IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
MCLEAN COUNTY, ILLINOIS

BARTON MCNEIL *Petitioner-Defendant* v. PEOPLE OF THE STATE OF ILLINOIS, *Respondent-Plaintiff*	)	No. 98 CF 0633 Honorable William Yoder, Judge Presiding

PETITIONER'S RESPONSE TO THE STATE'S MOTION TO DISMISS

For the reasons that follow, the Court should deny the State's motion to dismiss Barton McNeil's Successive Post-Conviction Petition.

I. INTRODUCTION

1. In its Motion to Dismiss, the State agrees that Petitioner Barton McNeil's post-conviction petition presents sufficient evidence to entitle him to a third-stage evidentiary hearing. However, the State presents arguments in opposition to that hearing considering certain portions of the claims and certain pieces of evidence presented in McNeil's petition. All of the State's arguments lack merit but, more fundamentally, each is best addressed at the evidentiary hearing the State has agreed must happen.

2. The only question before the Court today is what the scope of the evidentiary hearing should be. For the reasons that follow, the Court should deny the State's motion to dismiss in its entirety and advance each of McNeil's claims to the third stage.

II. LEGAL STANDARD

A. The second stage considers only a petition's legal sufficiency.

3. "The second stage of postconviction review tests the legal sufficiency of the petition." *People v. Domagala*, 2013 IL 113688, ¶ 35 (2013). "[A]t the dismissal stage … [a] court

is concerned merely with determining whether the petition's allegations sufficiently demonstrate a constitutional infirmity which would necessitate relief[.]" *People v. Coleman*, 183 Ill. 2d 366, 380 (1998). "[A] hearing is ***required*** whenever the petitioner makes a substantial showing of a violation of constitutional rights." *Id.* at 381 (emphasis added). The "substantial showing" standard is met when "allegations of a constitutional violation, [...] ***if proven*** at an evidentiary hearing, would entitle petitioner to relief." *Domagala*, 2013 IL 113688, ¶ 35 (emphasis in original).

B. Factual findings and credibility determinations are forbidden.

4. A court is "foreclosed from engaging in any fact-finding at a dismissal hearing as well-pleaded facts are to be taken as true at this point in the proceeding." *People v. Jones*, 399 Ill. App. 3d 341, 357 (1st Dist. 2010). "Factual disputes raised by the pleadings require a determination of the truth or falsity of the supporting documents which ***cannot*** be properly made at a dismissal hearing; they can ***only*** be resolved through a third-stage evidentiary hearing." *Id.* at 357 (emphasis added). Indeed, "when a petitioner's claims are based upon matters outside the record, ... it is not the intent of the [A]ct that [such] claims be adjudicated on the pleadings." *Coleman*, 183 Ill. 2d at 382 (quotation removed). The State's many efforts to inject fact-finding into these second stage proceedings must be rejected.

III. RELEVANT FACTS AND PROCEDURAL HISTORY

5. McNeil presents a claim of actual innocence. In support, he presents newly-discovered, material, non-cumulative evidence that would likely change the result on retrial. In the alternative, and insofar as any evidence is not deemed to be newly-discovered, McNeil presents a claim of ineffective assistance of counsel.

6. In support of his actual innocence claim, McNeil's petition includes a host of newly-discovered evidence. This evidence includes advances in the science of forensic pathology revealing that there is nothing in the autopsy findings showing the victim, McNeil's daughter

Christina, was smothered as the State contended at trial, or even that her manner of death was homicide. Similarly, modern science shows that there is no evidence Christina was sexually abused, eliminating the only motive the State ever suggested for the alleged crime.

7. Further, to the extent Christina's death was a homicide, the newly-discovered evidence indicates that another individual—not Barton McNeil—was responsible. This individual confessed to the murder, left her hair and DNA at the scene, behaved suspiciously on the night of Christina's death, lied to police and the trial court, and was subsequently convicted of a separate, eerily similar murder.

IV. ARGUMENT

A. The State agrees that McNeil's actual innocence claim should advance to the third stage.

8. The State agrees that McNeil's actual innocence claim must be evaluated at the third stage. However, in its motion to dismiss, the State attempts to slice the actual innocence claim into parts and asks the Court to limit the hearing to only certain pieces of newly-discovered evidence and ignore others.

