting appellant was against the weight of the evidence presented at trial.

Issue 2. Trial counsel was ineffective for failing to subpoena witnesses with relevant information.

Issue 3. Ineffective assistance of counsel for failure to call, interview, and investigate potential alibi witnesses.

Issue 4. Violation of 6th Amendment Constitution of the U.S. the right to enjoy to effective Assistance of counsel.

Issue 5. Trial counsel was ineffective for withholding exculpatory document, affidavits, thus is in violation of Due Process clause.

Issue 6. Violation of 14th amendment of U.S. Constitution, due counsel ineffectiveness.

Issue 7. Trial Judge erred by admitting Samuel Wilkerson as eye/witness to the stand in favorable of the commonwealth/when prosecutor lead the witness by finger pointing to the defendant, and instructing him to tell the jury if defendant was Mr. Reynoso.

Issue 8. Miscarriage of justice occurred when the commonwealth used false testimony to obtain conviction.

Issue 9. Possession of instrument of crime.

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In the "Because of the Forgoing Reasons, the Relief Which I Desire" section, Mr. Reynoso said:

10. BECAUSE OF THE FOREGOING REASONS, THE RELIEF WHICH I DESIRE IS:

(A) Release from custody and discharge

(B) A new trial

(C) Correction of sentence

(D) Other relief (specify): Constitutional violation 6th & 14th amendment, Withholding

exculpatory evidence and other documents, as well refusing to interview and call potential Witnesses.

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¹²⁰ JA 344.

¹²¹ JA 346.

At the time of Mr. Reynoso's direct appeal, defendants had to raise trial counsel ineffectiveness claims in the first instance after they had retained or were appointed new counsel. Mr. Reynoso received new counsel on direct appeal, meaning appellate counsel had to raise any trial counsel ineffectiveness claims on direct appeal. *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977).¹²² Direct appeal counsel raised a trial counsel ineffectiveness claim regarding Edward Sanchez, but not regarding the additional alibi witnesses and other evidence of innocence trial counsel had failed to present.

Thus, if Mr. Reynoso wanted merits review of his trial counsel ineffectiveness claim during his initial-review PCRA proceedings, he had to raise a direct appeal counsel ineffectiveness claim, alleging direct appeal counsel failed to litigate a meritorious trial counsel ineffectiveness claim. Issues 3 and 6 in his PCRA petition make clear he challenged trial and direct appeal counsel's advocacy because he referenced the Sixth and Fourteenth Amendments.¹²³ The Fourteenth Amendment guarantees a defendant effective direct appeal counsel. *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985).

¹²² The Pennsylvania Supreme Court changed this requirement in 2002. *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002).

¹²³ Although Mr. Reynoso did not use the phrase "ineffective assistance" of "appellate" or "direct appeal" counsel in his PCRA petition, a competent Pennsylvania post-conviction litigator in 2000 would have quickly realized that the interplay between Issue 3, Issue 6, and *Hubbard* fairly presented an appellate counsel ineffectiveness claim. Moreover, federal and state courts liberally construe *pro se* pleadings. *Higgs v. Att'y Gen.*, 655 F.3d 333, 339 (3d Cir. 2011) ("The obligation to liberally construe a *pro se* litigant's pleadings is well-established."); *Commonwealth v. Maris*, 629 A.2d 1014, 1017 n.1 (Pa. Super. 1993) (same). In *Haines v. Kerner*, 404 U. S. 519, 520 (1972), the Supreme Court

Shortly before and after filing his PCRA petition, Mr. Reynoso obtained the abovementioned affidavits from the eight additional alibi witnesses to prove his trial and appellate counsel ineffectiveness claims.

1. Eunice De La Rosa Cabreja provided a notarized affidavit on June 1, 2000.¹²⁴ In her affidavit, she averred (1) that she has known Mr. Reynoso for “several years” and is Juan Alexander’s godmother, (2) that she is “certain” Mr. Reynoso was in the Dominican Republic on July 23, 1991 as well as the preceding days with his wife, Catalina Roman, because she had “constant person contact” with both on these days, that (3) she attended Juan Alexander’s July 27th baptism in Pimentel, and (4) had trial counsel asked, she would have testified.

2. Dr. Jose Javier Bueno provided a notarized affidavit on June 8, 2000.¹²⁵ In his affidavit, he averred (1) that he has known Mr. Reynoso for “many years” because he was neighbors with his family in Pimentel, (2) that he was in Pimentel on July 23, 1991, (3) that he saw Mr. Reynoso in Pimentel on July 23, 1991 and several days thereafter, (4) that he attended Juan Alexander’s July 27th baptism, (5) that the photographs taken at the baptism were taken by him, and (6) had trial counsel asked, he would have testified.

instructed judges to hold *pro se* complaints “to less stringent standards than formal pleadings drafted by lawyers.”

¹²⁴ JA 543-546.

¹²⁵ JA 541-542.

