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APPELLATE COURT 4TH DISTRICT

No. 4-24-0430

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 11th Judicial Circuit,
Plaintiff-Appellee,	)	McLean County, Illinois.
	)	
-vs-	)	No. 98 CF 0633
	)	
BARTON MCNEIL,	)	Honorable
	)	William Yoder,
Defendant-Appellant.	)	Judge Presiding.

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLEE

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The Purpose of the Third Stage Hearing in this Case

NATURE OF THE CASE

Following a bench trial in 1999, defendant, Barton McNeil, was convicted of two counts of first degree murder, for the killing of his three year old daughter Christina McNeil. The trial court subsequently sentenced defendant to a term of natural life in the Department of Corrections. On October 24, 2001, this Court affirmed defendant's conviction, but vacated defendant's sentence as violative of the single subject rule, and remanded the matter for resentencing. *People v. McNeil*, 325 Ill. App. 3d 1190 (4th Dist. 2001) (No. 4-99-0679) (unpublished order under Illinois Supreme Court Rule 23). Following resentencing, the trial court sentenced defendant to 100 years in the Department of Corrections. On November 4, 2004, this Court affirmed defendant's sentence following remand. *People v. McNeil*, 352 Ill. App. 3d 1242 (4th Dist. 2004) (No. 4-02-0849) (unpublished order under Illinois Supreme Court Rule 23).

On September 25, 2005, defendant filed, *pro se*, a petition for relief pursuant to the Postconviction Hearing Act. Defendant initially raised claims alleging ineffective assistance of counsel. On March 7, 2008, this Court affirmed the first stage dismissal of defendant's petition as frivolous and patently without merit. *People v. McNeil*, 378 Ill. App. 3d 1139 (4th Dist. 2008) (No. 4-05-0892) (unpublished order under Illinois Supreme Court Rule 23).

On November 1, 2013, defendant filed, with the benefit of counsel, a petition for postconviction forensic testing pursuant to 725 ILCS 5/116-3. The People agreed to the testing of the pillow case and bed sheet used by the victim at the time of her death. On April 4, 2014, the trial court entered an order approving DNA testing for the items agreed to by the parties. Later, on February 23, 2021, defendant filed a motion for leave to file a successive

postconviction petition. Defendant's successive petition asserted the existence of newly discovered evidence relevant to a claim of actual innocence. The postconviction court subsequently advanced defendant's petition for second stage proceedings.

On April 1, 2022, the People filed a motion to dismiss, in part, defendant's successive postconviction petition. The People agreed that defendant's claim of actual innocence, premised on two newly discovered affidavits averring that defendant's former girlfriend had allegedly confessed to killing the victim, should advance to a third stage evidentiary hearing. The People contended that the remaining "newly discovered" evidence presented in support of defendant's claims of actual innocence, was insufficient to survive second stage dismissal.

On October 11, 2022, following a hearing on the People's motion to dismiss, the postconviction court advanced defendant's claim of actual innocence, premised on the existence of the two newly discovered affidavits, to a third stage evidentiary hearing. Defendant's remaining claims were dismissed at second stage. On November 21, 2023, the postconviction court conducted a third-stage evidentiary hearing on the remaining claims in defendant's successive postconviction petition. On February 1, 2024, the post-conviction court denied defendant's successive petition. Defendant now appeals. No issue is raised concerning the sufficiency of the postconviction pleadings.

ISSUES PRESENTED FOR REVIEW

Whether the postconviction court abused its discretion in limiting the evidence to be considered at the third stage proceedings to only those relevant to claims of actual innocence raised in a successive postconviction petition.

Whether the postconviction court erred in dismissing the majority of defendant's claims of actual innocence because the newly discovered evidence defendant presented was legally insufficient to survive second stage dismissal.

Whether following a third stage evidentiary hearing, the postconviction court manifestly erred when it denied defendant's successive petition, where the court rejected defendant's claim that the affidavits and other evidence concerning an alleged confession, presented at the evidentiary hearing were new, material, or of such conclusive character that they constituted newly discovered evidence for purposes of an actual innocence claim.

STATEMENT OF FACTS

Defendant's statement of facts fails to comply with Illinois Supreme Court Rule 341(h)(6) because it does not state the facts necessary to an understanding of the case, "accurately and fairly without argument or comment * * *" IL. S. Ct. R. 341(h)(6) (eff. Oct. 1, 2020). Defendant's statement of facts is replete with an argumentative slant to nearly every fact discussed, beginning with the "overview" of the relevant facts and continuing on throughout the entirety of the statement of facts section. The People ask that all of the objectionable portions of defendant's statement of facts be stricken and disregarded by this Court. Accordingly, the People are providing their own statement of facts.

On July 1, 1998, defendant was charged, by way of indictment, with two counts of first degree murder in violation of 720 ILCS 5/9-1(a)(1) and (a)(2), in that defendant, without lawful justification, killed Christina McNeil by smothering her, and in committing these acts, defendant either intended to kill or cause great bodily harm to the victim, or knew his acts created a strong probability of death or great bodily harm. (C. 30-31)

The People's Motion *in Limine* and Defendant's Offer of Proof Hearing

On December 28, 1998, the People filed a motion *in limine* and accompanying memorandum of law, seeking to bar defendant from introducing evidence that his "on again, off again, girlfriend" Misook Nowlin-Wang[1], may have been involved in, or otherwise committed the murder for which defendant was charged. (C. 181-82, 147-59) Defendant filed a memorandum in opposition to the People's motion *in limine*. (C. 238-55) The People later argued that there was no evidence supporting any motive for Ms. Nowlin-Wang to have killed the victim, and defendant's reliance on certain bad character and propensity evidence failed to establish any connection between Ms. Nowlin-Wang and the commission of the murder. (R. 720-26, 727-34) The trial court conditionally granted the People's motion *in limine* but left open the possibility for the defense to make a specific offer of proof. (R. 738-41)

At the hearing on the defense's formal offer of proof, Ms. Nowlin-Wang testified under oath, that she was not present at defendant's residence, at any point during the evening hours of June 15, 1998, or the early morning hours of June 16, 1998. (R. 825-26) Ultimately, the trial court found the evidence regarding the "purported motive" was "not very strong in terms of commission of a murder to set someone else up." (R. 831) Separately, the trial court found that the other evidence presented was insufficient by not "indicating any close enough connection that would allow this [evidence] to come in[,] in terms of proving the former girl

[1] At various points in the record, Ms. Nowlin is also referred to as "Ms. Wang." For the sake of consistency and to differentiate, the People will refer to her as Ms. Nowlin-Wang.

friend was the perpetrator as opposed to the defendant." (R. 831-32) As such, the trial court affirmed its previous ruling barring admission of the proffered evidence.

Defendant's Trial and Sentencing

On July 1, 1999, defendant's case proceeded by way of a bench trial. (R. 14) At trial, the evidence established that on June 16, 1998, at approximately 7:45 a.m., police and EMS personnel responded to the scene of a call at 1106 North Evans Street, Apartment 2, in Bloomington. (R. 22, 31, 39-40, 76, 80) Defendant had reported finding his daughter in bed, unconscious and not breathing. (R. 45, E. 14) Upon their arrival, paramedics identified the victim, Christina McNeil, "had no electrical activity in her heart," and rigor mortis was present, indicating the victim had been dead for several hours. (R. 34, 40)

Bloomington Police Officer Karen Baker testified that the bedroom where the victim was found showed no signs of disturbance. (R. 24-25) Detective Thomas Sanders noted the presence of a window on the north wall of the bedroom. (R. 81) He took photographs of both the interior and exterior areas surrounding this window. (R. 81, 84-86)

Det. Sanders observed and documented an accumulation of dust, spider webs, and dead insects on the window ledge and the mesh screen. (R. 84, 120, E. 27, C. 1326) Det. Sanders indicated that the dust and insect debris suggested that the window had not been "moved around." (R. 120) Additionally, he reported no markings, muddy footprints, or disturbances in the area around the window, both inside the bedroom and outside near the bushes. (R. 85-86, 119, 121, C. 1326, E. 27-29) Evidence also showed that it had rained the night before, and Det. Sanders confirmed that photographs taken on June 16 did not show

any trampling or disturbances around the bushes near the front window. (R. 150, 176-80, 153-56, E. 17-18, 29 - People's Exhibit 15(L))

Det. Sanders testified that he took a photograph showing a small cut in the lower left corner of the window screen. (R. 84-85, E. 27 - People's Exhibit 15(H)) Upon returning to defendant's apartment on the evening of June 16, he reexamined the window and discovered two holes in the screen. (R. 87) He later realized that both holes had been present in his earlier photographs, but he had not noticed them due to the his viewing angle. (C. 1326) Additionally, Det. Sanders was present for the victim's autopsy and collected various pieces of evidence, including strands of hair from the victim's hands and left forearm, her clothing, bed sheets, a pillow and pillowcase, as well as several forensic swabs. (R. 90, 94-95, 1111 114-15)

Det. Randall McKinley testified that on June 16, 1998, he was contacted by his shift command, who informed him that defendant wanted to speak to a detective at his residence. (R. 354) Upon Det. McKinley's arrival, defendant led him to the north side of the building and pointed out a window, stating that he knew how "they got in," based on his observation. (R. 354-56) Det. McKinley noted that the lower portion of the window screen had small holes, but due to the height of the window, it seemed difficult for someone to have entered without assistance. (R. 457, 358) Det. McKinley testified he saw no scuff marks, mud, or anything unusual on the wall beneath the window. (R. 357) Defendant later agreed to speak with detectives at the police department. (R. 359)

After obtaining defendant's permission to search the residence, Det. McKinley returned later that evening with Det. Sanders. (R. 360) Inside the apartment, the two

inspected the interior of the bedroom window and observed dust, spider webs, a dead bug, and dirt along the surface, suggesting the window had not been recently disturbed. (R. 361-62) A video showing the undisturbed dust and spider webs on the interior part of the window was admitted into evidence. (R. 364, E. 16 at 00:48-1:55)

