No. 15-8129

In The Supreme Court of the United States

DONALD R. NASH,

Petitioner,

v.

TERRY RUSSELL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE INNOCENCE NETWORK IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus to this Brief, The Innocence Network ("the Network"), is an association of organizations dedicated to providing pro bono legal and investigative services to prisoners for whom evidence discovered post-conviction can provide conclusive proof of innocence. Drawing on its experience with wrongful convictions, the Network also advocates for reforms in the criminal justice system to prevent future wrongful convictions. The sixty-nine current members of the Network represent hundreds of prisoners in their innocence claims throughout the fifty states and the District of Columbia, as well as internationally.[2]

The facts of this case are especially troubling and further highlight that habeas gateway claims for actual innocence under *Schlup v. Delo*, 513 U.S. 298 (1995), continue to be treated in ways that differ significantly in circuits across the country. *Amicus* asks the Court to intervene, to clarify its ruling in *Schlup*, and to correct the grave injustice that has occurred in this case, and that will continue to occur

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[1] As provided by Supreme Court Rule 37(6), *amicus* state that no counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or their counsel, made a monetary contribution intended to fund its preparation or submission. The parties have been given notice and have consented to the filing of this brief. Such consents are being lodged with this brief.

[2] A partial list of member organizations is attached in the Appendix.

in similar cases, as long as the "new evidence" standard followed by the Eighth Circuit is allowed to continue.

The circuit split in this case goes to the core of our system of justice. Habeas petitioners who have been wrongfully convicted may have their actual innocence claims reviewed in some circuits but not others. *Amicus* is deeply concerned that such actual innocence claims not be extinguished based on whether a petitioner happens to be imprisoned in Illinois versus Iowa or Wisconsin versus Minnesota. Equal justice under the law requires that this circuit split be resolved now.

SUMMARY OF ARGUMENT

The Supreme Court's ruling in *Schlup v. Delo* established that federal courts will consider a habeas corpus petitioner's procedurally defaulted constitutional claim if it is more likely than not that no reasonable juror would have convicted him in light of "new reliable evidence . . . that was not presented at trial." *Id*. at 324, 330, 332. The Court has not defined what types of evidence satisfy the "new evidence" rule and, thus, the federal courts of appeals have interpreted it differently. The most restrictive interpretation of "new evidence" comes from the Eighth Circuit which states that "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine v. Bowersox (Amrine I)*, 128 F.3d 1222, 1230 (8th Cir. 1997). But the Eighth Circuit essentially stands alone

in its narrow interpretation. Other circuits interpret the test more broadly to achieve its underlying purpose; they consider evidence "new" if it is simply "newly presented," *see, e.g., Gomez v. Jaimet*, 350 F.3d 673, 679 (7th Cir. 2003), or if the failure to present it at trial was due to ineffective assistance of counsel, *see, e.g., Houck v. Stickman*, 625 F.3d 88, 94 (3d Cir. 2010).

In practice, the Eighth Circuit's rule that new evidence must be "newly discovered" prohibits the review of new evidence in nearly every case. As a result, innocent prisoners who have strong cases for innocence, like Mr. Nash, will remain wrongfully imprisoned.

Overturning wrongful convictions of innocent people have become increasingly common in our criminal justice system. This is clear from the recent rise in DNA exonerations. Jay Nelson, *Facing Up to Wrongful Convictions: Broadly Defining "New" Evidence at the Actual Innocence Gateway*, 59 Hastings L.J. 711, 711 (2007) (arguing that the federal courts should adopt the newly-presented evidence rule). To ensure the legitimacy of our criminal justice system, the courts must seek truth above all other objectives. *Id*. at 729. The Eighth Circuit's rule relies on an overly-rigorous procedural test that elevates finality over truth seeking. Finality has its place, but when life and liberty are at stake, it must never impede the search for truth.