3. Luis Ernesto Romano Caba provided a notarized affidavit on May 29, 2000.¹²⁶

In his affidavit, he averred (1) that Mr. Reynoso is his brother-in-law, (2) that he has known him for “many years,” (3) that he had “personal contact” with him in the Dominican Republic every day from July 14, 1991 through July 23, 1991 and beyond, and (4) had trial counsel asked, he would have testified.

4. Ernesto Roman provided a notarized affidavit on May 29, 2000.¹²⁷ In his affidavit, he averred (1) that Mr. Reynoso is his son-in-law because he married his daughter Catalina Roman, (2) that he has known Mr. Reynoso for “many years,” (3) that Mr. Reynoso, Catalina, and Juan Alexander were at his Pimentel home twice on July 23, 1991, (4) that Mr. Reynoso and his family had visited him twice-a-day in the days preceding July 23, 1991, (5) that he was with Mr. Reynoso on July 23, 1991 at Mr. Reynoso’s newly purchased piece of land he had bought from Miguel Alamonte on July 17, 1991, and (6) had trial counsel asked, he would have testified.

5. Minerva Reynoso provided a notarized affidavit on April 10, 2000.¹²⁸ She averred (1) that she is Mr. Reynoso’s sister, (2) that on July 13, 1991 her, her husband Angel Rondon, Catalina Roman, and Juan Alexander, met Mr. Reynoso at the Santo Domingo airport, (3) that when Mr. Reynoso landed on July 13, 1991, he was with

¹²⁶ JA 539-540.

¹²⁷ JA 545-546. Trial counsel knew of Ernesto Roman because he is Mr. Reynoso’s father-in-law and Mr. Reynoso told trial counsel Ernesto Roman could vouch for his whereabouts on July 23, 1991.

¹²⁸ JA 547.

Martha and Miguel Alamonte and Father de la Cruz, (4) that between July 13, 1991 to July 21, 1991 she was with Mr. Reynoso and his family “all the time,” (5) that she left the Dominican Republic on July 21, 1991, but after returning to the United States, she spoke with Mr. Reynoso via the telephone everyday thereafter, including July 23, 1991, (6) trial counsel interviewed her before trial, but did not subpoena her as a witness, and (7) had trial counsel asked, she would have testified.

6. Angel Maria Rondon provided a notarized affidavit on April 10, 2000.¹²⁹ He averred that (1) Mr. Reynoso has been his brother-in-law for twenty-five years, (2) that on July 13, 1991 he, Minerva Reynoso, Catalina Roman, and Juan Alexander met Mr. Reynoso at the Santo Domingo airport, that (3) when Mr. Reynoso landed on July 13, 1991, he was with Martha and Miguel Alamonte and Father de la Cruz, (4) that on July 23, 1991, he was with Mr. Reynoso at Mr. Reynoso’s residence, which is Calle Leon de la Mota #5, Pimentel, Dominican Republic, (5) that between July 13, 1991 and July 23, 1991, he and Mr. Reynoso “were in constant contact” with one another “in person and by phone” because they “lived in the same house during [this] time,” (6) that trial counsel interviewed him before trial and he told trial counsel he would testify on Mr. Reynoso’s behalf, (7) that he attended Mr. Reynoso’s trial with the intent of testifying on Mr. Reynoso’s behalf, and (8) had trial counsel asked, he would have testified.

¹²⁹ JA 548. Trial counsel knew about Angel Maria Rondon because she testified at Mr. Reynoso’s trial as a character witness. JA 1141-1143.

7. Miguel Alamonte provided a notarized affidavit on April 10, 2000.¹³⁰ He averred (1) that on July 13, 1991, he, Martha, and Mr. Reynoso flew from Philadelphia to the Dominican Republic on an AA flight, (2) that they had a layover in San Juan before they arrived in the Dominican Republic on July 13, 1991, (3) that on July 17, 1991, he, Mr. Reynoso, and Mr. Reynoso's wife went to Dr. Jose Javier Bueno's office so he (Miguel) could sell Mr. Reynoso the "property rights" to "Santos Serrano" a property in Pimentel, (4) that between July 13, 1991 and July 23, 1991, he was "in constant contact" with Mr. Reynoso "over the phone and in person," (5) that two detectives had questioned him before trial, and (6) had trial counsel asked, he would have testified.

8. Catalina Roman Caba provided a notarized affidavit on February 18, 2000.¹³¹ She averred (1) that she is Mr. Reynoso's wife, (2) that they have two sons, (3) that on July 13, 1991 her, Minerva Reynoso, Angel Maria Rondo, and Juan Alexander met Mr. Reynoso at the Santo Domingo airport, (4) that when Mr. Reynoso landed in Santo Domingo, he was with Martha and Miguel Alamonte, (5) that on July 23, 1991, she, Mr. Reynoso, Juan Alexander, and other relatives and friends spent most of the day at their Pimentel house, located at Leon de la Mota No. 5, (6) that on July 27, 1991 she and Mr.