Det. McKinley testified that he and another detective interviewed defendant at the Bloomington Police Department. (R. 366) During the interview, defendant stated he picked up Christina on June 15, 1998, around 7:00 p.m., bought her McDonald's, and returned to his apartment. (R. 367-68) Defendant claimed that after Christina ate, he took a nap while she entertained herself. (R. 368) Defendant stated that he put Christina to bed around 10:30 p.m. and later accessed the internet. (R. 369) Defendant said he heard Christina's voice around 12:30 a.m., and told her to go back to sleep before falling asleep himself around 2:45 a.m. (R. 370-71)

Testimony and evidence regarding defendant's dial-up internet access showed that he logged onto the internet at 10:39 p.m. on June 15, 1998 and ended his session at 7:40 a.m. on June 16, 1998. (R. 166-68, E. 20-21) Records indicated that defendant first accessed his email at 7:20 a.m. on June 16, interacted with the email server at 7:37:08 a.m., and logged off at 7:37:19 a.m. (R. 169-70, 174, E. 20-21)

Defendant reported that, upon waking up in the morning at 7:19 a.m., he began to get ready, during which he called out for Christina. (R. 371) Upon noticing Christina had not gotten up, defendant stated he went to rouse her awake at 7:40 a.m., at which time he found her cold to the touch and unresponsive. (R. 372) During the interview, defendant asserted, unprompted, that he was "positive" that when police received the autopsy report, the cause

of death would be asphyxiation. (R. 374) Defendant also reported he normally slept in the nude, in bed with Christina. (R. 373)

Det. Marvin Arnold testified that he conducted two interviews with defendant, the first on June 16 in the evening. (R. 59-60, 62) Det. Arnold testified that Det. Sanders was present for this interview. (R. 60) Det. Arnold subsequently identified People's Exhibit 14 as a recording[2] of his first interview with defendant. (R. 64)

During the interview, defendant decried the fact that Ms. Nowlin-Wang was not being investigated as a possible suspect, despite admitting that she never made any direct threats to the victim and was rarely alone with her. (E. 15 at 11:01:03-11:03:22, 11:40:22-11:40:41, 11:36:00-11:37:00) When asked, defendant failed to provide any past instances where Ms. Nowlin-Wang had ever threatened or physically harmed Christina. (E. 15 at 11:15:14-11:17:38) Defendant also acknowledged that Ms. Nowlin-Wang's daughter, Michelle Nowlin, "often" stayed at defendant's place. (E. 15 at 11:07:04-11:07:10) Defendant reiterated his belief that the autopsy would show asphyxiation/smothering as the cause of death, given defendant's belief that there would be no signs of trauma or evidence of poisoning. (E. 15 at 11:08:11-11:09:11) Defendant claimed he knew he was a "suspect." (E. 15 at 11:05:59-11:06:11)

Det. Arnold conducted a second interview with the defendant on June 17, at around 11:10 a.m. (R. 62) Prior to the interview, Det. Arnold had attended the victim's autopsy, where forensic pathologist Dr. Hnilica noted external injuries and signs of sexual trauma. (R.

[2] Det. Arnold testified defendant's first interview was recorded at defendant's insistence. (R. 72)

62) During the interview, Det. Arnold mentioned to defendant that the autopsy would reveal "everything," while vaguely indicating something unusual about the body. (R. 71) In response, defendant stated, "Don't tell me she was molested." (R. 71)

Dr. Violet Hnilica, the forensic pathologist who performed the victim's autopsy, identified bruising around the victim's mouth, forehead, chin, and back. (R. 308-09) An examination with ultraviolet lights made these bruises more visible, revealing deep subcutaneous hemorrhage in the mid-back area. (R. 308, 310) Dr. Hnilica noted blood in the victim's mouth and nose and testified that the external findings indicated pressure had been applied to the victim's face and back, causing the bruising and abrasions. (R. 308, 310) Dr. Hnilica also observed tiny ruptures in the capillaries around the eyes, known as petechia, which indicated a struggle to breath and supported a determination of asphyxia. (R. 311)

Dr. Hnilica testified that the victim's vagina and anus were "extremely red" and "dilated." (R. 311) Dr. Hnilica observed an "irregular" scalloped-like appearance to the victim's hymen, which was indicative of "previous stretching or tearing and healing" accounting for the scalloped appearance. (R. 311-12) Dr. Hnilica observed "chronic inflammation" in the victim's hymen. (R. 311-12)

An internal examination of the victim's vaginal area revealed the presence of "bloody vaginal fluid." (R. 312) Dr. Hnilica testified that, due to the rapid healing rate of the vaginal mucosa, this bleeding must have occurred recently, within hours. (R. 350-51) She noted that the blood was consistent with an injury to that area. (R. 315-16) The examination showed the most severe inflammation in the vagina, with less intense inflammation around the anus. (R. 313) Dr. Hnilica stated that such inflammation was exceedingly rare in a young girl,

unless there had been prior issues reported, typically by a parent. (R. 331) The victim's mother, Tita McNeil, testified that she never observed the victim engaging in any behavior involving touching or playing with her vaginal area. (R. 387-88)

Dr. Hnilica opined that the chronic inflammation observed in the victim's vaginal area indicated molestation that had likely been occurring over a period of days or weeks. (R. 314-15) She noted swelling in the victim's brain, which correlated with asphyxial death, and found petechia in the lungs – a rare finding in children that further supported asphyxia as the cause of death. (R. 317-19) Based on the presence of food in the victim's stomach, Dr. Hnilica estimated that she had died within two hours of eating. (R. 321-22) Additionally, she noted the absence of any diseases in the victim's medical history. (R. 323-24) Ultimately, Dr. Hnilica concluded that the cause of death was smothering, resulting in asphyxia. (R. 324)

Forensic testing conducted on hairs found in the victim's hands, compared against hair samples taken from Christina and defendant, excluded defendant, and matched the characteristics of a mixed-race, Asian-Caucasian child. (R. 197-98, 199-203, 208-14) Serology testing conducted on stains located on the fitted bed sheet, pillow case, pillow, and Christina's t-shirt, identified the presence of human blood and urine on some of the items, but excluded the presence of any semen. (R. 226-28, 236-37, 239-46) Testing performed on the vaginal, anal, and oral swabs collected during the victim's autopsy, were found not to contain any semen. Testing identified blood on the vaginal swab. (R. 230-32, 250-51)

DNA analysis conducted on five blood stain samples taken from the fitted bed sheet, and hair taken from the victim's left hand, compared against samples taken from the victim and defendant, identified the blood stains and hair matched the victim's DNA profile. (R.

267-76, 280-81, 285-86) Defendant's DNA profile was excluded as the source of DNA from the blood stains and hair found in the victim's hand. (R. 281)

In defendant's case-in-chief, the defense called Wayne Downey, the property manager for defendant's apartment building. (R. 1114-15) Mr. Downey could not recall previously seeing any large holes in defendant's bedroom window screen, though the existence of holes in the corners of the window screens was not a cause for concern, as he testified tenants would make them to gain access to their units when locked out. (R. 1117, 1119-20) Det. Arnold was called to testify about his observation on June 16, 1998, of a "small circular hole" in the lower left corner of defendant's bedroom window screen, as depicted in a photograph. (R. 1221-23, E. 39)

At trial, defendant testified that he picked up Christina on the evening of June 15, 1998, purchased McDonald's for her, and returned to his apartment between 7:45 and 8:00 p.m. (R.1132-33) He stated that Christina ate while he logged onto his computer and he claimed to have taken a two-hour nap, starting around 8:30 p.m. (R. 1134-36) Defendant stated he woke up around 10:30 p.m. and told Christina it was time for bed. (R. 1137) After putting her to sleep, he returned to the living room to use his computer. (R. 1138-41) Defendant noted that he saw Christina awake around midnight, and decided to go to bed at approximately 2:00 a.m. (R. 1145) Defendant stated he later checked on her, confirmed she was asleep, and then laid down on the couch. (R. 1145) The next morning, defendant found Christina unresponsive in bed and called 911. (R. 1156-57)

On cross examination, defendant admitted to several inconsistencies in his trial testimony regarding details about his and the victim's activities the evening before her death,

as compared to what he told detectives. (R. 1186-99, 1200-01) Following defendant's testimony, the defense rested. (R. 1210) The parties then gave their closing statements. (R. 1214-46, 1246-60, 1261-66) The trial court continued the matter for ruling. (R. 1266)

On July 7, 1999, the trial court found defendant guilty of both counts; the trial court characterized the matter "as a classic case of circumstantial evidence." (R. 1269) The court found no evidentiary support for defendant's claim that someone entered through the bedroom window, noting a lack of disturbance consistent with such an entry and the presence of undisturbed dust, cobwebs, and insects on the window screen. (R. 1269-70) The presence of holes in the window screen were explained by Mr. Downey to be the result of tenants locking themselves out and trying to gain entry into their units. (R. 1270)

The court also stated that defendant's theory was inconsistent with the victim's estimated time of death, which was likely between 10:30 p.m. and 12:30 a.m. or between 10:30 p.m. and 12:00 a.m., depending on the accepted version of events. (R. 1270) Thus, the court found there was no evidence that anyone else had entered the home during that time. (R. 1270)

Furthermore, the court pointed to defendant's actions after the victim's death as "strong evidence" of guilt. (R. 1270-71) The court noted that even before the cause of death was determined, defendant was suggesting how the victim died and claimed someone had entered the home. (R. 1271) The court found defendant's demeanor during the police interview indicated he was aware of being a suspect and had already formulated a defense. (R. 1271-72) Additionally, the People's evidence suggested possible sexual misconduct as a motive, which defendant had alluded to, before being prompted by police. (R. 1272)

Ultimately, the trial court concluded that the evidence established beyond a reasonable doubt that defendant forcefully and intentionally suffocated Christina McNeil.