9. A fundamental flaw in the State's motion to dismiss is the way in which it urges the Court to consider each piece of newly-discovered evidence in isolation, rather than in the context of all of the other evidence. The analysis of an actual innocence claim requires the consideration of "all the evidence, both new and old, **together.**" *Coleman,* 2013 IL 113307, ¶ 97 (emphasis added): *see also id.* ¶ 96 (courts consider newly-discovered evidence "along with the trial evidence"). In other words, the totality of the evidence is what matters. Therefore, each piece of newly-discovered evidence must be considered in combination with each other and in combination with the evidence in the record or which is not newly-discovered, not in isolation as the State urges.

10. At the hearing, which both sides agree must take place, the Court should have the opportunity to consider ***all*** of the evidence, not just some of it. The Court should not be called upon to ignore evidence, as the State requests.

B. The State seeks to defend McNeil's conviction by rewriting history and ignoring facts and evidence.

11. In its motion to dismiss, the State derides McNeil's claim that newly-discovered evidence of Misook Nowlin's hair and DNA at the scene of Christina's death, along with her subsequent conviction of a similar murder, supports his actual innocence claim. The State characterizes the evidence of Misook's culpability as requiring that she "secretly and silently forced entry through a window of the residence, secretly and silently murdered Christina, and then secretly and silently departed without disturbing anything in this small residence or alerting the defendant who was awake on the other side of the wall—during a torrential downpour[.]" (MTD 14-15). The State claims that this would be "positively rebutted" by the trial record. (*Id.*) The State cuts-and-pastes this characterization into its brief in multiple locations. (*Id.* at 14-15, 21, 27, 33).

12. This argument is disingenuous given that the State is simultaneously agreeing that *other* evidence of Misook's culpability *should* be considered at an evidentiary hearing. In addition, it is the State's—not McNeil's—characterization of the evidence that is belied by the record.

13. The State's contention that McNeil's newly-discovered evidence would have required Misook to enter and exit the apartment "without disturbing anything" is patently false. (MTD 14-15). On the contrary, McNeil presents evidence in his petition that Misook disturbed many things. She knocked a fan to the floor. (*E.g.*, Pet. ¶¶ 26, 28). McNeil's petition includes a picture of the fan on the ground. (*Id.* at ¶ 32). She disturbed the blinds. (*Id.* at ¶ 37). McNeil's petition includes a picture of that too. (*Id.* at ¶ 31). She cut holes in the screen. (*E.g.*, *Id.* at ¶¶ 28, 56). Again, McNeil's petition includes photographs of the damaged screen. (*Id.* at ¶ 30). In

addition, McNeil's petition notes that the screen was out of its track. (*E.g., Id.* at ¶¶ 56, 124). The State's characterization of the evidence is a strawman.

14. Another strawman is the State's contention that McNeil was awake at the time of these events. (MTD 14, 21, 27, 33). This contention requires fact-finding. Moreover, although unclear, the State may be relying on the stomach contents evidence presented at trial in order to make this argument. That evidence is thoroughly discredited by modern science, is a portion of the newly-discovered evidence McNeil presents in his petition, and is something the State does not even attempt to argue against in its motion to dismiss. (*Infra* ¶¶ 20-22).

15. The State's dismissive recasting of McNeil's evidence also relies on an assertion that McNeil was on the other side of the wall from Christina when she died. (MTD 14, 21, 27, 33). That is incorrect and belied by the record. The record shows that McNeil was asleep on a couch in the living room and that the couch is across the room from the wall of the bedroom. (*See* July 6, 1999 Tr. at 41).

16. Finally, the State misconstrues the evidence to contend that Christina's death occurred during a "torrential downpour." As an initial matter, this is yet another instance of the State apparently relying on the time of death as calculated based on stomach contents, which is discredited by the modern science presented in McNeil's petition and which the State does not defend. But moreover, to argue that Misook could not have murdered Christina because there was a "torrential downpour" at the time is inaccurate. At trial, an official weather observer for the National Weather Service testified that on June 16, 1998, the first recorded rain was at 3:00 a.m. (July 1, 1999 Tr. at 141). He further testified that at 3:00 a.m., there was just 0.03" of rain accumulated, which was "not a whole lot" and "basically" just droplets on the pavement. (*Id.* at 146, 147, 148). The evidence thus demonstrates that Misook could have entered the apartment

anytime at or prior to 3 a.m. without encountering any rainfall, let alone a "torrential downpour."