¹³⁰ JA 549. Trial counsel knew about Miguel Alamonte because trial counsel had called Martha as an alibi witness at trial.

¹³¹ JA 539-540.

Reynoso baptized Juan Alexander, and (7) had trial counsel asked, she would have testified.

Collectively, then, by the time Mr. Reynoso filed and began litigating his initial-review PCRA petition, ten people had come forward and either testified under oath or averred under penalty of perjury that Mr. Reynoso was in the Dominican Republic between July 13, 1991 and July 27, 1991, with several specifically saying they had seen him or had been with him in the Dominican Republic on July 23, 1991.

Mr. Reynoso obtained the eight affidavits to prove his trial counsel and appellate counsel ineffectiveness claims. However, Mr. Reynoso's appointed initial-review PCRA attorney, MaryAnn Swift, never incorporated these affidavits into a counseled amended PCRA petition, and she never even presented them to the PCRA court. Instead, Swift filed a *Finley*/no-merits letter on May 29, 2001,¹³² wherein she mistakenly concluded Mr. Reynoso had already litigated the following claims on direct appeal:

Issue 1. The verdict was against the weight of the evidence presented at trial.

Issue 2. Trial counsel was ineffective for failing to subpoena witnesses with relevant information.

Issue 3. Ineffective assistance of counsel for failure to call, interview, and investigate potential alibi witnesses.

Issue 7. The trial judge erred by admitting Samuel Wilkerson as an eye-witness when the prosecutor led the witness by finger pointing to the defendant, and instructing him to tell the jury if defendant was Mr. Reynoso (sic).

¹³² *Pennsylvania v. Finley*, 481 U.S. 551 (1987); JA 351-356.

Issue 8. Miscarriage of justice occurred when the Commonwealth used false testimony to obtain conviction [sic].¹³³

Mr. Reynoso never raised Issue 3 on direct appeal, as Edward Sanchez was an eyewitness to the shooting, not an alibi witness. The remaining claims, as Swift correctly noted, were ineffectiveness claims:

Issue 4. Violation of 6th Amendment Constitution of the U.S. [sic], the right to enjoy effective assistance of counsel.

Issue 5. Trial counsel was ineffective for withholding exculpatory documents and affidavits and for not presenting them at trial.

Issue 6. Violation of 14th amendment of U.S. Constitution [sic], due to counsel ineffectiveness.

Swift, though, erroneously construed Issues 4, 5, and 6 as only raising *trial* counsel ineffectiveness claims, not trial *and* appellate counsel ineffectiveness claims. Thus, based on Swift's misinterpretation of Mr. Reynoso's ineffectiveness claims, she mistakenly concluded Issues 4, 5, and 6 had been waived as a result of *Hubbard*.

Swift wrote:

¹³³ JA 345.

Petitioner's remaining issues (4, 5, 6) allege claims of ineffectiveness of counsel. The claims turn on allegations of error of trial counsel where petitioner has not indicated that issues 4 and 6 may refer to subsequent appellate counsel Meehan. Petitioner does not allege that he is eligible for relief under 42 C.S. 9543(3) or (4) and therefore these issues are waived under 42 C.S. 9544 (b) since petitioner could have raised these issues—both specific (5) and unspecific (4, 6) on his initial direct appeal where he had new counsel Meehan.

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The PCRA court, which is the sole fact-finding court in Pennsylvania, never considered the eight alibi affidavits, nor made factual or credibility findings regarding these witnesses. Instead, the PCRA court summarily dismissed Mr. Reynoso's PCRA petition without a hearing.¹³⁵

b. Initial-review PCRA appeal

During his initial-review PCRA appeal, Mr. Reynoso's appointed attorney, Jack McMahon, attached the eight affidavits to Mr. Reynoso's opening brief. McMahon argued trial counsel was ineffective for failing to present these witnesses and direct appeal counsel was ineffective for not litigating this meritorious trial counsel ineffectiveness claim on direct appeal.¹³⁶ Although admirable, McMahon's belated incorporation of the affidavits was futile for two reasons.

¹³⁴ JA 355.

¹³⁵ JA 357, 360-362.

¹³⁶ JA 363-378.

First, under state law, appellate counsel may not refer to evidence – or attach evidence to the defendant’s opening brief – that is not part of the certified record. *Commonwealth v. Martz*, 926 A.2d 514, 524-525 (Pa. Super. 2007). Consequently, “[m]aterials that have only been included in briefs, but are not part of the record cannot be considered.” *Commonwealth v. McBride*, 957 A.2d 752, 757-758 (Pa. Super. 2008). *Second*, fact-finding responsibilities vest with the Common Pleas Courts, *i.e.*, the PCRA court, not with the Pennsylvania Superior Court or Supreme Court, meaning the state appellate courts cannot make factual or credibility findings. *Commonwealth v. Young*, 748 A.2d 166, 194 (Pa. 2000).