ARGUMENT

I. The Eighth Circuit's "Newly Discovered" Standard Creates a Manifest Injustice.

The very case from which the Eighth Circuit's "newly discovered" standard is based, *Amrine I*, 128 F.3d at 1228, illustrates how the rule does not work and stifles the search for the truth. Joseph Amrine ("Amrine") was convicted in 1986 for murdering a fellow prisoner and was sentenced to death. The conviction was based solely on the alleged eyewitness testimony from three fellow inmates. *Id*. at 1223-24. Amrine appealed directly to the Missouri Supreme Court, which affirmed the conviction. *State v. Amrine*, 741 S.W.2d 665, 668 (Mo. 1987) (en banc). He then filed for state post-conviction relief alleging ineffective assistance of counsel. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 544 (Mo. 2003). At the post-conviction hearing, two earlier witnesses recanted their testimonies identifying Amrine as the murderer. The third witness "did not appear or testify in any of the state post-conviction proceedings." *Id*. The Missouri courts denied an appeal. *Id*.

Amrine then sought federal habeas corpus relief. *Id*. "Although counsel argued that Amrine was actually innocent given the recantations," the District Court denied Amrine's petition, holding that the recantations were not "new evidence." *Id*. Thereafter, the third remaining eyewitness recanted his testimony, such that there was no remaining eyewitness testimony against Amrine. *Id*. at 545.

On appeal, the Eighth Circuit recognized that given the recantations from all eyewitnesses, there was a "real possibility that [Amrine's] case may be an example of the 'extremely rare' scenario for which the actual innocence exception is intended." *Amrine I*, 128 F.3d at 1228 (citing *Schlup*, 513 U.S. at 322-24). Despite recognizing the strength of the exculpatory evidence presented by Amrine, the Eighth Circuit remanded the case for an evidentiary hearing to determine whether the recantations were "new evidence" under *Schlup*. *Id*. The Eighth Circuit then set forth the "newly discovered" rule, instructing the District Court to only consider evidence "new" "if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Id*. at 1230.

On remand, in accordance with the Eighth Circuit's rule, the District Court only considered the third witness' recantation, holding that the recantations of the two others were not "new" as they were presented at an earlier hearing. The court went on to hold that the third witness' recantation was not reliable and, since it was the only "new evidence" the court examined, it denied habeas relief. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 545 (Mo. 2003) (setting forth history of case). The Eighth Circuit affirmed, holding that "the district court properly focused on [the third witness'] testimony because the . . . [other recantations] were not new." *Id*.

Finally, in 2003, the Missouri Supreme Court determined that based on the recantations, Amrine

was indeed actually innocent. *Id*. The court noted that "Amrine was convicted solely on the testimony of three fellow inmates, each of whom have now completely recanted their trial testimony" and thus "no credible evidence remains from the first trial to support the conviction." *Id*. at 548. The same was true when the Eighth Circuit first heard Amrine's habeas petition in 1997 and when they heard it again in 2001, but because of its high bar to reviewing "new evidence," the court did not consider the recantations and Amrine remained in prison for six more years before he was finally exonerated and released.

The origin of the Eighth Circuit's "newly discovered" rule demonstrates that in practice it elevates finality over the search for truth. And without this Court's intervention, the Eighth Circuit rule may continue to produce such injustices.

II. No Other Circuit Interprets "New Evidence" as Narrowly as the Eighth Circuit.

There is a split among the circuits as to what types of "new evidence" are reviewable under a gateway claim for actual innocence under *Schlup v. Delo*. In practice, the split leaves the Eighth Circuit as an outlier against all of the other circuits that have considered the issue. Indeed, various circuits readily confirm the existence of such split. *See, e.g., Wright v. Quarterman*, 470 F.3d 581, 591 (5th Cir. 2006) ("The courts of appeals disagree as to whether *Schlup*

requires 'newly discovered' evidence or merely 'newly presented' evidence."); *Cleveland v. Bradshaw*, 693 F.3d 626, 633 (6th Cir. 2012) ("There is a circuit split about whether the 'new' evidence required under *Schlup* includes only newly discovered evidence that was not available at the time of trial, or broadly encompasses all evidence that was not presented to the fact-finder during trial, *i.e.*, newly presented evidence.").

The Eighth Circuit has adopted the most restrictive interpretation of the *Schlup* "new evidence" requirement: "evidence is new only if it was not available at trial and could not have been discovered earlier through the exercise of due diligence." *Amrine I*, 128 F.3d at 1230.