The trial court later sentenced defendant to a term of natural life in the Department of Corrections. (R. 455-57, C. 629) This Court affirmed defendant's conviction, but vacated defendant's sentence as a violation of the single subject rule, and remanded the matter for resentencing. *People v. McNeil*, 325 Ill. App. 3d 1190 (4th Dist. 2001) (No. 4-99-0679) (C. 680-85) On July 18, 2002, following a resentencing hearing, the trial court sentenced defendant to 100 years in the Department of Corrections. (R. 507, C. 905) This Court affirmed defendant's sentence following remand. *People v. McNeil*, 352 Ill. App. 3d 1242 (4th Dist. 2004) (No. 4-02-0849) (C. 1070-77)

Defendant's Postconviction Proceedings

On September 25, 2005, defendant filed, *pro se*, a petition for postconviction relief. (C. 1106-1142) Defendant attached an "affidavit" to his petition averring to a host of "facts" regarding Ms. Nowlin-Wang's behavior, defendant's version of events preceding the victim's death, the police investigation, trial evidence, and potential sources purportedly supportive of defendant's claim of motive against Ms. Nowlin-Wang. (C. 1143-74) On March 7, 2008, this Court affirmed the first-stage dismissal of defendant's postconviction petition. (C. 1320-36)

On November 1, 2013, defendant filed a petition for postconviction forensic testing of various pieces of evidence from his trial. (C. 2873-2884) On February 20, 2014, the People responded, acknowledging an agreement to test blood and urine stains found on the victim's pillowcase and fitted bed sheet. (C. 2909) However, the People objected to the rest

of defendant's requests for forensic testing, arguing they would not significantly support his claim of actual innocence. (C. 2910-12) On April 4, 2014, the postconviction court granted an order for DNA testing on five untested blood and urine stains on the bed sheet and blood stains on the pillowcase. (C. 2968-69)

On August 1, 2014, the postconviction court held a hearing on the defendant's motion for further forensic testing. On August 26, 2014, the court granted additional testing of the previously agreed-upon bed sheet and pillowcase, as well as stains on the victim's underwear and t-shirt. (C. 3018 V2) The court determined defendant had met the requirements for testing a latent fingerprint found on the inside of the bedroom window, the window screen, the bed sheet, and the pillowcase. (C. 3018 V2) However, the court denied defendant's request for additional testing of the underwear and t-shirt. (C. 3018 V2)

On February 23, 2021, defendant filed a motion for leave to file a successive postconviction petition, citing newly discovered evidence relevant to a claim of actual innocence. The basis for his claim included: [1] evidence from a forensic pathologist suggesting the victim's cause of death was "sudden unexplained death in childhood (SUDC)" rather than smothering; [2] evidence indicating no signs of sexual abuse of the victim; [3] the presence of Ms. Nowlin-Wang's DNA on the bed sheets; [4] an affidavit from a former neighbor of Ms. Nowlin-Wang, stating that she had been seen acting "suspiciously" on the night of the victim's death; [5] affidavits from Dawn Nowlin and Michelle Spencer, stating that Ms. Nowlin-Wang's ex-husband, Don Wang, claimed she confessed to killing the victim; and [6] evidence of Ms. Nowlin-Wang's *modus operandi*, resulting from her subsequent conviction in 2012 for the first-degree murder of her mother-in-law, Linda Tyda. (C. 1338-

1409) Defendant attached several exhibits to his motion, including forensic expert reports, DNA and forensic testing results, and affidavits from Michelle Spencer, Dawn Nowlin, and Susanna Burns, the former neighbor of Ms. Nowlin-Wang. (C. 1463-68, 1490, 1515-31, 1532, 1550-55, 1557-59, 1560-65, 2862-66, 2831-48)

On April 1, 2022, the People filed a motion to partially dismiss defendant's successive postconviction petition. (C. 3056-96 V2) The People acknowledged that defendant's claim of actual innocence, based on newly discovered affidavits from Michelle Spencer and Dawn Nowlin, regarding Ms. Nowlin-Wang's alleged confession, should proceed to a third-stage hearing. (C. 3086 V2) However, the People argued that most of the other newly discovered evidence did not meet the necessary criteria to support a claim of actual innocence. (C. 3061-85 V2, 3087-92 V2) Defendant subsequently filed a response to the People's motion to dismiss. (3097-3116 V2)

On May 12, 2022, the parties appeared for a hearing on the People's motion to dismiss defendant's postconviction petition. The People argued that, aside from the two claims related to Don Wang allegedly telling others about Ms. Nowlin-Wang's confession, most of defendant's newly discovered evidence did not meet the necessary elements of materiality, newness, or conclusiveness, so as to support a claim of actual innocence. (R. 533-39, 557-64) In response, the defense maintained that it had presented a single claim of actual innocence, not multiple claims based on separate pieces of evidence. Therefore, they argued that all of the newly discovered evidence supporting defendant's claim should proceed to a third-stage evidentiary hearing. (R. 541-44, 564-65)

On October 11, 2022, the postconviction court granted the People's motion to dismiss six of the defendant's actual innocence claims based on newly discovered evidence and the entirety of the defendant's ineffective assistance of counsel claim. However, the court advanced two actual innocence claims based on newly discovered affidavits from Michelle Spencer and Dawn Nowlin, along with the defendant's totality of the evidence claim, but only as it pertained to the evidence involving these affidavits, to a third-stage hearing. (C. 3123-31 v2)

On November 21, 2023, the parties appeared in court for a third-stage evidentiary hearing. Based on the defense's representation that they intended to call Ms. Nowlin-Wang as a witness, and the fact that Ms. Nowlin-Wang had her own postconviction matter pending on appeal, the court appointed the Public Defender's Office to represent her. (R. 601-03, 605) Following opening statements, defendant first called Michelle Spencer (née Nowlin) as a witness. (R. 617)

On direct examination, Mrs. Spencer testified that Ms. Nowlin-Wang was her mother, who was presently incarcerated for murdering Linda Tyda, the mother of Ms. Nowlin-Wang's husband, Don Wang. (R. 621-22) Mrs. Spencer recounted attending a "celebration of life" event for Ms. Tyda about 12 years prior, when she was around 22 years old. (R. 624-26) During the event, she, Mr. Wang, her stepmother Dawn Nowlin, and her father stepped away to talk. (R. 624) Mrs. Spencer testified that Mr. Wang "randomly" stated that Ms. Nowlin-Wang had told him she killed Christina McNeil. (R. 624-25) Mrs. Spencer testified that she observed Mr. Wang "was in a very hard place at the time," as such, she did not know "if he said that just to make me not like my mom or – I don't know what his intentions

were." (R. 625) On cross examination, Mrs. Spencer testified that her conversation with Mr. Wang occurred within a short time following Ms. Tyda's death. (R. 631)

The defense then called Dawn Nowlin as a witness. (R. 636) Mrs. Nowlin testified that during the celebration of life event for Ms. Tyda, she and her stepdaughter were speaking with Mr. Wang when he mentioned that, during a "big fight," Ms. Nowlin-Wang had "confessed to killing Christina." (R. 641-42) Mrs. Nowlin could not provide additional context for this statement, noting only that it occurred during the course of a "very heated argument." (R. 642) Mrs. Nowlin did not recall the specific date or time frame when this conversation took place. (R. 641, 643-44)

After Mrs. Nowlin's testimony, the defense indicated their last witness would be Ms. Nowlin-Wang. (R. 644) After swearing in the witness, the postconviction court advised Ms. Nowlin-Wang that she had the right to an attorney, so the court had appointed the Public Defender's Office to represent her. (R. 645) The court confirmed Ms. Nowlin-Wang had sufficient time to speak with her counsel prior to appearing in court. (R. 645-46) The court also informed Ms. Nowlin-Wang that a transcript of the proceedings would be prepared and that anything she said could be used against her in future proceedings. (R. 646) Ms. Nowlin-Wang stated she understood. (R. 646) On direct examination, Ms. Nowlin-Wang consistently invoked her fifth amendment privilege, in the face of the defense's questioning. (R. 647-50)

Following Ms. Nowlin-Wang's testimony, the defense offered all of the exhibits attached to defendant's petition and rested. (R. 651) The People objected to the admission of all of the exhibits. (R. 651) The postconviction court indicated that while all of the exhibits to defendant's petition were already a part of the record, the court would only

consider the relevant affidavits as evidence, for purposes of the third stage hearing. (R. 651-52)

The People subsequently called Det. Steven Fanelli as a witness. (R. 652)Det. Fanelli testified that he had conducted an interview with Mr. Wang on February 16, 2012. (R. 653) He identified People's Exhibit 1 as an edited version of that interview. (R. 653-54) The defense objected to the admission of the edited version, requesting that the entire recording be admitted. (R. 654) Citing the completeness doctrine, the postconviction court allowed the edited version to be admitted but gave the defense the option to play the rest of the interview or submit a full transcript. (R.655-56) People's Exhibit 1 was then played in open court.

During the 11-minute and 26-second edited interview, Mr. Wang stated that he did not recall Ms. Nowlin-Wang ever confessing to the victim's murder. (E. 77 (DVD) at 9:07-9:20) When questioned, he denied ever telling anyone that Ms. Nowlin-Wang had confessed or making such a statement to a third party. (E. 77 (DVD) at 9:21-9:33, 9:35-10:33, 11:21-11:26) When asked directly if Ms. Nowlin-Wang ever told him she killed the victim, Mr. Wang replied, "not to the best of my knowledge," and confirmed that he would have remembered if she had confessed during their marriage. (E. 77 (DVD) at 10:40-11:20) Det. Fanelli testified that Mr. Wang had never recanted his statement. (R. 658)

During cross-examination, the defense played a portion of the unedited interview video where Mr. Wang expressed his belief that Ms. Nowlin-Wang had the "capability" to commit murder, citing her having killed his mother. (E. 77 (flash drive) at 18:59-20:50) However, when asked if Ms. Nowlin-Wang was involved in the victim's murder, Mr. Wang said he did not know and did not want to speculate. (E. 77 (flash drive) at 18:59-20:50, E.

