

**STATE OF ILLINOIS  
IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT  
COUNTY OF McLEAN**

THE PEOPLE OF THE  
STATE OF ILLINOIS,

Plaintiff/Respondent,

Vs.

98 CF 633

Barton McNeil,

Defendant/Petitioner.

**FILED**  
FEB 01 2024  
CIRCUIT CLERK  
McLEAN COUNTY

**ORDER**

This cause having come on for third stage hearing on the Petitioner's Successive Post-Conviction Petition, filed herein on February 23, 2021, the court being fully advised in the premises, DOES HEREBY FIND:

1. That the court has jurisdiction of the parties and subject matter herein.
2. That following a bench trial, Petitioner was found guilty of Counts 1 and 2 and on August 12, 1999, was sentenced on Count 1, First Degree Murder, to natural life in the Illinois Department of Corrections. The Petitioner filed a notice of appeal.
3. The Appellate Court affirmed the Trial Court but remanded the case for a new sentencing hearing.
4. Following remand from the Appellate Court, the Petitioner was resentenced on July 18, 2002, to a term of 100 years in the Illinois Department of Corrections. The Petitioner filed notice of appeal.
5. The Appellate Court affirmed the Trial Courts sentence in a Rule 23 Order filed November 4, 2004, the Mandate issued on December 7, 2004.
6. The Petitioner filed a Petition for Post-Conviction Relief on September 28, 2005.
7. The Trial Court denied Petitioners initial Post Conviction Petition in a written order entered on September 28, 2005.
8. The Appellate Court affirmed the Trial Court in a Rule 23 Order dated March 7, 2008. The Mandate issued on November 10, 2008



9. Petitioner filed a Motion for Leave to File a Successive Post Conviction Petition on February 23, 2021, which was granted by the Trial Court on August 17, 2021, advancing the Successive Post Conviction Petition to second stage review.
10. The Respondent filed a Motion to Dismiss in part on April 1, 2022, and said motion was heard on May 12, 2022.
11. On October 11, 2022, the court entered a written order dismissing Claims I.A., I.B., I.C., I.D., I.E., I.H. and Claim II. Claim I.I. was dismissed as it relates to all claims except I.F. and I.G.. The court advanced Claims I.F., I.G, and Claim I.I. as it relates to Claims I.F and I.G.to third stage hearing.
12. On November 21, 2023, this court conducted a Third Stage Post Conviction Hearing.
13. The issues at third stage hearing were:
  - a. I.F.- Dawn Nowlin's newly discovered affidavit averring that Misook confessed to Don Wang.
  - b. I.G.- Michelle Nowlin's newly discovered affidavit averring that Misook Confessed to Don Wang, and,
  - c. I.I.- The Totality of the Evidence (only as it relates to Claims I.F., and I.G.)
14. Michelle Spencer, formerly Nowlin, testified at third stage hearing that she is Misook Nowlin's daughter, born in 1989. That her mother was convicted of killing Linda Tyda and is currently serving a prison sentence for the offense. That at Linda Tyda's Celebration of life sometime around 2011, she, Andy Nowlin, and Dawn Nowlin were having a conversation with Don Wang, Linda Tyda's son, at which time Don Wang said to her, "you know what your mom told me one time? . . . That she killed Christina." Michelle could tell that "he was in a very hard place at the time too."
15. Michelle further testified, "And I don't honestly know if he said that just to make me not like my mom or – I don't know what his intentions were. And like I said it was very random and I don't even know how our conversation got to that point for him to bring that up."
16. Dawn Nowlin testified that she is Andy Nowlin's wife. That she is Michelle Spencer's stepmother. She attended Linda Tyda's celebration of life but doesn't remember the year. She believed it was held at the Jumer Hotel. She was engaged in a conversation with Don Wang during which Andy Nowlin and Michelle Nowlin (now Spencer) were



present. That during that conversation, Don Wang told her that "...he got in a big - - him and Misook was in a big fight and that she confessed to killing Christina." When asked if he (Don Wang) said anything further, more specific, she replied, "That it was just a very heated argument and that she said she killed Christina."

17. Detective Fanelli of the Bloomington Police Department testified that he was made aware that there were assertions being made that Misook Nowlin had made statements to Don Wang that she had killed Christina. He subsequently asked Don Wang to come to the Bloomington Police Department to be interviewed. The interview occurred on February 16, 2012 and was video and audio recorded and a portion was played during the third stage hearing. A transcript of the portion played by the state was introduced and admitted as Peoples Exhibit 1A. An additional video clip was played by the Petitioner and a complete transcript was tendered and admitted as Petitioners Exhibit 1A. During the interview, Detective Fanelli asked Don Wang:

(Peoples Exh. 1A, Page 6, lines 9-14)

Q -Okay. Did she ever at any time ever confess to you or tell you that she killed Christina?

A-Not that I remember if she said something like that.

Q-Okay. Would would there be any- Would there be anybody that you ever told? Or did you ever tell anybody that Misook confessed to you that she killed Christina?

A- (Shakes head) I don't believe so.