On the other hand, the Second, Fourth, Sixth, Seventh, and Ninth Circuits interpret *Schlup* more broadly and more consistently with its purpose. This view has been termed the "newly presented" evidence standard. *See, e.g., Rivas v. Fischer*, 687 F.3d 514, 543 (2d Cir. 2012) (defining "new evidence" under *Schlup* as "evidence not heard by the jury"); *Gomez v. Jaimet*, 350 F.3d at 679 ("All *Schlup* requires is that the new evidence is reliable and that it was not presented at trial."); *Griffin v. Johnson*, 350 F.3d 956, 961-63 (9th Cir. 2003) ("[W]e hold that habeas petitioners may pass *Schlup*'s test by offering 'newly presented' evidence of actual innocence.").

The circuits which follow the "newly presented" evidence standard reason that the "burden for proving

actual innocence in gateway cases is sufficiently stringent" and that it would be both "inappropriate and unnecessary" to impose additional threshold requirements on habeas petitioners. *Gomez*, 350 F.3d at 680. These circuits frame the relevant question not as whether the new evidence was *available to the defendant* during his trial, but rather whether the new evidence was *introduced to the jury* at trial. *Griffin*, 350 F.3d at 963. Therefore, the circuits following the "newly presented" evidence standard do not impose an additional "due diligence" requirement on petitioners who seek to introduce new and reliable evidence of their innocence.

The Seventh Circuit has even stated that blocking review of actual innocence claims based on the Eighth Circuit's "newly discovered" standard "def[ies] reason." *Gomez*, 350 F.3d at 680. In *Gomez v. Jaimet*, the petitioner sought to introduce certain statements from his co-defendants under the *Schlup* gateway that were not considered at trial. *Id*. at 679-80. The petitioner argued that these statements supported his theory of innocence that he did not actually fire the gun that shot and killed the victim. *Id*. at 680. The Seventh Circuit "agree[d] with the Eighth Circuit that merely putting a different spin on evidence that was presented to the jury does not satisfy the *Schlup* requirements." *Id*. But the court stressed that "if a petitioner comes forth with evidence that was *genuinely not presented to the trier of fact*, then no bar exists to the habeas court evaluating whether the evidence is strong enough to establish the petitioner's

actual innocence." *Id*. (emphasis added). In *Gomez*, the statements from the petitioner's co-defendants were not presented to the jury at trial, and therefore the Court found it proper to consider them in evaluating the petitioner's actual innocence claims.

Similarly, the Ninth Circuit rejects the Eighth Circuit's standard, and follows the "newly presented" evidence approach. In *Griffin v. Johnson*, for example, the petitioner, who pled guilty to intentional murder, sought to introduce psychiatric records under the *Schlup* gateway to support an insanity defense under Oregon law. *Griffin*, 350 F.3d at 963. The records were in petitioner's possession before trial, but his attorney never offered this evidence before accepting a plea bargain, despite petitioner's wishes. *Id*. at 959. In evaluating whether the petitioner's psychiatric records were "new evidence" under *Schlup*, the Ninth Circuit criticized the Eighth's Circuit's narrow "newly discovered" standard head-on. *Id*. at 961-62. The Ninth Circuit explained that "passages in Justice Stevens's [majority] opinion suggest that a habeas petitioner may pass through the *Schlup* gateway without 'newly discovered' evidence if other reliable evidence is offered 'that was not presented at trial.'" *Id*. at 961. Here, because the psychiatric records were not presented to the trial court, the Ninth Circuit concluded that "[they] constitute 'new . . . evidence . . . that was not presented at trial.'" *Id*. at 963 (citing *Schlup*, 513 U.S. at 324). Thus, the Court held that the petitioner's psychiatric records were "new evidence"

and should be considered in evaluating the petitioner's actual innocence claims. *Id*.

The Fourth Circuit recognizes that "the *Schlup* Court adopted a broad definition of 'new' evidence . . . : a petitioner must offer 'new reliable evidence . . . that was not presented at trial.'" *Royal v. Taylor*, 188 F.3d 239, 244 (4th Cir. 1999) (quoting *Schlup*, 513 U.S. at 324). Further, the Fourth Circuit has stated that a court undertaking a *Schlup* analysis "should make its assessment in light of all available evidence, including that considered unavailable or excluded at trial and any evidence that became available only after trial." *Id*. (citing *Schlup*, 513 U.S. at 327-28).