68) Following Det. Fanelli's testimony, both parties presented their closing arguments. (R. 663-80, 680-87, 687-90)

The postconviction court, subsequently issued a written order on February 1, 2024, denying defendant's successive petition, following the third-stage evidentiary hearing. (C. 3172-77 V2) The court concluded that the statements by Mrs. Spencer and Mrs. Nowlin about Ms. Nowlin-Wang's alleged confession would likely be inadmissible at a retrial, as these statements could not be used to impeach Mr. Wang's expected testimony. (C. 3176 V2)

The court determined that the witnesses' testimony was not conclusive enough to alter the trial's outcome or undermine the court's confidence in the judgment of guilt. (C. 3177 V2) The court found Mrs. Spencer expressed uncertainty about Mr. Wang's intentions in making the statement and described him as being "in a very hard place." (C. 3173 V2) Mrs. Nowlin's testimony was found to be vague, stemming from a heated argument, as noted by Mr. Wang. (C. 3173 V2) Additionally, Det. Fanelli's interview revealed Mr. Wang consistently denied that Ms. Nowlin-Wang had confessed to the crime. (C. 3174-75 V2) The court also emphasized that Ms. Nowlin-Wang invoked her Fifth Amendment right against self-incrimination when questioned by the defense. (C. 3175 V2)

Defendant now appeals.

ARGUMENT

I.

THE POSTCONVICTION COURT DID NOT ABUSE ITS DISCRETION BY LIMITING THE EVIDENCE TO BE CONSIDERED AT THE THIRD STAGE PROCEEDINGS TO ONLY THOSE RELEVANT TO CLAIMS OF ACTUAL INNOCENCE RAISED IN A SUCCESSIVE POSTCONVICTION PETITION.

First, defendant contends on appeal that the postconviction court erred by analyzing the evidence in his successive petition separately, rather than collectively, which led the court to find the majority of the evidence insufficient to warrant further third-stage proceedings. (Def. Br. 34-38) Defendant argues that this alleged error fundamentally affected the court's analysis at both the second and third stages of the proceedings. (Def. Br. 20, 22, 24-28, 30, 33-38) However, defendant's claim is completely meritless.

Newly Discovered Evidence Relevant to a Claim of Actual Innocence

When advancing an actual innocence claim, "it [is] a defendant's burden to present evidence that was (1) newly discovered, (2) material and not cumulative, and (3) of such a conclusive nature that it would probably change the result on retrial." *People v. Robinson*, 2020 IL 123849, ¶ 47. To constitute "newly discovered evidence" said evidence must have been "discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence." *Id*. Evidence is not "newly discovered" if it presents facts "already known to the defendant, even if the source of those facts was unknown, unavailable or uncooperative." *People v. Snow*, 2012 IL App (4th) 110415, ¶ 21; *People v. Jarrett*, 399 Ill. App. 3d 715, 723 (1st Dist. 2010). Moreover, "although new evidence need not necessarily establish the defendant's innocence, *it must establish a basis for closer scrutiny*

of the defendant's guilt." *People v. Carter*, 2013 IL App (2d) 110703, ¶ 84 (citing *People v. Gonzalez*, 407 Ill. App. 3d 1026, 1036 (2d Dist. 2011) (Emphasis added).

"Material" evidence means the evidence is relevant and probative of the petitioner's innocence. *People v. Coleman*, 2013 IL 113307, ¶ 96. "[N]oncumulative means the evidence adds to what the jury heard," whereas conclusive means the evidence "is of such conclusive character that it would probably change the result on retrial." *See People v. Molstad*, 101 Ill. 2d 128, 135 (1984); *People v. Ortiz*, 235 Ill. 2d 319, 336 (2009). The "conclusive character" requirement has been described as the most important element of an actual innocence claim. *People v. Washington*, 171 Ill. 2d 475, 489 (1996); *Robinson*, 2020 IL 123849, ¶ 47.

It is axiomatic that the postconviction court "has wide discretion to limit the type of evidence it will admit at a postconviction evidentiary hearing." *People v. Morgan*, 212 Ill. 2d 148, 162 (2004) (citing *People v. Coleman*, 206 Ill. 2d 261, 278 (2002)). As this Court has previously explained, a trial court does not err by not considering "evidence" which was not admitted at trial or which fails to rise to the level of "new evidence," "in determining whether it was probable a retrial would lead to a different result." *See People v. Whalen*, 2021 IL App (4th) 210068-U, ¶ 26[3].

Moreover, this Court recently explained that, "following the guidance from our supreme court [in *Robinson*], we consider each piece of evidence individually to determine whether it is sufficient to establish a colorable claim of actual innocence." *People v. Harvell*, 2024 IL App (4th) 230152-U, ¶ 42 (citing *Robinson*, 2020 IL 123849, ¶¶ 51-83) Thus,

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[3] The People cite *Whalen* and two other Rule 23 decisions as persuasive authority according to Illinois Supreme Court Rule (e)(1) [IL S. Ct. R. 23(e)(1)]; copies are attached.

defendant's alleged claim of error in the postconviction court's analysis of "each piece of evidence individually," not only lacks a basis in law, but is contradicted by how our Supreme Court and this Court analyze claims of actual innocence.

Further, the premise of defendant's argument is based, in part, on a series of speculative leaps regarding how his alleged "new" evidence of Ms. Nowlin-Wang's invocation of her fifth amendment privilege, and the inadmissible propensity and bad character evidence originally barred pretrial, would impact a hypothetical retrial. Defendant's argument seeks to re-litigate the original court's pretrial ruling barring the admission of the propensity and bad character evidence (Def. Br. 26-28), as opposed to the trial proceedings. Yet, the operative question in an actual innocence claim is whether the *trial evidence* is placed in a different light when compared against the new evidence (*Robinson*, 2020 IL 123849, ¶ 48), not proffered evidence that was barred pretrial. Further, the propriety of the trial court's ruling barring defendant's proffered evidence was already decided on by this Court in the direct appeal proceedings. (C. 688-93) Thus, reconsideration of this pretrial issue is barred by *res judicata*. *People v. Ligon*, 239 Ill. 2d 94, 103 (2010).

Ignoring this fact, defendant then assumes, that if somehow the original court's pretrial ruling *were* overruled, the presentation of all the "new evidence" would probably change the result on retrial. For the reasons that follow, that argument is meritless. (*See* Issue III, *infra*) Defendant further speculates that at the hypothetical retrial, he would be able to obtain admission of this "new evidence," despite the fact that: [1] propensity and bad character evidence is plainly inadmissible; and [2] defendant would not be able to present Ms. Nowlin-Wang's invocation of her fifth amendment privilege, as evidence supporting the

assertion that she was the actual perpetrator, at the hypothetical retrial. (*See,* Issue III, *infra*) As such, the foundation of defendant's argument crumbles when logic is applied.

In addition, defendant's attempt at creating a *per se* rule that a postconviction court must still consider at third stage, evidence it deemed insufficient to survive second stage dismissal, lacks any basis in law. "At the second stage, the well-pleaded facts in the petition and accompanying affidavits, including any affidavits containing hearsay, which do not conflict with the record, are taken as true when determining whether a defendant has made a substantial showing of his innocence so as to advance the petition to a third-stage evidentiary hearing; no credibility determinations are made." *People v. Velasco*, 2018 IL App (1st) 161683, ¶ 117 (citing *People v. Gacho*, 2016 IL App (1st) 133492, ¶ 13); *People v. Coleman*, 183 Ill. 2d 366, 385 (1998). In this case, defendant's "new evidence" most certainly conflicted and was rebutted by the record.

In advancing his claim, defendant misleadingly cites to our Supreme Court's decision in *Thompkins* in support of his wide-reaching *per se* rule. (Def. Br. 30) In *Thompkins*, the Court found the trial court had abused its discretion where it refused to hear the testimony of five witnesses as part of the defendant's offer of proof, left the courtroom, refused to hear one witness's live testimony; and compounded that error "when the circuit court denied [the] defendant the opportunity to place his offers of proof in the record." *People v. Thompkins*, 181 Ill. 2d 1, 11-13 (1998).

Unlike *Thompkins*, the postconviction court here never refused to accept defendant's offers of proof during the pretrial hearing, nor did the court engage in any of the egregious conduct like the trial court did in *Thompkins*. Thus, defendant's reliance on *Thompkins* is not

only misleading, but also significantly misrepresents the context surrounding the postconviction court's ruling limiting the evidence that could be considered at third stage. This is because defendant erroneously treats the postconviction court's reasoned determination that defendant's newly discovered evidence was insufficient to survive second stage dismissal, as akin to a court's outright refusal to consider offers of proof or even allow certain evidence into the record. As the record shows, the court permitted the totality of defendant's newly discovered evidence to become part of the record, while finding that to accept defendant's *per se* admission argument "would seemingly negate the need for a stage 2 hearing." (R. 651-52, C. 3129 V2) Additionally, the postconviction court did not err in finding, as a matter of law, that the DNA test results, experts' opinions, and propensity and bad character evidence, failed to satisfy the elements of newly discovered evidence, sufficient to survive second stage dismissal. (*See* Issue II, *infra*)

Separately, defendant's assertion that he presented only one claim of actual innocence, supported by multiple pieces of evidence, rather than several distinct claims analyzed separately by the postconviction court, is ultimately irrelevant in this context. The court's approach actually benefitted defendant, because framing the claim as a single assertion meant that if even one piece of evidence failed to meet the requirements for actual innocence, it could jeopardize the entire claim.

Therefore, the distinction defendant makes does not change the outcome of the analysis. Thus, it was appropriate for the court to review the evidence as supporting multiple claims of actual innocence. *See People v. English*, 403 Ill. App. 3d 121, 133 (1st Dist. 2010); *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) ("Defendant is not precluded from raising

multiple claims of actual innocence where each claim is supported by newly discovered evidence."). Ultimately, the postconviction court did not abuse its discretion in limiting the evidence to be considered at the third stage proceedings to only those which were relevant to claims of actual innocence, and defendant's conclusory claim to the contrary fails to establish error.

II.

THE POSTCONVICTION COURT DID NOT ERR IN DISMISSING THE MAJORITY OF DEFENDANT'S CLAIMS OF ACTUAL INNOCENCE BECAUSE THE NEWLY DISCOVERED EVIDENCE DEFENDANT PRESENTED WAS LEGALLY INSUFFICIENT TO SURVIVE SECOND STAGE DISMISSAL.