17. The State exposes the frailty of its position when it must resort to misrepresentations and exaggerations in order to oppose McNeil's actual innocence claim. In addition, in positing this argument (over and over again) in its motion, the State has *created* factual disputes that can only be resolved at a third stage hearing.

C. The State does not dispute that modern science refutes the trial evidence regarding Christina's time of death.

18. McNeil presents evidence that modern science has established stomach content analysis is not a reliable measure of time of death. (Pet., Ex. 35, Baker Rpt. at 15). At trial, McNeil testified that Christina went to bed around 10:30 p.m., was awake around midnight, and asleep when he checked on her before he went to bed around 2:00 a.m. The State sought to discredit McNeil's truthful version of events with testimony from Dr. Hnilica regarding Christina's stomach contents. Ultimately the trial court would credit Dr. Hnilica's testimony and conclude that McNeil's timeline was inconsistent with the evidence and that Christina must have died at a time when McNeil was awake and alone in the apartment with her. (Pet. 30, July 7, 1999 Tr. at 164).

19. As Dr. Baker explains, we now know that stomach contents are not a reliable measure of time of death or the time of a last meal. (Pet., 31, Ex. 35, Baker Rpt. at 15). Indeed, modern science shows that utilizing stomach contents as a guide is far too imprecise and "thus liable to mislead the investigator and the court." (*Id.*)

20. The State does not dispute that Dr. Baker's report regarding stomach content analysis is newly-discovered, material, non-cumulative, and conclusive. The only part of Dr. Baker's report that the State contends is not newly-discovered are those sections relating to whether a crime occurred at all. (See MTD 6, 7, 8). It is therefore uncontested that evidence pertaining to stomach content analysis / time of death should proceed to a third-stage evidentiary

hearing.

D. The State's effort to prevent the Court from considering newly-discovered pathology evidence at an evidentiary hearing must be denied.

21. As noted, McNeil's petition presents the report of forensic pathologist Dr. Andrew Baker. (Ex. 35). That report concluded that "nothing about the autopsy findings in Christina McNeil's case supports an objective, independent, diagnosis that she was smothered or that the manner of death was a homicide." (*Id.* at 17).

22. The State does not dispute that Dr. Baker's findings are material, noncumulative, and conclusive. (See MTD 6, 7, 8). Rather, the State simply contends that Dr. Baker's findings are not newly-discovered. (*Id.*) The State's argument on this score is based on conjecture and fact-finding.

23. On its face, Dr. Baker's report is based on newly-discovered scientific evidence. (*E.g.*, Baker Rpt. at 8 ("Dr. Hnilica's testimony as to the significance of any petechiae is undercut by a *modern understanding* of how and why petechiae form." (emphasis added); *id.* at 17 ("the specificity of petechia is *now* known to be *far* less than testified to by Dr. Hnilica" (first emphasis added)). The State invites the Court to make the factual conclusion that Dr. Baker is incorrect that the science has advanced and to find that his assertion to the contrary is not credible. But fact-finding and credibility determinations are forbidden at this stage. See, *Jones*, 399 Ill. App. 3d at 357. Moreover, the Illinois Supreme Court has "emphasized that is not the intent of the [A]ct that ... claims be adjudicated on the pleadings." *Coleman*, 183 Ill. 2d at 382 (quotation omitted). The State's contention that Dr. Baker's report is not based on newly-discovered evidence requires determinations that can only be made after a third-stage evidentiary hearing.

24. Separately, the State's argument that Dr. Baker's findings are not newly-discovered is based on an apparent belief that scientific testimony is only newly-discovered where it relies

exclusively on studies that post-date trial. Dr. Baker's report cites studies that post-date McNeil's trial (pet., Ex. 35, Baker Rpt. at 8, 16) in addition to studies that pre-date trial (*id.* at 15). The State cites no authority for its proposition that this somehow means that nothing in Dr. Baker's report constitutes newly-discovered evidence. That is because it is not the law.

25. Similarly unavailing is the State's contention that this evidence should have been raised in a prior post-conviction petition. This argument requires extensive fact-finding that can only take place at an evidentiary hearing. Moreover, the State's position is contrary to well-established law. *See, e.g., People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) ("although defendant's first two petitions also alleged actual innocence, defendant's third petition presented a new 'claim' of actual innocence because it offered two additional eyewitnesses who were previously unknown to defendant. Defendant is not precluded from raising multiple claims of actual innocence where each claim is supported by newly discovered evidence.").