The Sixth Circuit also advocates a broader definition of what should be considered "new" evidence. *Souter v. Jones*, 395 F.3d 577, 593 n.8 (6th Cir. 2005) ("A correct reading of *Schlup* reveals that the examples following the words 'new reliable evidence' were not meant to be an exhaustive list of everything upon which an actual innocence claim may be based."). For example, in *Souter v. Jones*, the defendant filed a petition for writ of habeas corpus supported by affidavits from two of the prosecution's experts, both recanting their trial testimonies. *Id*. at 584-85. The Sixth Circuit reasoned that an eyewitness remembering additional details would certainly constitute "new evidence." *Id*. at 592. Therefore, one of the expert's changed opinion, which was the result of "his increased education, training, and experience," as well as the examination of evidence – which was available at the time of trial – that he had not seen before,

constituted "new evidence." *Id*. at 593. Moreover the court held that the retractions from two of the prosecution's experts, which "do not merely add to the defense, but also deduct from the prosecution . . . can be consider[ed] 'new reliable evidence' upon which an actual innocence claim may be based." *Id*.

The Second Circuit defines "new evidence" under *Schlup* simply as "evidence not heard by the jury," *Rivas*, 687 F.3d at 543, and expressly rejects a due diligence requirement as unnecessary to support a gateway claim of actual innocence, *id.* at 547 n.42. In *Rivas v. Fischer*, the Second Circuit held that the defendant, who was convicted of murder nearly six years after the victim was killed, had sufficiently produced credible and compelling "new evidence" to satisfy the *Schlup* gateway standard, based in large part on the affidavit of an expert challenging the trial testimony of the State's medical examiner. *Id*. at 552. Under the Eighth Circuit's "newly discovered" evidence standard, however, the expert's affidavit would not have been considered because, as the Second Circuit specifically acknowledged: (1) the affidavit was "based on facts that were known to [the defendant] or discoverable by him or his counsel at the time of his trial," *id*. at 536, and (2) the defendant's trial counsel never considered calling an expert at trial to challenge the State's medical examiner, *id*. at 526.

The only circuit[3] to agree with the Eighth Circuit is the Third. Yet even the Third Circuit has limited the effect of the rule by adopting an exception for evidence that was not discovered due to ineffective counsel. *Houck v. Stickman*, 625 F.3d at 94. In creating this exception, the Third Circuit recognized the unfairness of the *Amrine* rule:

> [I]t is unfair to a petitioner to apply the *Amrine* statement of the law in cases in which the petitioner claims that he had had ineffective assistance of counsel by reason of his attorney not discovering exculpatory evidence when the petitioner is relying on that very evidence as being the evidence of actual innocence in a gateway case to reach the ineffective assistance of counsel claim. As we have indicated, the rule that *Amrine* sets forth requires a petitioner, such as Houck, in effect to contend that his trial counsel was not ineffective because otherwise the newly presented evidence cannot be new, reliable evidence for *Schlup* purposes.

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[3] The Tenth Circuit has not definitively stated which side of the split it falls on, but it has applied a rather restrictive approach to determining which evidence is "new." *See, e.g.*, *Johnson v. Medina*, 547 Fed. App'x 880, 885 (10th Cir. 2013) (citing *Schlup* for proposition that evidence is new if it was "excluded or unavailable at trial" but finding that evidence was not "new" where petitioner was aware of discrepancies in the DNA evidence and existence of an alternative suspect before he pled guilty).

Id. In practice, however, the Third Circuit's exception permits a habeas petitioner to present new evidence in most of the cases in which it might be presented under the "newly presented" rule applied by other circuits. Claims of actual innocence based on exculpatory evidence that was known but not presented at trial will usually support a claim or lead to an allegation of ineffective counsel.