Second, defendant contends that the postconviction court erred in its second stage dismissal of his various claims of actual innocence, which he believes made a substantial showing of actual innocence, based on the newly discovered evidence. (Def. Br. 38-49) However, defendant's successive petition and supporting documentation failed to make a substantial showing that the DNA evidence, experts' opinions, and propensity and bad character evidence concerning Ms. Nowlin-Wang, satisfied the elements of newly discovered evidence. Accordingly, as a matter of law, the postconviction court correctly determined that the majority of defendant's claims were insufficient to survive second stage dismissal.

Contrary to defendant's arguments, (Def. Br. 39-41) the DNA test results were neither new, material, nor of such conclusive character that they constituted newly discovered evidence relevant to an actual innocence claim. Evidence is not "newly discovered" if it presents facts "already known to the defendant at or prior to trial," or "if the evidence was available at a prior posttrial proceeding." *Snow*, 2012 IL App (4th) 110415, ¶ 21. To be

material, the evidence "need not, standing alone, exonerate the defendant; rather, it must tend to 'significantly advance' his claim of actual innocence." *People v. Stoecker*, 2014 IL 115756, ¶ 33. "The determination of whether forensic evidence significantly advances the defendant's actual innocence claim requires an evaluation of the evidence introduced at trial, as well as the evidence the defendant seeks to test." *Id*. This Court reviews the postconviction court's dismissal order at the second stage *de novo*. *People v. Brooks*, 2021 IL App (4th) 200573, ¶ 34.

Under these principles, the DNA test results did not satisfy the new, material, or conclusive elements of newly discovered evidence. In this case, the DNA test results were not "new" for purposes of an actual innocence claim because the record demonstrates that defendant was aware of the ultimate facts borne out by the test results – namely that Ms. Nowlin-Wang's DNA or her daughter's DNA would be identified on the pillow case and bedding. In the affidavit defendant attached to his initial *pro se* postconviction petition, defendant held himself out as cohabitating with Ms. Nowlin-Wang for three years; he averred that Ms. Nowlin-Wang's daughter and the victim shared a bed on "countless occasions" during "frequent overnight stays," and that when defendant moved out of the apartment he had previously shared with Ms. Nowlin-Wang, he took with him to his new apartment the same bed previously shared by the victim and Ms. Nowlin-Wang's daughter. (C. 1144, 1146) Additionally, defendant averred that on June 9, 1998 (approximately seven days before the murder), Ms. Nowlin-Wang had "spent the night" at defendant's apartment. (C. 1151)

These averments by defendant constitute judicial admissions. Judicial admissions are formal concessions in the pleadings in the case or stipulations by a party or its counsel that

have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of that fact. *Knauerhaze v. Nelson*, 361 Ill. App. 3d 538, 557-58 (1st Dist. 2005). Accordingly, defendant had already judicially admitted to the fact that Ms. Nowlin-Wang and her daughter had previously been in the victim's bed, thus explaining the presence of their DNA on the pillow case and bedding that were subjected to forensic testing.

Additionally, as this Court found in its earlier decision affirming the first stage dismissal of defendant's initial postconviction petition, the presence of a mixed-race Asian-Caucasian DNA profile, identified from testing performed on hair samples taken from the victim's hand, were explained by "testimony at trial [which] indicated Michelle [Nowlin] had slept with Christina in that same bed before and her hair may have been there already." (C. 1333) Moreover, this Court found the DNA testing done on the hairs found in the victim's hands "did not match defendant but did match Christina – mixed-race Asian-Caucasian, child source." (C. 1330) Accordingly, "[t]hey would also match Michelle, who like Christina, was also a mixed-race Asian-Caucasian child." (R. 1330)

The same conclusion applies to the results of the subsequent DNA testing performed on the bedding and pillow case, which could not exclude defendant and Ms. Nowlin-Wang as a contributors to the DNA profile mixture, or Ms. Nowlin-Wang individually. (C. 1562, 1583, 1585) The presence of a mixture of the DNA profiles of defendant and Ms. Nowlin-Wang is explained by defendant's judicial admission that in the days leading up to the victim's death, he and Ms. Nowlin-Wang had spent the night together, thus explaining the presence of her DNA on the bed. Additionally, since defendant judicially admitted that the bed upon which the victim was found, had come from the former apartment where defendant

and Ms. Nowlin-Wang had once co-habitated, it stands to reason that the bed would still contain traces of Ms. Nowlin-Wang's DNA. Accordingly, the DNA test results were neither new nor conclusive "newly" discovered evidence.

Defendant erroneously suggests that by accepting the bed sheet and pillow case were suitable for postconviction DNA testing, the People waived all arguments regarding defendant's allegations of new, material, and noncumulative elements of his actual innocence claim. (Def. Br. 39) However, such a suggestion would be in error. "The fact that the State agreed or failed to object to testing only means that the State conceded that the results may be materially relevant and may significantly advance defendant's claim, *i.e.*, it conceded that defendant *had made a prima facie case* and was entitled to testing. The State's concession at the motion stage *does not equate to a concession at [the] second postconviction stage* that the results warrant[ed] an evidentiary hearing." *People v. Dodds*, 344 Ill. App. 3d 513, 521-22 (1st Dist. 2003) (Emphasis added).

Here, the DNA test results were not "new" as defendant had already judicially admitted to the fact that Ms. Nowlin-Wang and her daughter had previously been in the bed, thus explaining the presence of their DNA. As indicated in one of the DNA test result reports, "Mitochondrial DNA is inherited maternally. A mtDNA match cannot exclude any maternal relatives." (C. 1558 - Note 7) Thus, a match could derive either from Ms. Nowlin-Wang or a maternal relative, like her daughter.

Furthermore, the DNA tests results were not material to defendant's actual innocence claim. This is because the results did not "significantly advance" defendant's claim, as the record shows that defendant had previously acknowledged the circumstances establishing

why Ms. Nowlin-Wang's DNA or her daughter's DNA would be discovered on the bedding and pillow case. Therefore, the DNA tests results were not material since they were irrelevant and not probative of defendant's innocence. This is because they failed to support the assertion that Ms. Nowlin Wang's DNA (or her daughter's DNA) was deposited on the bed at the time of victim was murdered, as opposed to one of the other countless times where the two individuals were in the bed, prior to the victim's death.

Defendant also asserts that the DNA testing "proved that Misook's hair and DNA were in Christina's bed," and thus was sufficiently conclusive evidence warranting post-conviction relief. (Def. Br. 40-41) However, as a matter of law, the DNA test results were not of such conclusive character as to survive second stage dismissal. Given that the DNA test results merely confirmed a fact already known to defendant – that Ms. Nowlin-Wang's DNA or her daughter's DNA would be identified on the bedding and pillow case, by virtue of their prior contact with the bed, this already-known piece of information would have no impact on the court's determination of the conclusive-character element of defendant's actual innocence claim. Moreover, the DNA test results did not alter the trial evidence, which conclusively established that no one entered the bedroom through the window on the night in question, and the holes identified in the window screen were not evidence of any sort of covert entry into the apartment. (R. 24-25, 84-86, 119-20, 150, 153-56, 176-80, 357-58, 364, 457, E. 17-19, 16, 27-29, C. 1326-27) Accordingly, the fact that Ms. Nowlin-Wang's DNA would be subsequently identified on the bed is not a circumstance of such conclusive character as to probably change the result on retrial. Thus, the DNA test results did not constitute "newly discovered evidence."

As it relates to defendant's claim that the opinions of his experts constituted newly discovered evidence, (Def. Br. 42-44) the record shows the postconviction court considered, and rejected, the reports and affidavits of Dr. Harper and Dr. Baker, as constituting newly discovered evidence. (C. 3122-24 V2)

As our Supreme Court has explained, "[t]he actual innocence claim recognized in *Washington* was based on '*new*' evidence, *i.e.*, evidence that either did not exist or could not have been discovered at the time of trial." *People v. Flournoy*, 2024 IL 129353, ¶ 73 (Emphasis added). Issues which could have been raised on direct appeal but were not are procedurally defaulted. *See People v. Rissley*, 206 Ill. 2d 403, 412 (2003).

In this case, the postconviction court found the contradictory evidence presented through the reports and affidavits of Dr. Harper and Dr. Baker were not "new" for purposes of defendant's actual innocence claim, because the substance of the contradictory information would have been available at the time of defendant's trial or initial postconviction petition, through the exercise of due diligence. *Robinson*, 2020 IL 123849, ¶ 47. Thus, this issue is forfeited. The information contained in defendant's experts' reports did not present new evidence, discovered through subsequent advancements in new scientific testing methods or through the use of new technology. Rather, defendant's forensic experts merely challenged the merit of the original trial's forensic evidence, and offered critiques of the existing evidence, without offering new factual discoveries. As such, this conflicting evidence is insufficient for purposes of an actual innocence claim.

Indeed, in *Sanders*, our Supreme Court noted that proposed testimony contradicting previously presented trial evidence, which simply adds conflicting evidence to the original

trial evidence, does not fall within the category of evidence that is of "such conclusive character as would probably change the result on retrial." *People v. Sanders*, 2016 IL 118123, ¶ 52. The opinions of defendant's forensic experts fall squarely within this category of non-conclusive and simply conflicting evidence.

Additionally, Dr. Harper's opinion regarding the absence of sexual abuse trauma (C. 1554-55) is positively rebutted by Dr. Hnilica's forensic findings identifying numerous contusions around the victim's face, a "contusion on the right vulva under ultraviolet light," and the presence of blood in the vagina – a circumstance which would not naturally occur in a "prepubertal" body. (C. 1464-65) Indeed, as this Court previously noted "the pathologist testified Christina's vaginal and anal area were extremely inflamed and blood was in her vagina, both indicating sexual abuse within hours of her death." (C. 1081)

Similarly, Dr. Baker's opinion explaining the victim's cause of death as sudden unexplained death in childhood ("SUDC") (C. 1530-31) is positively rebutted by Dr. Hnilica's testimony and internal examination regarding the identification of edema or swelling in the victim's brain and lungs, as "weigh[ing] heavier" "with an asphyxial death." (R. 317-18, C. 1465, 1468) Additionally, Dr. Hnilica's testimony and internal examination identifying petechia in the victim's left and right lungs, as supporting a finding of asphyxia (R.318, C. 1467), positively rebutted Dr. Baker's conclusory opinion that the presence of petechia observed on the victim's lungs "offer[ed] no evidence that Christina was smothered." (C. 1522)

Moreover, defendant's reliance on Dr. Baker's opinion establishing SUDC as the actual cause of death undercuts defendant's overall argument that it was Ms. Nowlin-Wang,

and not defendant, who murdered the victim. Either the victim died from a sudden unexplained, previously undiagnosed condition, or she was murdered in her bed. However, despite defendant's flip-flopping, it cannot be both.