On November 12, 2002, the Pennsylvania Superior Court affirmed. Despite the fact the eight affidavits were not part of the certified record, the Superior Court considered them and found them to be “cumulative” to Martha Alamonte’s and Father de la Cruz’s trial testimony. Based on this cumulateness finding, the Superior Court said Mr. Reynoso was not prejudiced by the absence of these eight alibi witnesses.¹³⁷

Mr. Reynoso had until December 12, 2002 to petition the Pennsylvania Supreme Court for discretionary review. He did not, and by not doing so, 28 U.S.C. § 2244(d)(1)’s 1-year limitations period began to run once again on December 12, 2002. Based on the March 7, 2000 filing of his *pro se* PCRA petition, Mr. Reynoso had 142

¹³⁷ JA 379-384.

days remaining or until May 4, 2003 to file a timely federal petition. He did not file a federal petition on or before May 4, 2003.

6. Second and third PCRA petitions

In August 2006, after he and his family had learned that Sarah Robinson may be willing to recant her testimony, Mr. Reynoso hired Michael Farrell for \$25,000 to interview Robinson and, potentially, file a successive PCRA petition if she recanted. Mr. Reynoso also hired Farrell to interview Sam Wilkerson to see if he too had any information beneficial to Mr. Reynoso. From 2006 to 2010, though, Farrell did nothing, despite countless letters from Mr. Reynoso imploring him to interview Robinson and Wilkerson.¹³⁸ Farrell's lack of communication and action forced Mr. Reynoso to seek assistance from the Pennsylvania Disciplinary Board ("PDB").¹³⁹ Once the PDB admonished Farrell, he finally interviewed Robinson on October 1, 2010.¹⁴⁰

¹³⁸ JA 614-679.

¹³⁹ JA 83-87, 637-658. Michael Farrell, notably, is now serving a 42-month federal prison sentence. A federal jury convicted Farrell on February 2, 2017 for money laundering, witness tampering, and obstruction of official proceedings in connection with his activities on behalf of a drug trafficking organization. <https://www.justice.gov/usao-md/pr/philadelphia-attorney-sentenced-42-months-prison-laundering-drug-proceeds-and-witness> (last visited February 3, 2019).

¹⁴⁰ The facts regarding Farrell's ineptness, tardiness, and complete lack of communication are thoroughly briefed in Mr. Reynoso's amended 2254 petition and spelled out in greater detail in Mr. Reynoso's numerous letters to Farrell – which are included in the joint appendix. JA 76-111, 614-679. The point being is Farrell prevented Mr. Reynoso from presenting three substantial witnesses to the state courts: Sarah Robinson, Marisol Colon-Torres, and Jose Colon.

On November 22, 2010, Farrell filed Mr. Reynoso's second PCRA petition,¹⁴¹ which he based on Sarah Robinson's October 1, 2010 recantation identifying Mr. Reynoso as the Papidito (the gunman).¹⁴² Robinson, moreover, also identified Chuito – aka Rafael Vidal – as the gunman. On November 15, 2011, the PCRA court dismissed the petition without holding a hearing, finding that Mr. Reynoso had not diligently obtained Robinson's recantation.¹⁴³ Mr. Reynoso did not appeal the dismissal.

On November 21, 2011, Farrell filed Mr. Reynoso's third PCRA petition,¹⁴⁴ which he based on Sam Wilkerson's September 24, 2011 recantation identifying Mr. Reynoso as the gunman. Wilkerson, moreover, also identified Chuito – aka Rafael Vidal – as the gunman. On March 2, 2012, Mr. Reynoso supplemented his third PCRA petition by attaching a March 1, 2012 handwritten statement from Wilkerson memorializing his verbal recantation.¹⁴⁵

On August 2, 2013, Mr. Reynoso supplemented his third PCRA petition again by attaching affidavits from Marisol Colon-Torres and Jose Colon, both of whom identified Chuito – aka Rafael Vidal - as the gunman. Marisol's affidavit is dated July 21, 2011,¹⁴⁶ while Jose's is dated July 1, 2011.¹⁴⁷ Farrell, therefore, had both affidavits

¹⁴¹ JA 385-395.

¹⁴² JA 564-571.

¹⁴³ JA 99-101.

¹⁴⁴ JA 396-409.

¹⁴⁵ JA 572-574.

¹⁴⁶ JA 580-583.

¹⁴⁷ JA 575-579.

before the PCRA court dismissed Mr. Reynoso's second PCRA petition, and before he filed Mr. Reynoso's third PCRA petition, but Farrell waited two years to present their affidavits to the PCRA court. Under 42 Pa. C.S. § 9545(b)(2), Farrell had only 60 days from July 21, 2011 and July 1, 2011, respectively, to present these affidavits to the PCRA court.