E. The Court should reject the State's request that it ignore evidence that modern science demonstrates that there is no support for the State's contention that Christina was sexually abused.

26. McNeil's petition presents expert reports from Dr. Baker and Dr. Nancy Harper, a nationally-renowned pediatrician and expert specializing in child abuse, including sexual molestation, setting forth newly-discovered evidence that there is no indication Christina had been sexually abused. (Pet. at Exs. 35 and 36). The State does not dispute that this evidence is material, nor does it dispute that this evidence is non-cumulative. Rather, the State argues that the evidence is not newly-discovered and insufficiently conclusive.

27. As to whether the evidence is newly-discovered, Dr. Harper specifically states that her conclusions are based on scientific advances that post-date McNeil's trial. Dr. Harper states that, "at the time of the postmortem examination" performed on Christina's body, "there was debate in the literature on the significance of the transverse of horizontal measurement of the

hymen." (Pet., Ex. 36, Harper Rpt. At 6). That debate has now been settled, and "the current scientific literature does not support an association between the transverse diameter of the hymenal opening and child sexual abuse." (*Id.*). The State is thus just plain wrong when it contends that Dr. Harper simply presents a "different interpretation of the autopsy findings" rather than a conclusion based on newly-discovered scientific principles. (MTD 8).

28. As it does with Dr. Baker's report above, the State again engages in a review of the studies Dr. Harper cites and concludes that because some of them pre-date trial, nothing Dr. Harper says can be considered newly-discovered, despite her expert conclusion to the contrary. (*See* MTD 8-12). Like Dr. Baker, Dr. Harper cites to sources from both before and after McNeil's trial. (*See generally* Harper Rpt.). For the reasons set forth above with respect to Dr. Baker's report, there is no support for State's position that scientific evidence is newly-discovered only where expert testimony regarding the science ignores any sources that pre-date trial. Further, the State asks the Court to engage in impermissible fact-finding on this score.

29. As to conclusiveness, the State contends that the record rebuts the proposition that evidence of sexual abuse was fundamental to the State's case. (*See* MTD at 11). In presenting this argument, the State appears to concede that sexual abuse evidence should never have been presented at trial because it was overly prejudicial and irrelevant. (*Id.* at 11-12 ("the trial court is presumed to [have] adequately vetted and properly considered prejudicial evidence" and "the trial judge in this case ***properly*** considered the evidence … and afforded it little—if any—weight")).

30. But the State's effort to distance itself from the case it presented at trial is contrary to the record. The State's theory at trial, and its presentation of evidence, was that sexual abuse occurred immediately prior to, and as part of the same series of events, that led to Christina's death, and that McNeil even put Christina's underwear back on after the murder to cover-up evidence of

sexual abuse. During opening statements, the State said, "The evidence is going to show ... she was in her bedroom, the defendant entered the bedroom, sexually abused her, and after that smothered her while she was face down on her bed. After he smothered her he ... laid her on her back, placed her underwear back on...." (July 1, 1999 Tr. at 5). What is more, as described above, the State presented expert testimony that Christina had suffered "current and chronic trauma" to her "vaginal area." (*Id.* at 8).

31. The State's shifting sands approach to the evidence in this case is unpersuasive. At trial, in order to send McNeil to prison, the State contended that the so-called evidence of sexual abuse was extremely probative. Now, in order to keep McNeil in prison, the State contends that the so-called evidence of sexual abuse was meaningless. The Court should grant Mr. McNeil an evidentiary hearing where these issues can be resolved.

32. The State's position in its motion to dismiss appears to be that it does not matter why McNeil killed Christina, all that matters is that there was no evidence anybody else could have done it. Ironically, this contention squarely supports McNeil's actual innocence claim as it highlights the importance of the newly-discovered evidence of Misook Nowlin's culpability.

33. Finally, in his petition, McNeil explains that, "had the finder of fact known that Hnilica was flat wrong about whether Christina had been sexually abused, the credibility of her other conclusions would have been severely undermined." (Pet. at 46-47 (citing *People v. Woodall*, 131 Ill. App. 2d 662 (3d Dist. 1970) ("where newly discovered evidence affects the credibility of the testimony of a material witness it would be a strong reason for granting a new trial") and *People v. Tyler*, 2015 Il App (1st) 123470, ¶¶ 186, 189 (remanding postconviction petition for third-stage hearing where evidence of systematic pattern of police misconduct would undermine testifying officers' credibility)). The State does not respond to this argument.