Because of the Eighth Circuit's unreasonably narrow interpretation, habeas petitioners who come forward with new and reliable evidence of their innocence are treated differently from how they would be treated anywhere else. All other circuits consider "newly presented" evidence for purposes of overcoming the procedural default based upon a miscarriage of justice. But the Eighth Circuit does not. All other circuits normally address the second prong of the *Schlup* gateway – whether it is more likely than not that no reasonable juror would have convicted the petitioner in light of the new evidence. But the Eighth Circuit does not because the first prong of the test (the "newly discovered" rule) means that the inquiry ends before the critical question about jury impact can even be considered. There is no "new evidence" to be evaluated, even though there may be plenty of evidence that a jury has never previously heard.

The Eighth Circuit's interpretation is needlessly narrow. Many cases with strong "new evidence" or actual innocence would not be heard under the

"newly discovered" standard. If a petitioner brings forth new and reliable evidence of his actual innocence, a federal habeas court should be able to weigh that evidence in deciding whether no reasonable juror would have convicted the petitioner. It should not matter whether that new and reliable evidence could have previously been produced at trial through the exercise of due diligence; the new evidence is just that – new and reliable – and therefore should not be barred on grounds that elevate finality or even Federal-State comity over the court's truth-seeking mission.

III. The *Amrine* Standard Prevents Federal Habeas Court Review of the Most Common Kinds of Wrongful Conviction Claims.

Since 1989, there have been over 1,750 exonerations: cases in which the defendant was not only wrongfully convicted but was also proven to be actually innocent of the crime for which he or she was convicted. Nat'l Registry of Exonerations, *Exonerations by Year: DNA and Non-DNA*, http://www.law.umich.edu/special/exoneration/Pages/Exoneration-by-Year.aspx (last visited Apr. 5, 2016).

Among the leading causes of wrongful convictions are false confessions, witness misidentification, and

false accusations from a third party.[4] And the leading method of unmasking wrongful convictions has been DNA testing, which has not only been able to eliminate some defendants as guilty but has also sometimes been able to point toward the actual perpetrator as the national DNA database has expanded.

Yet remedying these wrongful convictions is thwarted by the *Amrine* rule. And in particular, the probative value of DNA testing is dealt a serious blow by *Amrine*, as this case demonstrates.

A. False Confessions

False confessions are prevalent in the American legal system and are "commonly thought to be obtained as a result of interrogation tactics." Shawn Armbrust, *Reevaluating Recanting Witnesses: Why the Red-Headed Stepchild of New Evidence Deserves Another Look*, 28 B.C. Third World L.J. 75, 95 (2008) (citation omitted). Of the 222 exonerations on the National Registry that involved false confessions, 66% (148 of 223) involved official misconduct. Nat'l Registry of Exonerations, *Exoneration Detail List* (the "National Registry"), http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Apr. 5,

[4] Samuel R. Gross and Michael Shaffer, *Exonerations in the United States, 1989-2012: Report by the National Registry of Exonerations* (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

2016) (select "FC" and "OM" filters). A significant body of evidence shows that police interrogation tactics are the primary cause of false confessions. Richard A. Leo et al., *Bringing Reliability Back in: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 Wis. L. Rev. 479, 516 (2006). Throughout the country, police have adopted sophisticated interrogation techniques to elicit confessions through what can broadly be categorized as a two-step process: first, the interrogator "persuade[s] the suspect that he is caught and that he is powerless to change the situation"; and second, the interrogator makes the suspect believe "that the only way to improve his otherwise hopeless situation is by admitting to some version of the offense." Steven Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891, 915-16 (2004).

Compounding this problem, certain segments of society are particularly vulnerable to these techniques, including the mentally disabled and juveniles. This is because both the mentally disabled and juveniles have difficulty comprehending their *Miranda* rights and the consequences of confessions. William C. Follette et al., *Mental Health Status and Vulnerability to Police Interrogation Tactics*, Am. Bar Assoc. (2007), http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_cjmag_22_3_mentalhealthstatus.authcheckdam.pdf; Barry C. Feld, *Police Interrogation of Juveniles: An Empirical Study of Policy and Practice*, 97 J. Crim. L.

& Criminology 219, 244-46 (1996) (juveniles are more easily pressured and fail to understand their rights). Indeed, this Court has repeatedly recognized both groups' vulnerability. *See, e.g., J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2403 (2011); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960).