Marisol is Carlos Torres's sister. In her notarized affidavit,¹⁴⁸ she averred (1) that on July 4, 2011, while visiting her husband, Jose, at SCI-Graterford, she spoke with Mr. Reynoso and "informed him" she and Jose "had information" regarding his "innocence" – information they had provided to detectives, but which detectives did nothing with, (2) that on July 23, 1991, she was inside her 3045 North Darien Street home when police came to her house looking for Jose for an alleged robbery of an ice cream truck, (3) that Chuito had the drug corner on the same block the robbery had occurred, (4) that Chuito confronted her at her house and asked why the police had been on "his block" looking for Jose, (5) that Chuito had told her the increased police presence on "his block" was impacting his drugs money, (6) that Chuito returned to her house later with the police, resulting in Jose's arrest, (7) that after police had arrested Jose, Chuito told her he had Jose arrested because Jose had been involved in robbing his drug house, (8) that Chuito also told her he knew Carlos "had recently robbed the drug house and that he would kill him," (9) that after Chuito threatened to kill Carlos,

¹⁴⁸ JA 580-583.

she went to Darien Street and Clearfield Street in search of Carlos to tell him about Chuito's death threat, (10) that as she walked toward Darien Street and Clearfield Street, she "heard gunshots and saw Chuito in a car pulling away," (11) that shortly after the shooting, she saw Chuito "at the drug house" and asked him why he had killed Carlos, (12) that Chuito replied, "Don't worry about it. I did you a favor," (13) that when "police questioned" her after the shooting, she told them Chuito had shot Carlos, (14) that after identifying Chuito as the gunman, she "never heard anything more" from detectives, and (15) that she had not seen Mr. Reynoso for at least a week before the shooting.

Jose Colon is Carlos Torres's brother-in-law and Marisol's husband. In his affidavit,¹⁴⁹ he averred that (1) he had known Mr. Reynoso "for a few years" before the shooting, (2) that on the morning of the shooting he and Carlos Torres had robbed an ice cream truck, (3) that after the robbery, he went and hid in their Darien Street house, (4) that Chuito had a "drug corner" on the same block the ice cream truck was on, (5) that once Chuito learned he and Torres had robbed the ice cream truck, Chuito took the police to his house and had him arrested, (6) that Chuito did this because he did not like the increased police presence on his drug corner, (7) that while in custody for the ice cream truck robbery, an officer informed him that Carlos had been shot and killed, (8) that upon learning of Carlos's death, he immediately suspected Chuito was

¹⁴⁹ JA 575-579.

responsible, and (9) that before his arrest on July 23, 1991, he had not seen Mr. Reynoso in the neighborhood.

The PCRA court refused to consider Marisol's and Jose's affidavits and refused to permit them to testify at a PCRA hearing because Farrell had filed them well beyond the PCRA's 60-day rule. 42 Pa. C.S. § 9545(b)(2).¹⁵⁰ The PCRA court, though, held an evidentiary hearing on August 13, 2013 where Sam Wilkerson testified.

At the PCRA hearing, Wilkerson identified Chuito – aka Rafael Vidal – as the gunman. Wilkerson said he identified Mr. Reynoso as the gunman because detectives told him they had identified Mr. Reynoso as the shooter, so he went along with what the detectives had told him.¹⁵¹ He said he would have identified the shooter by any name the detectives gave him.¹⁵² He also said detectives never showed him a photograph of Mr. Reynoso before trial.¹⁵³ He said he was afraid of Chuito because he had a reputation for being dangerous and shooting people: “Chuito was the boss, as in serious as the boss. So nobody really would have wanted to say anything [against him].”¹⁵⁴

¹⁵⁰ JA 102-109.

¹⁵¹ JA 1380, 1382.

¹⁵² JA 1382.

¹⁵³ JA 1381.

¹⁵⁴ JA 1382.

Wilkerson also said his July 31, 1991 statement was false. He said detectives had beat him at Homicide, and when he awoke from the beating, he was handcuffed to a chair and a written statement was on the table waiting to be signed by him. He said detectives refused to feed him and prohibited him from using the bathroom until he signed the statement they (*i.e.*, the detectives) had written. Wilkerson said he signed the statement because it was obvious to him detectives were not going to let him leave if he did not sign the statement.¹⁵⁵

Wilkerson said that when he identified Mr. Reynoso at trial, he did not identify him as the gunman. Instead, he merely identified him as someone he “recognized” after the prosecutor had asked him if he “recognized” Mr. Reynoso.¹⁵⁶ Wilkerson then had this colloquy with Farrell on redirect-examination:

Q. Did you ultimately... answer the District Attorney’s question and identify my client as the shooter, finally, in front of the jury?

A. No, I don’t think so.

Q. Why? Why was there any hesitation?

A. Because he wasn’t the shooter. But my brother was working with [Chuito’s] people at that time. He had started working with [Chuito’s] people, so I couldn’t just come out and say, [Chuito] is the person.

Q. What person are you talking about, this person.

¹⁵⁵ JA 1386-1389, 1400-1401.

¹⁵⁶ JA 1401.