F. The State's contention that hair evidence placing Misook at the crime scene is immaterial and insufficiently conclusive must fail.

34. The State has agreed that there should be an evidentiary hearing regarding evidence that Misook is responsible for Christina's death. (MTD 31, 32). Specifically, the State has agreed that a hearing must take place regarding newly-discovered evidence that Misook confessed. (*Id.*) However, the State also takes the position that scientific evidence supporting Misook's confession should not be considered at that hearing. (*Id.* at 12-18, 19-24). A hearing regarding Misook's confession to the crime would be incomplete without also considering the scientific evidence corroborating that confession. *See Chambers v. Mississippi*, 410 U.S. 284 (1973); *People v. Tenney*, 205 Ill. 2d 411 (2002). The State's effort to artificially limit the evidence of Misook's culpability that the Court may consider should be rejected.

35. McNeil's petition presents newly-discovered scientific evidence that Misook Nowlin's hair was found in Christina's bed the morning Christina died in that very bed. (Pet. ¶ 157). Specifically, at the crime scene, multiple hairs were recovered from Christina's hands, arms, and bed. Three of those hairs were sent for post-conviction DNA analysis. (Pet. ¶ 157, Ex. 37). Two of the hairs were unsuitable for testing. (*Id.* at 1). Newly-discovered DNA testing revealed that the other hair, which was discovered inside the pillowcase, was not Christina's, but that the hair was consistent with Misook's DNA. (*Id.* at 2).

36. The State does not dispute that this evidence is newly-discovered and non-cumulative. (MTD 32-37). The State argues only that this evidence is not material and that it is not sufficiently conclusive. (*Id.*) The State is wrong on both counts.

37. The State begins with an irrelevant argument that the bed was not in fact "Christina's bed" because it was "defendant's bed." (MTD at 13). However, it is beyond dispute that Christina slept in the bed on the nights she stayed with McNeil—on those nights, it was

"Christina's bed." The State's resort to semantics underscores the weakness of its position. Indeed, the State used the same language at trial, referring to it as "Christina's bed" and the "victim's bed" multiple times. (E.g., July 1, 1999 Tr. at 59, 82, 102).

38. ***Material.*** The State contends that Misook's hair in the bed in which Christina died, at the time Christina died, is not material because Misook's hair could have been present because she and McNeil had previously been in a relationship, and not because she killed Christina. In making this argument, the State points out that even though McNeil and Misook were broken up, McNeil stated he and Misook had sexual intercourse three days before Christina's death. (*See*, MTD 13, 14). The State also references that Misook was in McNeil's apartment twelve days before Christina's death and refused to leave. (*Id.*)

39. It is correct that McNeil and Misook had broken up at the time of Christina's death. This makes it less likely that Misook's hair would be present in the bed in which Christina died at the time Christina died. While a police report does indicate that McNeil told police that he and Misook had sexual intercourse on June 13, 1998, the police report does not indicate that Misook and McNeil had intercourse in McNeil's apartment as opposed to at Misook's. In fact, in McNeil's testimony at his trial, he stated that he had never had sex with Misook at his apartment. The only time they had sexual intercourse at his home was in his previous apartment on Croxton Avenue. (July 6, 1999 Tr. at 56). The State itself actually argued at a pre-trial hearing that there was *no evidence* Misook was in McNeil's home near the time of the murder:

> there has to be a close connection, and we still have not heard any evidence of a close connect of Misook being at the residence during or before the time of the murder, or that she was even in the apartment on the day of the murder. There is no evidence of that whatsoever.

(March 4, 1999 Tr. at 131-132)

40. Newly-discovered evidence that Misook's hair was on the bed in which Christina

died at the time Christina died is relevant and probative evidence that Misook, and not McNeil, is responsible for Christina's death. Evidence indicating that a third-party committed the crime is by definition material. *E.g.*, *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 38. Bart McNeil should receive a new trial based on this evidence alone.

41. ***Conclusive.*** The State also argues that evidence of Misook's hair at the scene of Christina's death is not conclusive, again relying on the fact that the trial court found that an intruder had not entered the residence. (MTD 12-18). The trial court ruled on the intruder theory without any of the newly-discovered evidence, including the fact that Misook's hair and DNA have now been found at the location of Christina's body. This reliance on the trial court's finding regarding an intruder, again, does not take into account that an analysis of an actual innocence claim requires the court consider "all the evidence, both new and old, together." *Coleman*, 2013 IL 113307 at ¶ 97.