Peoples Exh. 1A, Page 6 line 27-Page 7, line 17)

)... "this lady will testify that Don Wang told her that Misook confessed to killing Christina." Now is that true?

- No.

Okay, so-

Confess means you tell me the whole story and how she did it?

That she basically- Yeah. Or, okay, or did she ever without telling you the whole, did Misook ever tell you something like "I killed Christina." Did Misook ever tell you?



A- (Shakes head) Not to my knowledge.

Q- Okay.

A- Really. Not to my knowledge at all.

Q- Okay. Um. Would that be something. If if Christine- Or if Misook would've said to you, if she would've said to you at some point in your marriage that "hey, I did kill that 3-year-old girl, you know, back in 1998 where Barton, you know-" Would would that be something that you would be like "holy cow!" Would that totally stick in your mind where you would remember that conversation?

A- Of course I would.

Q- Okay.

A- Yeah.

Q- And and so you have no knowledge of Misook ever telling you um that she had killed Christina?

A- No.

18. Misook Wang, AKA Misook Nowlin was sworn and testified during the hearing after being given the opportunity to speak with appointed counsel and being advised that anything she says could be used against her in future proceedings. Ms. Wang/Nowlin repeatedly asserted her fifth amendment right against self-incrimination in response to respondents' counsels' questions.

19. After hearing arguments of counsel, the court took the matter under advisement.

### **LEGAL PRINCIPLES**

To establish a claim of actual innocence, the evidence supporting the petition must be (1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial. Edwards, 2012 IL 111711, ¶ 32, 360 Ill.Dec. 784, 969 N.E.2d 829; see also People v. Coleman, 2013 IL 113307, ¶ 96, 374 Ill.Dec. 922, 996 N.E.2d 617; People v. Washington, 171 Ill. 2d 475, 489, 216 Ill.Dec. 773, 665 N.E.2d 1330 (1996). Newly discovered evidence is evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence. Coleman, 2013 IL



113307, ¶ 96, 374 Ill.Dec. 922, 996 N.E.2d 617. Evidence is material if it is relevant and probative of the petitioner's innocence. *Id.* Noncumulative evidence adds to the information that the fact finder heard at trial. *Id.* (citing People v. Molstad, 101 Ill. 2d 128, 135, 77 Ill.Dec. 775, 461 N.E.2d 398 (1984)). Lastly, the conclusive character element refers to evidence that, when considered along with the trial evidence, would probably lead to a different result. *Id.* ¶ 96 (citing Ortiz, 235 Ill. 2d at 336-37, 336 Ill.Dec. 16, 919 N.E.2d 941). The conclusive character of the new evidence is the most important element of an actual innocence claim. Washington, 171 Ill. 2d at 489, 216 Ill.Dec. 773, 665 N.E.2d 1330.

Ultimately, the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt. Coleman, 2013 IL 113307, ¶ 97, 374 Ill.Dec. 922, 996 N.E.2d 617. The new evidence need not be entirely dispositive to be likely to alter the result on retrial. *Id.* (citing People v. Davis, 2012 IL App (4th) 110305, ¶¶ 62-64), 359 Ill.Dec. 249, 966 N.E.2d 570. Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence. *Id.* (citing People v. Robinson, 2020 IL 123849 P's 47 and 48)

The evidence of the assertions by Michelle Spencer and Dawn Nowlin do constitute newly discovered evidence. However, the testimony would almost certainly not be admissible at a retrial as the defendant would have to first call Don Wang to testify that Misook Nowlin never confessed to him and then call Michelle Spencer and Dawn Nowlin to attempt to impeach Don Wang's testimony. Such testimony by Don Wang would not damage the defendant's case but would only fail to support its theory.

A party may only impeach its own witness with a prior inconsistent statement if the witness' testimony has damaged, rather than failed to support, the position of the impeaching party. People v. Sims, 285 Ill.App.3d at 610, 220 Ill.Dec. 698, 673 N.E.2d at 1127. The requirement that the witness' testimony must damage, rather than fail to support, the position of the impeaching party recognizes the danger that the statement may be improperly introduced under the guise of impeachment. Such a statement may not be used substantively. *People v.*

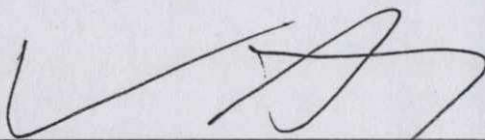


*Cruz*, 162 Ill.2d 314, 358–59, 205 Ill.Dec. 345, 643 N.E.2d 636, 657–58 (1994). (Citing *People v. Edwards*, 309 Ill. App. 3d 447, 453)

The conclusive character of the new evidence is the most important element of an actual innocence claim. The evidence of the impeaching testimony of Michelle Spencer and Dawn Nowlin is not conclusive evidence that, when considered along with the other trial evidence, would probably lead to a different result at trial. The evidence supporting the postconviction petition does not place the trial evidence in a different light or undermine the court's confidence in the judgment of guilt.

**WHEREFORE**, the Respondent's Successive Petition for Post Conviction Relief is denied following third stage hearing.

DATE: 2/1/24

  
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CIRCUIT JUDGE  
William Yoder