A. Chuito.¹⁵⁷

After holding another PCRA hearing on December 9, 2013, where a detective challenged Wilkerson's PCRA testimony,¹⁵⁸ the PCRA court dismissed Mr. Reynoso's third PCRA petition on August 21, 2014.¹⁵⁹ Mr. Reynoso appealed to the Pennsylvania Superior Court, which affirmed on November 16, 2015,¹⁶⁰ and the Pennsylvania Supreme Court denied his discretionary appeal on March 23, 2016.¹⁶¹

B. Federal habeas proceedings

1. Timeliness

Mr. Reynoso's federal petition was due on or before May 4, 2003. He filed his first federal petition on April 8, 2016 – nearly thirteen years late.¹⁶² When he filed his untimely petition, though, he cited *McQuiggin* and argued that the “substantial evidence of innocence” presented in his petition “trigger[ed] the actual innocence/miscarriage of justice exception to the timeliness rule.”¹⁶³ On January 10, 2017, he filed a comprehensive 135-page amended petition, raising a global trial counsel ineffectiveness claim comprised of several sub-claims.¹⁶⁴

¹⁵⁷ JA 1401-1402.

¹⁵⁸ JA 1411-1423.

¹⁵⁹ JA 429.

¹⁶⁰ JA 112-113, 442-471, 472-480.

¹⁶¹ JA 113, 481-504.

¹⁶² JA 8-25.

¹⁶³ JA 23.

¹⁶⁴ JA 26-159.

2. R&R and the District Court's adoption of the R&R

The Magistrate Judge filed its *Report and Recommendation* (“R&R”) on April 18, 2018.¹⁶⁵ It deemed Mr. Reynoso’s petition untimely because much of the evidence he presented in support of his gateway innocence claim did not constitute “new evidence” under *Schlup* and *McQuiggin*. The Magistrate Judge said “new evidence” did not include “evidence that counsel discovered prior to trial, but failed to present at trial.”¹⁶⁶

As a result, the Magistrate Judge refused to consider (1) Eunice de la Rose Cabreja’s affidavit; (2) Dr. Jose Javier Bueno’s affidavit; (3) Luis Ernesto Romano Caba’s affidavit; (4) Ernesto Roman’s affidavit; (5) Minerva Reynoso’s affidavit; (6) Angel Maria Rondon’s affidavit; (7) Miguel Alamonte’s affidavit; (8) Catalina Ramon Caba’s affidavit; (9) Edward Sanchez’s pre-trial statement; (10) the July 17, 1991 land sale agreement; (11) photographs from the July 27, 1991 baptism; (12) Mr. Reynoso’s July 13, 1991 AA stubs; (13) AA’s apology letter; and (14) the July 30, 1991 gun permit paperwork.¹⁶⁷

On June 22, 2018, after Mr. Reynoso had filed his comprehensive objections,¹⁶⁸ the District Court adopted the R&R’s findings and conclusions, dismissed Mr. Reynoso’s petition as untimely, and refused to grant him a COA.¹⁶⁹ On July 7, 2018,

¹⁶⁵ JA 160-188.

¹⁶⁶ JA 169.

¹⁶⁷ JA 170, 181-185.

¹⁶⁸ JA 189-243.

¹⁶⁹ JA 244.

Mr. Reynoso appealed.¹⁷⁰ On July 10, 2018, he filed a COA application regarding the timeliness issue,¹⁷¹ which the Court granted on January 8, 2019.¹⁷²

SUMMARY OF ARGUMENT

Reeves is a precedential opinion, meaning its binding precedent in this Circuit. Mr. Reynoso's appeal represents a straightforward and uncomplicated application of *Reeves*. In *Reeves*, this Court said evidence is "new" under *Schlup* and *McQuiggin* if it was not presented to the fact-finder, even if trial counsel had, knew about, or had the capabilities to develop the evidence before trial. Specifically, the Court said when a petitioner raises a trial counsel ineffectiveness claim based on trial counsel's failure to present to the fact-finder the exculpatory evidence that demonstrates his actual innocence, this evidence is "new evidence" for purposes of *Schlup*'s gateway actual innocence claim.

At trial, Mr. Reynoso's attorney presented two alibi witnesses, but knew of many more alibi witnesses and other evidence that placed Mr. Reynoso in the Dominican Republic between July 13, 1991 and July 27, 1991. In his March 7, 2000 *pro se* PCRA petition, Mr. Reynoso raised trial and appellate counsel ineffectiveness claims, alleging that direct appeal counsel was ineffective for failing to raise a meritorious trial counsel ineffectiveness claim for failing to present substantial evidence of innocence at his trial.

¹⁷⁰ JA 245-246.

¹⁷¹ JA 247-285.

¹⁷² JA 286.

Mr. Reynoso procured affidavits from eight additional alibi witnesses. Due to a parade of bad state court lawyers, however, the state courts never considered this substantial evidence of innocence.