42. The evidence of Misook's hair at the scene of Christina's death is likely to change the result on retrial. As the Supreme Court recently explained in *Robinson*, "the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." 2020 IL 123849, ¶ 48. "Probability, rather than certainty, is the key[.]" *Id.* The DNA evidence confirming the presence of Misook's hair in Christina's bed would *at least* probably lead to a different result.

G. The State's contention that other DNA evidence placing Misook at the crime scene is immaterial and insufficiently conclusive must fail.

43. McNeil's petition presents newly-discovered post-conviction DNA test results identifying Misook's DNA in multiple locations on Christina's bedsheet and pillowcase. (Pet. ¶¶158-64; ex. 38; ex. 37; ex. 40; ex. 39, Reich Rpt.). The State does not dispute that this evidence is newly-discovered and non-cumulative. (MTD 32-37). Rather, the State simply cuts-and-pastes

its argument with respect to the hair evidence and posits that the DNA evidence is not material and not sufficiently conclusive. (*Id.*) For the reasons set forth above, the State's effort to prevent the Court from considering the DNA evidence at an evidentiary hearing must be denied.

H. The State's effort to prevent the Court from considering evidence of Misook Nowlin's behavior around the time of Christina's death must be rejected.

44. McNeil's petition presents an affidavit from Susanne Burns. Burns, a neighbor of Misook's, avers that she saw Misook in the early morning hours of June 16, 1998. (Pet. 52, Ex. 53). She observed Misook engaged in "unusual" behavior in the "middle of the night," going back and forth from her apartment to a storage closet in the hallway of their apartment building. (*Id.* ¶¶ 18-28). This information is especially significant because it demonstrates that Misook lied to the police and to the Court when she claimed to have been sleeping at that time. (Pet. 53, Ex. 4; Mar. 4, 1999 Tr. at 124-28).

45. The State does not dispute that Burns' affidavit is non-cumulative. (MTD 32-37). Instead, the State argues that the evidence is not newly-discovered, material, and that it is not conclusive. (*Id.*)

46. This is another example of the State attempting to artificially limit the scope of the evidence presented at an evidentiary hearing it has agreed to. That evidentiary hearing, by the State's admission, will consider evidence of Misook's culpability. The State's effort to prevent the Court from considering additional evidence of Misook's culpability should be rejected.

47. ***Newly-discovered.*** The State claims this evidence is not newly-discovered because McNeil was aware of the fact that Burns existed prior to trial and was aware that she lived across the hall from Misook. (MTD at 25). According to the State, this means that McNeil had "awareness of Ms. Burns as a possible witness[.]" (*Id.*) But the mere fact that McNeil knew Burns to exist does not mean he had any reason to know what she witnessed the night Christina died at an entirely

different location. Indeed, Burns explains in her affidavit the reasons she did not come forward sooner. (*See* Pet., ex. 53). The State presents no authority for the notion that information provided by a witness cannot be newly discovered whenever it is provided by an individual that the petitioner knew to exist. That is because that is not the law. *People v. Ortiz*, 235 Ill. 2d 319, 333-34 (2009); *People v. Edwards*, 2012 IL 111711, ¶ 38; *People v. Anderson*, 2021 IL App (1st) 200040, ¶ 63.

48. ***Materiality.*** The State's argument about materiality is pure fact-finding. The State asks the Court to conclude that Misook should have been "drenched" if she had been outside. However, even if the State were correct about the weather that night (it is not for the reasons described above), the affidavit is silent about whether Misook was wet (drenched or otherwise). (*See*, Pet., ex. 53). The State also asks the Court to make the factual conclusion that, even if Misook had gotten wet, it would have been impossible for her to have taken off a coat or other wet clothes before Burns saw her. The State's argument thus underscores the need to have an evidentiary hearing. Moreover, The State ignores that this affidavit demonstrates that Misook lied to the police and later lied under oath when she was questioned about her activities that night. That is material both to her culpability and to her credibility when she testified. *See People v. Tyler*, 2015 IL App (1st) 123470, ¶ 193 (evidence related to credibility sufficient to warrant third-stage hearing).