Thus, the postconviction court did not err in finding, as a matter of law, that the evidence derived from defendant's forensic experts "merely add[ed] conflicting evidence to the evidence adduced at the trial" which "is not of such conclusive character as would probably change the result on retrial." *Id*., ¶ 52. Accordingly, the opinions of defendant's experts did not constitute newly discovered evidence.

Finally, the propensity and bad character evidence offered against Ms. Nowlin-Wang, which defendant invokes as somehow conclusively establishing her guilt for the victim's murder, in no way constituted newly discovered evidence relevant to a claim of actual innocence. This is because the "culpability evidence" (*i.e*. evidence that Ms. Nowlin-Wang was a jealous person and a liar, had a report of physical violence in 1998 filed against her which involved her daughter, and years later in the future, she committed an unrelated murder against her mother-in-law) constituted inadmissible propensity and bad character evidence, which would never be admissible to prove that Ms. Nowlin-Wang acted "in conformity" with that alleged bad character or conduct on a particular occasion, namely at the time of the victim's murder. *See* IL R. Evid. 404 (a),(b) (eff. January 1, 2011). If the only purpose for admitting the propensity evidence is to prove the party it is offered against is a bad person, who does bad things in general, and therefore, acted in conformity with that villainous character on a particular occasion, the evidence remains inadmissible. IL R. Evid.

404(b) (eff. January 1, 2011). As defendant's argument plainly establishes, this was his only purpose for seeking admission of this "evidence."

More fundamentally, this propensity evidence fails to satisfy the material and conclusive-character elements of an actual innocence claim. In this case, the trial court originally barred the supposed evidence allegedly linking Ms. Nowlin-Wang to the crime because it merely highlighted some strife in defendant and Ms. Nowlin-Wang's relationship, which the court found irrelevant and insufficient to show "a specific person committed this offense." (R.738) Defendant's subsequent attempt at bolstering this generally irrelevant and insufficient evidence with *even more* generally irrelevant and insufficient evidence (R. 766-70, 777-79, 780-82, R. 831), does nothing to circumvent the requirements for admissibility. All defendant has done is marshal more irrelevant propensity evidence. Ultimately, the trial court rejected defendant's motive argument, finding it "not very strong in terms of commission of a murder to set someone else up." (R. 831) Separately, the court found there was insufficient evidence "indicating any close enough connection that would allow this [evidence] to come in[,] in terms of proving the former girlfriend was the perpetrator as opposed to the defendant." (R. 831-32)

Likely recognizing the lack of any legitimate claims of materiality and conclusiveness, defendant simply veers off into an irrelevant rehashing of the original propensity evidence, supplemented by the newly discovered evidence of Ms. Nowlin-Wang's 2011 first degree murder conviction, to assert that the postconviction court's ruling dismissing this particular claim at second stage was "erroneous." (Def. Br. 47-49)

However, the propriety of the trial court's initial ruling barring the admission of the original propensity and bad character evidence, and how that ruling would be impacted if the original court knew, that in 2011, Ms. Nowlin-Wang would be convicted of a completely separate murder (Def. Br. 48), is not at issue here. Defendant conflates the trial court's original ruling regarding the admissibility of the propensity and bad character evidence, with satisfying the elements necessary to demonstrate a claim of actual innocence. Simply put, a murder that occurred 13 years after the murder of the victim in this case is not newly discovered evidence *vis a vis* the subject murder. By definition, "[t]he new evidence need not be entirely dispositive," but it must "place [ ] the trial evidence in a different light and undermine[ ] the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 48. Ms. Nowlin-Wang's commission of a murder in 2011 is not "new" evidence related to this case – it is simply an unrelated crime that occurred years later.

In this case, the propensity and bad character evidence defendant presented utterly failed to place the trial evidence in a different light or otherwise undermine confidence in the judgment of guilt. The propensity and bad character evidence in no way established that Ms. Nowlin-Wang murdered the victim back in June 1998. Moreover, the fact that 13 years later, Ms. Nowlin-Wang was convicted of first degree murder for killing her mother-in-law, under completely separate circumstances, does nothing to place the trial evidence in a different light. Defendant's attempt to characterize a completely separate murder committed in 2011, as somehow establishing Ms. Nowlin-Wang's identity as the "true" perpetrator of the victim's murder in 1998, is not "newly" discovered evidence, but rather unrelated evidence of a different crime that occurred over a decade later. Defendant's invocation of this

"evidence" is nothing more than an abject attempt at misusing propensity evidence to further his claim. Thus, defendant failed to sustain his burden of establishing all of the elements of newly discovered evidence, relevant to a claim of actual innocence. Accordingly, the postconviction court did not err in finding, as a matter of law, that this "evidence" was insufficient to survive second stage dismissal. Thus, defendant's claim fails.

III.

THE POSTCONVICTION COURT DID NOT MANIFESTLY ERR WHEN IT DENIED DEFENDANT'S SUCCESSIVE POSTCONVICTION PETITION FOLLOWING A THIRD STAGE EVIDENTIARY HEARING, WHERE THE TESTIMONY AND EVIDENCE PRESENTED DID NOT CONSTITUTE NEWLY DISCOVERED EVIDENCE JUSTIFYING A NEW TRIAL BASED ON AN ACTUAL INNOCENCE CLAIM.

Third, defendant contends that he presented "compelling evidence" of his actual innocence at the third stage evidentiary hearing. Defendant alleges this evidence included a negative inference from Ms. Nowlin-Wang's refusal to testify and two hearsay-laced affidavits averring that Ms. Nowlin-Wang had made statements years later allegedly confessing in private to the murder of Christina McNeil. (Def. Br. 20, 22-34)

Contrary to defendant's claims, the postconviction court's decision denying his successive petition after a third stage evidentiary hearing was not manifestly erroneous. The postconviction court properly found defendant had failed to demonstrate that the affidavits and testimony of Mrs. Spencer and Mrs. Nowlin, when considered along with the totality of the trial evidence, was of such conclusive character that it placed the trial evidence in a different light or undermined the confidence in the judgment of guilt. As such, the postconviction court did not manifestly err, at third stage, when it chose to find defendant's

"newly discovered evidence" insufficient, unreliable, and irrelevant. Accordingly, defendant's claim on appeal fails.

The Postconviction Hearing Act

The Postconviction Hearing Act ("the Act") (725 ILCS 5/122-1 *et seq.* (West 2022)) provides a three-stage process by which a defendant-petitioner can assert that their conviction resulted from a substantial denial of their constitutional rights. *People v. Hodges*, 234 Ill. 2d 1, 9 (2009). The filing of a successive postconviction petition is "highly disfavor[ed]" because it "plagues" finality – without which "the criminal law is deprived of much of its deterrent effect." *People v. Clark*, 2023 IL 127273, ¶ 39 (internal citations omitted). To overcome the bar to successive postconviction petitions, a defendant must show actual innocence. *People v. Griffin*, 2024 IL 128587, ¶ 33.

Once a defendant's petition advances to a third stage evidentiary hearing, the defendant is no longer entitled to the presumption that the allegations in his petition and accompanying affidavits are true. *Gacho*, 2016 IL App (1st) 133492, ¶ 13. Instead, where a defendant advances an actual innocence claim at the third stage, the postconviction court is required to decide the weight to be given to the testimony and evidence, make credibility determinations, and resolve any conflicts in the evidence. *People v. Carter*, 2013 IL App (2d) 110703, ¶ 74. "In determining the weight to be given the new evidence and whether all the evidence, new and old, is so conclusive that it is more likely than not that no reasonable juror would find defendant guilty beyond a reasonable doubt on retrial, the court at the third stage must necessarily consider whether the new evidence would ultimately be admissible at a

retrial." *Velasco*, 2018 IL App (1st) 161683, ¶ 118. As discussed in Issue I, *supra*, the court is only required to consider the evidence that is relevant to an actual innocence claim.

"When a postconviction petition advances to a third-stage evidentiary hearing, as in this case, the trial court conducts an evidentiary hearing and the defendant bears the burden of showing, by a preponderance of the evidence, a substantial violation of a constitutional right." *People v. Marcus*, 2023 IL App (2d) 220096, ¶59 (citing *People v. Coleman*, 2013 IL 113307, ¶ 92). "A judge's factual findings and credibility determinations made at a third-stage evidentiary hearing of a postconviction proceeding should be disturbed only if manifestly erroneous, that is, only if the court committed an error that is clearly evident, plain, and indisputable." *People v. Eubanks*, 2021 IL 126271, ¶ 47 (Internal quotations omitted).

Initially, defendant erroneously asserts that the standard of review in this case is *de novo,* claiming that the trial court allegedly failed to both "follow and apply governing law" and address an argument on the merits. (Def. Br. 22) However, defendant's contention is baseless. The record clearly shows the postconviction court reviewed the merits of defendant's assertion of actual innocence, under the applicable law governing a third stage evidentiary hearing. (C. 3175-77 V2) Given the testimony presented and credibility determinations the court was required to make, case law is clear that the court's decision is reviewed for manifest error. Defendant fails to specifically assert what "errors of law" were committed by the postconviction court. (Def. Br. 22) Simply put, defendant's conclusory claim of legal error does not trigger the application of *de novo* review.