In April 2016, nearly thirteen years after AEDPA's 1-year limitations period had expired, Mr. Reynoso filed an untimely federal petition alleging, *inter alia*, the same trial and appellate counsel ineffectiveness claims he had raised in his *pro se* PCRA petition. He bolstered his ineffectiveness claims with the very same evidence he had procured during his initial-review PCRA proceedings, *i.e.*, the eight alibi affidavits and other evidence trial counsel knew about, but never presented. More importantly, Mr. Reynoso relied on this evidence to trigger *Schlup's* gateway innocence claim. The District Court, though, refused to consider the great majority of this evidence simply because trial counsel knew about it before trial and therefore it did not constitute "new evidence."

A straightforward application of *Reeves* proves the District Court erred. The eight alibi affidavits and other documents and photographs placing Mr. Reynoso in the Dominican Republic between July 13, 1991 and July 27, 1991 constitute "new evidence" because trial counsel never presented this evidence to the fact-finder. The Court, therefore, must remand Mr. Reynoso's case back to the District Court, instructing it to make "reliability" findings regarding this "new evidence." If reliable, the District Court must then make a holistic assessment of the new evidence and determine whether, based on this new evidence, no juror, acting reasonably, would have voted to find Mr.

Reynoso guilty beyond a reasonable doubt. If so, it must adjudicate the substantive federal claims raised in Mr. Reynoso's petition using the appropriate AEDPA standard.

ARGUMENT

I. *Reeves* entitles Mr. Reynoso to a remand because he raised a trial counsel ineffectiveness claim based on “new evidence” not presented to the fact-finder

A. *Schlup, House, and McQuiggin*: A short primer

Mr. Reynoso's federal petition is untimely. Despite its untimeliness, the Court can substantively review the merits of Mr. Reynoso's federal claims because the evidence presented in his federal petition overwhelmingly proves he was in the Dominican Republic on July 23, 1991 when the shooting occurred.

In *McQuiggin v. Perkins*, 569 U.S. 383 (2013), the 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, as it was in [*Schlup v. Delo*, 513 U.S. 298 (1995)], and [*House v. Bell*, 547 U.S. 518 (2006)], or, as in this case, expiration of the statute of limitations.” *Id.* at 386-387. 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[.]” *Id.* at 392-393. In this context, actual innocence refers to factual innocence, not legal insufficiency. *Sistrunk v. Rozum*, 674 F.3d 181, 191 (3d Cir. 2012).

McQuiggin's actual innocence standard is identical to *Schlup's* standard: when a federal petition is untimely, a petitioner will trigger the actual innocence exception if “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 v. Perkins*, 569 U.S. at 386 (quoting *Schlup v. Delo*, 513 U.S. at 329); accord *House v. Bell*, 547 U.S. at 538.

Schlup “makes plain that the habeas 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. at 538 (quoting *Schlup v. Delo*, 513 U.S. at 327-328). Based on this total record, the district court must make “a probabilistic determination about what reasonable, properly instructed jurors would do.” *Schlup v. Delo*, 513 U.S. at 329. The district 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.” *House v. Bell*, 547 U.S. at 538.

While the *Schlup* standard is “demanding,” it “does not require absolute certainty about the petitioner’s guilt or innocence.” *Id.* at 538. Mr. Reynoso’s “burden” at this point “is to demonstrate that more likely than not, in light of the *new evidence*, no reasonable juror would find him guilty beyond a reasonable doubt[.]” *Id.* at 538 (emphasis). Consequently, “mere impeachment evidence is generally not sufficient to satisfy the [*Schlup*] standard.” *Munchinski v. Wilson*, 694 F.3d 308, 338 (3d Cir. 2012).

However, “*new 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) (emphasis added).

B. When the petitioner claims trial counsel was ineffective for failing to present substantial and readily available evidence of innocence at his trial, *Reeves* holds that “new evidence” in this context is defined as evidence not presented to the fact-finder, meaning Mr. Reynoso is entitled to a remand because the facts here are congruent with those in *Reeves*

Schlup and *McQuiggin* beg the question of what constitutes “new evidence” to trigger *Schlup*’s gateway innocence claim. Shortly after Mr. Reynoso filed his COA application, this Court answered this question in *Reeves v. SCI-Fayette*, 897 F.3d 154 (3d Cir. 2018), and said “new evidence” is evidence not presented to the fact-finder, regardless of whether trial counsel had, knew about, or had the ability to develop this evidence before trial. *Id.* at 164.

In *Reeves*, another Pennsylvania murder case, the defendant was convicted of robbery and second-degree murder in connection with a May 25, 2006 robbery of a convenience store that left the store clerk dead. The relevant facts in *Reeves*, at least for Mr. Reynoso’s appeal, are those concerning the evidence the defendant’s trial attorney failed to present at trial. Most notably, trial counsel failed to present a wealth of evidence that two other men were responsible for the robbery and store clerk’s death. Trial counsel knew of this evidence before trial because the prosecutor had disclosed it. Trial counsel also failed to present evidence the defendant was left-handed, despite

surveillance footage that strongly suggested the perpetrator who shot the store clerk was right-handed. *Id.* at 157-158.