49. ***Conclusiveness.*** As to conclusiveness, the State simply cuts and pastes its argument about the DNA and hair evidence not being conclusive. The argument fails for the same reasons described above. It also fails because it ignores the fact that the evidence proves that Misook lied under oath when the trial court was considering whether or not to admit evidence of her culpability at McNeil's trial. *See id.*

I. The State's effort to prevent the Court from considering evidence of Misook Nowlin's subsequent strikingly similar murder should be rejected.

50. As noted, the State has agreed that evidence of Misook's culpability for Christina's death should be considered at an evidentiary hearing. However, the State would like that hearing to consider as little evidence as possible. Like the hair and DNA evidence, the State asks the Court to prevent McNeil from presenting evidence of Misook's murder of Linda Tyda to corroborate Misook's newly-discovered confession and to establish her *modus operandi*. The State's efforts must be denied.

51. McNeil now presents evidence that Misook subsequently committed another murder. This murder bears a number of striking similarities to Christina's death and suggests a particularly idiosyncratic *modus operandi*—taking revenge on an ex-partner by killing the person closest to them.

52. The State does not dispute that this evidence is newly-discovered and non-cumulative. (MTD 32-37). Rather, the State only disputes its materiality and conclusiveness. (*Id.*)

53. ***Materiality.*** The State contends that Misook's murder of Linda Tyda is not material because it occurred thirteen years after Christina's death. (*Id.* at 32, 33). In other words, according to the State, the evidence is not material because it is newly discovered. The State seeks to turn two prongs of the actual innocence inquiry against each other and contend that they cannot coexist. However, evidence can be both material and new, otherwise no petitioner could ever meet the actual innocence standard. The State's argument on this score is a *non sequitur*.

54. To be material, evidence must simply be "relevant and probative of the petitioner's innocence." *People v. Robinson*, 2020 IL 123849, ¶ 47. Evidence that another suspect committed a similar murder is relevant and probative. *See, e.g., People v. Enis*, 139 Ill. 2d 264, 281 (1990).

55. The State additionally argues that Misook's killing of Linda Tyda is not material

because the *modus operandi* in the two cases is not "identical." (MTD at 32). Whether that is the case requires fact-finding which cannot occur at this stage. But more importantly, two crimes need not be "identical" in order to form the basis of admissible *modus operandi* evidence. *People v. Connolly*, 186 Ill. App. 3d 429, 434 (4th Dist. 1989) ("it is not necessary that the crimes be identical"); *People v. Kimbrough*, 138 Ill. App. 3d 481, 487 (1st Dist. 1985) (same).

56. The two killings are remarkably similar. Both occurred shortly after Misook was rejected by her significant other. Christina was killed just hours after Misook and McNeil had dinner at a local restaurant and Misook became hysterical because McNeil "did not want her anymore." (*See,* Pet. ¶10). Misook herself confirmed this fight occurred, that she was mad at McNeil, and she was so upset she could not write out a check without McNeil's help. (*See,* Pet. ¶ 11, Mar. 4, 1999 Tr. at 119-121, 122). In the Linda Tyda murder trial, Don Wang testified that he and Misook had brunch at a restaurant in Bloomington, Illinois, and Don Wang brought up the topic of divorce. (Ex. 48 at 157). Wang testified he later learned that just 10 to 20 minutes after they left the restaurant, Misook set in motion a plan to kill his mother. (*Id.* at 158-159). Tyda would be dead the next day.

57. The State claims that the *modus operandi* was different because Christina was three years-old and Linda Tyda was 70. There is no dispute that the victims were of different ages. But both were the closest relative to the person that rejected Misook.

58. The State further contends that the two crimes were different because there was evidence Christina was sexually abused, whereas there was no evidence of sexual abuse in connection with the murder of Tyda. In this regard, the State is relying on debunked allegations of sexual abuse that it contends a few pages earlier in its motion are irrelevant. Taking McNeil's well-pleaded allegations as true as we must at this stage, there is no discrepancy between the two

murders in terms of whether they involved sexual abuse.

59. The State further argues that Misook confessed to murdering Linda Tyda, but she did not confess to murdering Christina and, therefore, the two crimes are not identical. As a threshold matter, whether an offender confesses to one crime and not another has no bearing whatsoever on whether the two crimes evidence a similar *modus operandi*. This is simply irrelevant. It is also incorrect. Dawn Nowlin and Michelle Nowlin have each provided affidavits stating that Don Wang told them Misook confessed that she murdered Christina and the State has agreed that those affidavits are sufficient to warrant an evidentiary hearing.