A 2004 study of 125 false confessors found that 81 percent of those whose cases went to trial were wrongfully convicted. Leo et al., *supra*, at 485. This is largely due to the fact that juries "tend to discount the possibility of false confessions as unthinkable, if not impossible." *Id*. at 485. A confession, even if recanted, is generally seen as "dispositive evidence of guilt," even when "contradicted by other case evidence and contain[ing] significant errors." *Id*. While many false confessors later seek to recant the confession, courts generally disfavor recantations and treat them as unreliable, which only compounds the damage done by false confessions.

Many false confessions, however, would not typically be "newly discovered" evidence under *Amrine*. Indeed, evidence of the falsity of a confession is a prime example of evidence that could have been produced at trial. All that goes into a typical false confession – the implied coercion, the frequent official misconduct, the false statements and promises to the defendant, the defendant's unusual vulnerability owing to age or mental disability – normally occurs or exists before trial. And all of it could in the normal case be raised at trial and, all of it would be blocked from federal habeas review under *Amrine*.

Some of these arguments are indeed raised at trial or in pre-trial suppression hearings concerning the confession. But in many such cases, the defendant does not challenge the wrongful confession at the time of trial, and often, in fact, pleads guilty rather than challenging the confession. In any case, few defendants produce expert testimony at trial regarding the psychological phenomena of wrongful confessions, and such testimony is often critical to a jury's understanding of this counterintuitive occurrence. Under *Amrine*, failure to challenge the confession at trial, or failure to present the necessary expert testimony, means that such critical evidence is almost certainly unavailable to support a *Schlup* gateway claim in a federal habeas proceeding. Even so, as recent history teaches, such evidence is frequently the most compelling and probative evidence of a defendant's actual innocence.

B. Accomplice and Similar Accusations, Recanted

A second leading cause of wrongful convictions is false accusations by accomplices or those otherwise somehow involved in the case.

Of the over 1,700 exonerations reported in the National Registry, in over half (990 of 1,774) the exoneree was falsely accused. National Registry (select "P/FA" filter). Yet a review of exoneree cases where co-defendants confessed, National Registry (select "CDC" filter), reveals that nearly 20% (195 out of 990) of exonerees were falsely accused by their co-defendants. That such a high percentage of exonerees

was falsely accused by co-defendants supports the premise that co-defendant accusations, without reliable corroboration, are particularly suspect.

In one study, 45.9% of wrongful capital convictions in the United States resulted from informant false testimony, making "snitches the leading cause of wrongful convictions in U.S. capital cases." Rob Warden, *The Snitch System: How Snitch Testimony Sent Randy Steidl and Other Innocent Americans to Death Row*, at 3 (2004), http://www.innocenceproject.org/causes-wrongful-conviction/SnitchSystemBooklet.pdf; *see also* Alexandra Natapoff, *Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 Golden Gate U. L. Rev. 107, 108 (2006) (stating that the "usual protections against false evidence, particularly prosecutorial ethics and discovery, may thus be unavailing to protect the system from informant falsehoods").

Under *Amrine*, the status of accomplice recantations as well as the frequent eyewitness recantations appears complex and more confusing than it ought to be, given how important an indicator that recantations generally are in wrongful convictions.[5] It should

[5] We address accomplice recantations here together with the frequent eyewitness misidentification cases seen in wrongful convictions. The *Amrine* standard casts doubt upon the validity for *Schlup* gateway purposes of many such recantations, which otherwise would be persuasive new evidence.

be clear that trial testimony recanted after trial would be admissible under *Armine* because the recantation could presumably not have been "discovered" at or before trial. But in practice, the *Amrine* standard appears to be restrictive toward even these recantations. In *Amrine* itself, two witness recantations by fellow prison inmates were not considered at all because they had already been raised, not at trial, but at post-conviction proceedings in the Missouri State courts. *State ex rel. Amrine v. Roper*, 102 S.W.3d at 544. Upon remand to the District Court, the third witness recantation, also by a fellow inmate, standing alone, was found not reliable and the petition dismissed. *Id*. at 545. Yet it was these same recantations, considered in their totality, that led the Missouri Supreme Court to ultimately vacate the defendant's conviction. *Id.* at 548. These highly probative recantations in *Amrine* never passed the *Schlup* gateway under the "newly discovered" rule.