The defendant filed a timely PCRA petition asserting a trial counsel ineffectiveness claim based on trial counsel's failure to present, *inter alia*, the alternate suspect evidence and surveillance footage. The PCRA court denied relief, the Pennsylvania Superior Court affirmed, and the Pennsylvania Supreme Court denied discretionary review. *Id.* at 159.

The defendant sought federal review, raising the same trial counsel ineffectiveness claims, but conceded his petition was untimely. The defendant, though, argued his tardiness was excusable because the evidence presented in his petition demonstrated his actual innocence. The Magistrate Judge, though, said gateway innocence claims required the petitioner to present "new evidence," which the Magistrate Judge defined as evidence not available to trial counsel. The District Court adopted the Magistrate Judge's definition of "new evidence," dismissed the petition as untimely, and refused to grant a COA. The petitioner, though, sought and received a COA on whether the evidence at issue constituted "new evidence" under *Schlup* and *McQuiggin*. *Id.* at 159.

On appeal, this Court rejected the District Court's definition of "new evidence," and said 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.” *Id.* at 164.

Reeves is settled law and Mr. Reynoso’s case is factually congruent with *Reeves*, meaning he is entitled to a remand, which is what the Court did in *Reeves* when it instructed the District Court to make “reliability” findings regarding the “new evidence” as *Schlup* and *McQuiggin* require. *Id.* at 165.

Mr. Reynoso’s trial attorney knew of substantial exculpatory evidence placing Mr. Reynoso in the Dominican Republic on the day of the murders – July 23, 1991. Trial counsel, though, only presented a small portion of this evidence. Likewise, trial counsel failed to present Edward Sanchez who identified Chuito – Rafael Vidal – as the gunman. During his initial-review PCRA proceedings, Mr. Reynoso obtained eight affidavits from the additional alibi witnesses trial counsel had known about but unreasonably failed to present.

Moreover, Mr. Reynoso used these affidavits to support his appellate counsel ineffectiveness claim raised in his *pro se* PCRA petition, alleging that direct appeal counsel had failed to litigate a meritorious trial counsel ineffectiveness claim as required by *Commonwealth v. Hubbard*, 372 A.2d 687 (Pa. 1977). Initial-review PCRA counsel, though, erroneously concluded Mr. Reynoso had only raised a *trial* counsel ineffectiveness claim, which she considered waived under *Hubbard* based on the fact Mr. Reynoso received new counsel on direct appeal. Initial-review PCRA appellate counsel presented these affidavits to the Pennsylvania Superior Court, but Pennsylvania

state appellate courts cannot consider evidence not presented to the PCRA court and not made part of the certified record. Likewise, Pennsylvania state appellate courts cannot make factual or credibility findings.

In his untimely federal petition, as well as his amended petition, Mr. Reynoso raised the same ineffectiveness claims he had raised in his *pro se* PCRA petition.¹⁷³ The District Court, though, refused to adjudicate his trial counsel ineffectiveness claim because it found his petition untimely. Specifically, the District Court said the great majority of his “actual innocence” evidence did not constitute “new evidence” because trial counsel was aware of this evidence before trial.¹⁷⁴

Reeves, however, overruled the District Court’s definition of “new evidence.” As a result, Mr. Reynoso is entitled to a remand where the District Court must gauge the “reliability” of his “new evidence,” and if reliable and sufficient to prove he is likely innocent, it must then adjudicate his federal claims, including his trial counsel ineffectiveness claim, using the appropriate AEDPA standard of review.

¹⁷³ JA 17, 23, 135-136.

¹⁷⁴ JA 169-171.

CONCLUSION

WHEREFORE, Mr. Reynoso respectfully requests that the Court remand his case to the District Court with instructions to assess the “reliability” of his “new evidence” as well as any other instructions consistent with *Schlup*, *McQuiggin*, and *Reeves* the Court deems necessary and just to ensure Mr. Reynoso receives the federal review he is entitled to under AEDPA, the Federal Constitution, and the common law.

Respectfully submitted this the 16th day of February, 2019.

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CERTIFICATE OF SERVICE

On February 16, 2019, counsel e-filed this pleading with the ECF system and the Commonwealth has e-service so it received an emailed PDF copy of this pleading.

COMBINED CERTIFICATIONS

1. Undersigned counsel are members of the bar of the United States Court of Appeals for the Third Circuit. L.A.R. 28.3(d).

2. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains under 13,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

3. I certify that today I served a copy of this opening brief and joint appendix on opposing counsel, ADA Joshua Goldwert, electronically through this Court's docketing system.

4. The text of the electronic brief is identical to the text in the paper copies. L.A.R. 31.1(c).

5. The Avast Antivirus virus detection program, version 17.9.2322, has been run on this file and no virus was detected. L.A.R. 31.1(c).

6. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Garamond.