60. Finally, the State argues that Misook's murder of Linda Tyda is immaterial because Christina was left lying in bed, whereas the body of Linda Tyda was hidden. (MTD 32-33). Of course, that is a function of where the murders happened. In each instance, Misook left the body in a location that would deflect the investigation from her. Christina was left in her dad's apartment where Misook murdered her; Tyda was buried in a forest preserve rather than at the location of the murder, which was Misook's own sewing shop.

61. Ultimately, the State's effort to highlight trivial differences between the two killings does nothing to affect the real materiality inquiry. Misook's murder of Linda Tyda is relevant and probative to this case.

62. The State fails to respond to McNeil's argument that the evidence is also material because it is probative and relevant to Misook's credibility when she testified at McNeil's pretrial hearing.

63. ***Conclusive.*** The State again cuts-and-pastes its argument that the evidence is insufficient conclusive from the sections regarding Misook's hair and DNA being recovered from the crime scene. For the same reasons, the State's argument must fail.

64. Furthermore, the State again fails to address McNeil's contention that the evidence of Misook's conviction of a similar murder would have undermined her credibility when she testified at McNeil's pretrial hearing and that this would lead to a probability of a different result.

J. To the extent the Court accepts the State's argument that any of McNeil's evidence is not newly-discovered, then a hearing is necessary as to McNeil's ineffective assistance of counsel claim.

65. McNeil's petition presents an ineffective assistance of counsel claim in the alternative to his innocence claim.

66. By contending that certain pieces of evidence contained in McNeil's petition are not newly discovered, the State has put the reasonableness and diligence of McNeil's trial counsel squarely at issue. For example, the State contends that the Burns affidavit is not newly discovered because McNeil was aware that Ms. Burns existed. If the Court were to accept that argument and find that Burns' evidence is not newly-discovered, there is nothing in the record that would allow the Court to assess why McNeil's counsel did not call Burns to testify. Therefore, there is no way for the Court to determine, without fact-finding, whether counsel's performance was objectively reasonable or whether the failure to investigate and call Ms. Burns was the product of trial strategy. The same holds true for the State's contentions that neither Dr. Baker nor Dr. Harper present newly-discovered science in their reports.

67. To the extent the court is persuaded by the State's argument that any of these pieces of evidence are not newly-discovered, it is also premature to assess whether McNeil suffered prejudice from counsel's unreasonable failure to investigate, locate, and present that evidence at trial. That would require fact-finding that is inappropriate at this stage.

V. CONCLUSION

68. WHEREFORE, for the reasons stated above and in his petition, Petitioner Barton McNeil respectfully requests this Court (a) deny the State's motion to dismiss; (b) grant an

evidentiary hearing on each of McNeil's claims; and (c) following that hearing, vacate Mr. McNeil's conviction and grant him a new trial.

Dated: April 21, 2022

Respectfully submitted,

BARTON MCNEIL

By: /s/ Karl Leonard
Counsel for Petitioner

By: /s/ John Hanlon
Counsel for Petitioner

By: /s/ Lauren Myerscough-Mueller
Counsel for Petitioner

By: /s/ Stephanie Kamel
Counsel for Petitioner

By: /s/ Leanne Beyer
Counsel for Petitioner

Karl Leonard
Lauren Myerscough-Mueller
THE EXONERATION PROJECT
at the University of Chicago Law School
311 N. Aberdeen Street, 3rd Floor
Chicago, IL 60607
(312) 789-4955
karl@exonerationproject.org
laurenm@exonerationproject.org

Counsel for Petitioner

John Hanlon
Stephanie Kamel
Leanne Beyer
ILLINOIS INNOCENCE PROJECT
University of Illinois, Springfield
One University Plaza, MS – PAC 451
Springfield, IL 62703
(217) 206-8558
jhanl2@uis.edu
skame2@uis.edu
lbeye2@uis.edu

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of April 2022, I hand-delivered a copy of the foregoing PETITIONER'S RESPONSE TO THE STATE'S MOTION TO DISMISS to:

State's Attorney Don Knapp
Assistant State's Attorney Mary Koll
McClean County State's Attorney's Office
104 W. Front Street, Room 605
Bloomington, IL 61701

I further certify that I caused a copy to be e-mailed to counsel for respondent as follows:

Assistant State's Attorney Mary Koll: Mary.Koll@mcleancountyil.gov

DATED: April 21, 2022

/s/ Leanne Beyer
Attorney for Petitioner Barton McNeil