Moreover, the *Amrine* standard means that recantations occurring before trial – and apparently before the mandatory state post-conviction proceeding as well – that were not discovered by counsel, or that the court decides could have been discovered in the exercise of due diligence (viewed with perfect hindsight), will certainly not be able to pass through the *Schlup* gateway. The standard embraced by the other circuits listed in this brief avoids the difficult post hoc judgments concerning recantations and sets a much more workable and just standard that would permit all newly presented evidence regarding recantations to be used to pass through the *Schlup* gateway.

C. Recent Cases from the Courts of Appeals Support a More Expansive Standard than *Amrine*

Recent cases from the Courts of Appeals and District Courts confirm the foregoing analysis. In *United States ex rel. Jones v. Jackson*, the conscious decision by counsel not to present testimony from his client's co-defendant would clearly have fallen within the *Amrine* prohibition and would not have been allowed. No. 08 C 4429, 2014 WL 4783810, at *7 (N.D. Ill. Sept. 25, 2014). Not bound by *Amrine*, the District Court sitting within the Seventh Circuit went on to permit the newly presented evidence and grant habeas relief. *Id*. at *10. In *Rivas v. Fischer*, discussed above, the court found that the expert affidavit concerning the time of the homicide victim's death could have been produced at trial, and thus found that a New York State statute with an almost identical test as *Amrine* prevented consideration of the affidavit. *Rivas*, 687 F.3d at 533. The court went on to hold under its federal standard, however, that a federal habeas court could consider the new evidence, since it need only be "newly presented" in the Second Circuit. *Id*. at 543-44. In both of these cases, however, *Amrine* would have precluded consideration of the evidence.

D. DNA Evidence

Perhaps most distressing are the implications for the use of DNA evidence under *Amrine*. Nearly 24% (420 of 1,774) of the exonerations listed on the National Registry are the result of DNA testing.

National Registry (select "DNA" filter). It has now been accepted almost universally as strongly suggestive evidence of innocence in cases where DNA is present and relevant. Yet, *Amrine* normally precludes consideration of such strong evidence of innocence, both generally and in this case in particular. Mr. Nash seeks to provide evidence that proves someone else's DNA was present on the apparent murder weapon: the shoelace that seems to have been used by the actual perpetrator to strangle the murder victim. But the habeas court may not consider this powerful exculpatory evidence because it could have been produced at trial. And under *Amrine*, the court would have been precluded from considering the DNA evidence even if it had conclusively identified the actual murderer.

Indeed, other DNA evidence in other cases would be blocked by *Amrine*. In only a few such cases could courts conceivably find that advances in DNA science would have made it impossible for the evidence to be produced at trial. The normal case is like Nash, where the possibility of DNA in a particular place is either overlooked or not appreciated, and only is produced afterward.

CONCLUSION

The circuit split here is undeniable. And this split goes to the core of our principle of equal justice under the law. Whether a habeas petitioner may have his claim of actual innocence heard must not be left to where he happens to be imprisoned. Now is the time for the Court to intervene and resolve this division of authority so that claims of actual innocence are treated the same throughout our nation.

Nash's petition for certiorari should be granted.

Respectfully submitted,

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After Innocence
Alaska Innocence Project
Arizona Innocence Project
Arizona Justice Project
Association in Defense of the Wrongly Convicted (Canada)
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Center on Wrongful Convictions
Committee for Public Counsel Services Innocence Program
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Innocence Project
Innocence Project Argentina
Innocence Project at UVA 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 Texas
Irish Innocence Project at Griffith College

Italy Innocence Project
Justicia Reinvindicada – Puerto Rico
Innocence Project
Kentucky Innocence Project
Knoops' Innocence Project (the Netherlands)
Life After Innocence
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
Minnesota Innocence Project
Montana Innocence Project
Nebraska Innocence Project
New England Innocence 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 of the New York
Office of the Appellate Defender
Resurrection After Exoneration
Rocky Mountain Innocence Center
Sellenger Centre Criminal Justice
Review Project (Australia)
Taiwan Association for Innocence
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
Wrongful Conviction Clinic at
Indiana University School of Law