In addition, the case law defendant cites in support of applying *de novo* review (as opposed to manifest error), is inapposite and irrelevant for analyzing a postconviction court's decision to deny a defendant's petition, after a third stage evidentiary hearing. (Def. Br. 22) *But see People v. Moore,* 207 Ill. 2d 68, 75-79 (2003) (applying *de novo* review to assess whether the trial court conducted an adequate *Krankel* inquiry); *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (1st Dist. 2001) (applying *de novo* review in a personal injury action and concluding that the trial court erred in granting a motion *in limine* in contradiction to a common law rule which barred an action by a bailor or bailee against the other regarding third party negligence); *People v. Williams*, 188 Ill. 2d 365, 369 (1999) (reviewing *de novo* "whether the use of a defendant's prior guilty plea to attempted murder as evidence at the defendant's murder trial was a 'direct' consequence of the guilty plea"); *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001) (applying *de novo* review to "the ultimate question of the defendant's legal challenge to the denial of his motion to suppress); *People v. Tolefree*, 2011 IL App (1st) 100689, ¶¶ 25-26 (applying manifest error to the trial court's merits determination of the defendant's *pro se* posttrial claims of ineffective assistance of counsel, while also explaining when *de novo* review versus manifest error is applicable). Therefore, contrary to defendant's assertion and case law, the postconviction court's decision is reviewed for manifest error.

The Purpose of the Third Stage Hearing in this Case

"[T]he primary purpose of a third-stage hearing is to test the reliability, credibility, or veracity of the new evidence and determine whether the new evidence is compelling enough to place the trial evidence in a new light and undermine confidence in the finding of

guilt." *People v. House*, 2023 IL App (4th) 220891, ¶ 94. In this case, the postconviction court was tasked with determining whether the "evidence supporting the postconviction petition," *i.e*. the affidavits and testimony of Mrs. Spencer and Mrs. Nowlin, "place[d] the trial evidence in a different light and undermine[d] the court's confidence in the judgment of guilt." (C. 3176 V2)

In making this determination, the postconviction court was required to assess the credibility of the two witnesses and determine the weight to be given to the affidavits and the witnesses' testimony. However, contrary to defendant's assertion, the postconviction court was not required to consider the affidavits as true for purposes of its analysis at the third stage. (Def. Br. 33) While the postconviction court was required to take the affidavits as true at second stage in determining whether to advance defendant's petition to a third-stage evidentiary hearing, when defendant's petition *did* advance to the third stage, defendant no longer enjoyed the presumption that the allegations in his petition and accompanying affidavits were true. *See Gacho*, 2016 IL App (1st) 133492, ¶ 13. The factual and credibility analyses a court undertakes at third stage necessarily require that it evaluate the quality and credibility of the evidence presented, rather than accepting it at face value. *See House*, 2023 IL App (4th) 220891, ¶¶ 78, 93-94. As discussed in Issue I, the court only had to consider the relevant evidence. In this case, that is exactly what the postconviction court did. In addition, Ms. Nowlin-Wang testified pretrial, under oath, that she could not have committed the murder. (R. 825-26) This fact needed to be considered by the postconviction court.

As the record shows, the postconviction court determined that "the assertions by Michelle Spencer and Dawn Nowlin" "would almost certainly not be admissible at a retrial."

(C. 3176 V2) This is because defendant would be unable to impeach Don Wang's denials that Ms. Nowlin-Wang never confessed to killing the victim, (E. 77 (DVD) at 9:07-9:20, 9:21-9:33, 9:35-10:33, 11:21-11:26) with the alleged statements from the affidavits, under the "improper" guise of a prior inconsistent statement. (C. 3176 V2) Additionally, while defendant asserts that this Court cannot speculate what Mr. Wang's testimony would be at the hypothetical retrial, (Def. Br. 31-32) it is defendant's burden at third stage to prove his case, not the People's burden to disprove it. *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006) ("Throughout the second and third stages of a postconviction proceeding, the defendant bears the burden of making a substantial showing of a constitutional violation."). Moreover, the court had the benefit of Mr. Wang's previous denials of any confession to him.

More importantly, contrary to defendant's argument, the testimony of Mrs. Spencer and Mrs. Nowlin was not of such conclusive character that it would have probably changed the result on retrial. Again, the postconviction court correctly determined that the testimony of the two witnesses was "not conclusive evidence that, when considered along with the other trial evidence, would probably lead to a different result at retrial." (C. 3177 V2) The postconviction court's determination on this point did not rise to the level of clearly evident, plain, or indisputable error, where Mrs. Spencer testified that she was unsure whether Mr. Wang's "intentions" in "randomly" making the statement to her, were to make Mrs. Spencer "not like" her mother, or whether it was simply uttered in the context of Mr. Wang being "in a very hard place" emotionally, during his mother's "celebration of life" funeral service," which occurred shortly after her death. (R. 624-25, 631) Therefore, Mrs. Spencer's affidavit and testimony not only lacked critical context concerning the impetus behind Mr. Wang's

alleged statement, but could also be explained as simply a byproduct of the emotional turmoil Mr. Wang was suffering at the time, following his mother's death. These circumstances call into question the credibility and weight attributable to this evidence. In addition, as previously argued (*see* Issue II, *supra*) the possibility of Ms. Nowlin-Wang as the perpetrator is negated by the conclusive proof that no one entered the victim's bedroom via the window on the night in question.

Similarly, Mrs. Nowlin's affidavit and testimony lacked specificity. Indeed, as she testified, Mrs. Nowlin could not recall the exact time frame of when Mr. Wang made his statement, or the specific language used, other than to say the alleged confession by Ms. Nowlin-Wang occurred during the course of "a very heated argument." (R. 642-44)

Therefore, while the postconviction court was free to admit the hearsay evidence concerning Ms. Nowlin-Wang's supposed "confession," without the need for the evidence "to meet the reliability criteria that would be required for admissibility at trial," the court was "entirely free, after having admitted such hearsay evidence, to conclude that, in the court's judgment, the admitted evidence [was] not worth very much." *Brooks*, 2021 IL App (4th) 200573, ¶ 55. Indeed, the postconviction court's determination was all the more proper because as this Court has previously explained, "part of a trial court's discretion at a third-stage evidentiary hearing includes the authority to admit questionable evidence and then to disregard it because, in the court's judgment, it is unreliable." *Id.*, ¶ 58. As such, the postconviction court properly weighed the hearsay affidavits and testimony, considered the possibility of their admissibility at a hypothetical retrial, and determined that the new evidence was unreliable and ultimately inadmissible. (C. 3176 V2)

Thus, considering the affidavits and testimony presented, together with the trial evidence, and recognizing the vague and emotionally-influenced circumstances surrounding the context in which the alleged "confession" was made, it is evident the postconviction court did not manifestly err in finding that the affidavits and testimony were unreliable, inadmissible, and not of such conclusive character as to warrant a different result on retrial. *See People v. Griffin*, 2024 IL App (2d) 220064-U, ¶¶ 42-43 (affirming the dismissal of the defendant's actual innocence claim following a third stage evidentiary hearing where the court did not manifestly err in finding the affidavits presenting and corroborating the defendant's claim of a recantation were "vague," ultimately "inadmissible at a new trial," and subjected to "credibility, reliability, and weight-testing" by the court.).

Principally, defendant argues that the postconviction court's analysis concerning the ultimate inadmissibility of the affidavits at a future retrial was erroneous because, according to defendant, this type of analysis can only take place "*after* a new trial is ordered, not during post-conviction proceedings." (Def. Br. 30) In support of this claim, defendant cites to our Supreme Court's decision in *Robinson*. However, defendant's reliance on *Robinson* is misplaced.

In *Robinson*, the State argued that "because Tucker's confession would be inadmissible hearsay on retrial, it cannot be considered in assessing the conclusive character of [the] petitioner's newly discovered evidence." *Robinson*, 2020 IL 123849, ¶ 78. The *Robinson* court noted that some of the case law the State cited in support of its position, predated the amendment to Illinois Rule of Evidence 1101, which made the rules of evidence inapplicable to postconviction proceedings. *Id*., ¶¶ 78-79. Therefore, pursuant to *Robinso*n,

it is obvious and not in contention that the postconviction court could consider the affidavits at issue, without needing to find that the affidavits satisfied any sort of trustworthiness-reliability criteria necessary for their admission at a trial. *Id.*, ¶ 81.

That being said, the requirements to resolve factual disputes and make credibility determinations logically necessitates that the postconviction court be free at the third stage to consider whether the new evidence would ultimately be admissible at a retrial. Being free to admit hearsay evidence at a postconviction proceeding, without the court needing to consider reliability criteria, is separate from a court judging certain evidence to be of little value to the ultimate merits determination of an actual innocence claim. *Brooks*, 2021 IL App (4th) 200573, ¶ 55. It is this distinction that makes defendant's reliance on *Robinson* unavailing.

Furthermore, to the extent defendant maintains that under *Robinson*, "new evidence that conflicts with the trial evidence meets the conclusive-character test. That is not what *Robinson* held." *People v. Ruhl*, 2021 IL App (2d) 200402, ¶ 82. Our Supreme Court's decision in *Robinson* "simply rejected the notion that a court can deny leave to file a successive petition just because the new evidence conflicts with the trial evidence." *Id.*, citing *Robinson*, 2020 IL 123849, ¶ 57. Therefore, defendant reliance on *Robinson* is misplaced.

Defendant additionally asserts that this Court can consider, as a negative inference, Ms. Nowlin-Wang's invocation of her fifth amendment privilege against self-incrimination, at the third stage evidentiary hearing. (Def. Br. 22-28) The decision as to whether to draw a negative inference is a matter within the court's discretion. *People v. Rodriguez*, 2021 IL

App (1st) 200173, ¶ 53. For the reasons that follow, the postconviction court did not abuse its discretion in choosing not to draw a negative inference from Ms. Nowlin-Wang's invocation of her fifth amendment privilege.

The fifth amendment to the United States Constitution provides that "[no] person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const., amend. V. Our State constitution similarly provides that "[n]o person shall be compelled in a criminal case to give evidence against himself nor be twice put in jeopardy for the same offense." Ill. Const.1970, art. I, § 10. "The privilege against self-incrimination may be invoked in any proceeding, civil or criminal, in which the witness reasonably believes that the information sought, or discoverable as a result of the witness's testimony, could be used in a subsequent criminal proceeding against him or her." *People v. Houar*, 365 Ill. App. 3d 682, 688 (2d Dist. 2006).

"[A]lthough a court may draw a negative inference from a party's refusal to testify, it is not required to do so." *Rodriguez*, 2021 IL App (1st) 200173, ¶ 53. A court's discretion to decline drawing an adverse inference is not "unfettered;" "a failure to draw an adverse inference may be error, even though the inference is permissive, if there is no good reason why the inference should not have been drawn." *People v. Gibson*, 2018 IL App (1st) 162177, ¶ 86.

In this case, the postconviction court's decision to not draw a negative inference from Ms. Nowlin-Wang's invocation of her fifth amendment privilege was based on sound considerations involving Ms. Nowlin-Wang's own pending postconviction proceedings, as well as the fact that Ms. Nowlin-Wang having invoked her fifth amendment privilege would

be inadmissible at any future retrial. As the record shows, the postconviction court was informed at the beginning of the evidentiary hearing that the defense intended to call Ms. Nowlin-Wang as a witness, and she had a pending "post-conviction matter that's now up on appeal." (R. 601)

Based on Ms. Nowlin-Wang's pending matter on appeal, the postconviction court appointed the Public Defender's Office to represent her during the evidentiary hearing, subsequently admonished her prior to testifying about to her right to counsel, confirmed she had an opportunity to speak with her counsel; the court further explained, "a transcript of this proceeding is going to be prepared in the future and anything that you say could be used against you in future proceedings." (R. 602-05, 645-46) On direct examination, Ms. Nowlin-Wang consistently invoked her fifth amendment privilege in the face of the defense's questioning. (R. 647-50)

During closing arguments, the defense asserted that Ms. Nowlin-Wang "killed Christina McNeil, and [defendant] had nothing to do with it." (R. 663) While acknowledging that Ms. Nowlin-Wang had a "right not to testify," the defense nonetheless argued "the only appropriate conclusion, the only appropriate inference" was that "Misook killed Christina." (R. 663)

During the People's closing argument, the prosecution offered several reasons which precluded the court from drawing a negative inference from Ms. Nowlin-Wang invoking her fifth amendment privilege – these included: [1] the permissive nature of drawing the inference; [2] that the decision to not testify may have been the result of receiving advice from her counsel regarding the impact her testimony may have on her pending postconviction

proceedings; [3] the fact that evidence of Ms. Nowlin-Wang's fifth amendment invocation would be inadmissible at trial; and [4] that Ms. Nowlin-Wang could not be called as a witness at a future retrial just to demonstrate that she would assert her fifth amendment privilege. (R. 682-84)

As the People correctly asserted below, it is improper for a party to call a witness at trial solely to show that the witness will invoke their fifth amendment privilege against self-incrimination. *See People v. Human*, 331 Ill. App. 3d 809, 819-20 (1st Dist. 2002) (citing cases). This is because the witness's refusal to testify following invocation of the privilege carries no evidentiary value. *People v. Vera*, 277 Ill. App. 3d 130, 137-38 (1st Dist. 1995). Defendant essentially argues now, as he did at the third stage evidentiary hearing, that Ms. Nowlin-Wang's guilt is established by virtue of the invocation of her fifth amendment privilege at the evidentiary hearing. However, this Court has previously found that exact argument to be meritless. *See Whalen*, 2021 IL App (4th) 210068-U, ¶¶ 22-23.

Indeed, just as this Court found in *Whalen*, the circumstances of when Ms. Nowlin-Wang invoked her fifth amendment privilege did not support a finding that the trial court erred by refusing to draw an adverse inference against her. As the record shows, Ms. Nowlin-Wang invoked her fifth amendment more than 25 years after the discovery of the victim's death on June 16, 1998. The "evidence" defendant asserts against Ms. Nowlin-Wang was neither new, material, or so conclusive as to now link her to the victim's murder, any more so than it did when defendant was originally tried. *Id.*, ¶ 23. (*See also* Issue II, *infra*) During the time of defendant's trial, Ms Nowlin-Wang did not invoke her fifth amendment privilege when she was called to testify by defendant, as part of his offer of proof hearing. In fact,

following the court's admonishments regarding her fifth amendment privilege against self-incrimination and that her testimony could be used against her "in any other type of court proceeding or prosecution" (R. 814-15), Ms. Nowlin-Wang freely answered all of the questions posed to her. (R. 815-29)

Additionally, assuming *arguendo*, that if the court had considered Ms. Nowlin-Wang's fifth amendment invocation as an adverse inference, the invocation would not constitute *direct* evidence establishing Ms. Nowlin-Wang murdered the victim, despite defendant's repeated attempts to characterize it as such. (Def. Br. 20, 22-25, 28) In support of his claim, defendant cites to *People v. Whirl*, 2015 IL App (1st) 111483, yet this Court previously determined that the trial court in *Whirl* erred by failing to draw an adverse inference from the police officer invoking his fifth amendment privilege, where it had been found, by a preponderance of the evidence, that the officer had tortured the defendant into making admissions. *Whalen*, 2021 IL App (4th) 210068-U, ¶¶ 20-21 (distinguishing *Whirl*). As such, the facts of *Whirl* are completely inapposite here. Thus, defendant's reliance on *Whirl is* woefully misplaced.

Accordingly, based on the record, the postconviction court did not abuse its discretion in choosing not to draw an adverse inference from Ms. Nowlin-Wang's invocation of her fifth amendment privilege, at the third stage evidentiary hearing. As such, Ms. Nowlin-Wang's invocation of her fifth amendment privilege was not "material" or "conclusive" new evidence relevant to defendant's actual innocence claim.

Defendant additionally asserts that the postconviction court's failure to consider at third stage, defendant's forensic and bad character and propensity evidence, which was found

insufficient to survive second stage dismissal, further supports a finding of error. (Def. Br. 26-28, 33-34) Defendant's argument lacks any basis in law or fact as the court is required to only consider the evidence that is relevant to actual innocence. (*See*, Issue I, *supra*)

In conclusion, defendant has failed to sustain his burden of showing a deprivation of a constitutional violation, by a preponderance of the evidence, following the third stage evidentiary hearing. The postconviction court did not manifestly err in determining the affidavits and testimony presented regarding Ms. Nowlin-Wang's alleged confession, were not of such conclusive character as to probably change the result on retrial. Additionally, the postconviction court did not abuse its discretion in choosing not to consider, as an adverse inference, Ms. Nowlin-Wang's invocation of her fifth amendment privilege. Thus, this Court should affirm the denial of defendant's successive petition for postconviction relief.

CONCLUSION

WHEREFORE, the People of the State of Illinois respectfully request that this Honorable Court affirm the denial of defendant's successive petition for postconviction relief, following the third stage evidentiary hearing.

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 49 pages.

Respectfully submitted,

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APPENDIX

People v. Whalen, 2021 IL App (4th) 210068-U

People v. Harvell, 2024 IL App (4th) 230152-U

People v. Griffin, 2024 IL App (2d) 220064-U

People v. Whalen

Appellate Court of Illinois, Fourth District

November 18, 2021, Filed

NO. 4-21-0068

Reporter
2021 IL App (4th) 210068-U *; 2021 Ill. App. Unpub. LEXIS 2021 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD WHALEN, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Prior History: [1]** Appeal from the Circuit Court of McLean County. No. 91CF344. Honorable Scott D. Drazewski, Judge Presiding.

People v. Whalen, 238 Ill. App. 3d 994, 605 N.E.2d 604, 1992 Ill. App. LEXIS 2000, 178 Ill. Dec. 810 (Ill. App. Ct. 4th Dist., Dec. 10, 1992)

Disposition: Affirmed.

Judges: JUSTICE TURNER delivered the judgment of the court. Justices Holder White and Steigmann concurred in the judgment.

Opinion by: TURNER

Opinion

ORDER

Held: The trial court did not err when it denied defendant's petition for relief from judgment pursuant to *section 2-1401* of the Code of Civil Procedure (*735 ILCS 5/2-1401* (West 2018)).

[*P2] On December 22, 2020, the trial court denied defendant Donald Whalen's petition for relief from judgment pursuant to *section 2-1401* of the Code of Civil Procedure (Code) (*735 ILCS 5/2-1401* (West 2018)). Defendant appeals, arguing the trial court abused its discretion in failing to consider significant evidence that weighs on the side of petitioner's innocence and in denying his petition. We affirm.

[*P3] I. BACKGROUND

[*P4] Because this court's opinion in *People v. Whalen, 2020 IL App (4th) 190171, 443 Ill. Dec. 190, 161 N.E.3d 314*, extensively outlines the facts in this case, we need not repeat them here except as necessary to explain our decision.

[*P5] In November 1991, a jury found defendant guilty of murdering his father, William Whalen, at the Twenty Grand Tap, a tavern owned by defendant's mother and father. The trial court sentenced defendant to a term of 60 years' imprisonment. In his direct appeal, *People v. Whalen, 238 Ill. App. 3d 994, 999, 605 N.E.2d 604, 608, 178 Ill. Dec. 810 (1992)*, this court **[**2]** held defendant could not complain he was not allowed to use an expert witness because defendant refused the trial court's offer to continue his trial, the court did not abuse its discretion in allowing the State to present evidence defendant purchased drugs in Chicago after his father's murder, and the court did not err by prohibiting defendant from introducing evidence regarding Robert McElvaney, whom defendant alleged may have murdered defendant's father.

[*P6] In August 2017, defendant filed a petition for relief from judgment pursuant to *section 2-1401* of the Code. In April 2018, defendant filed a supplement to his petition. In November 2018, the State filed an amended motion to dismiss the petition, which the circuit court denied.

[*P7] In January 2019, the circuit court held an evidentiary hearing on defendant's petition. In February 2019, the court allowed defendant's petition, vacated defendant's conviction, and ordered a new trial. The State appealed. This court reversed the circuit court's order granting the petition and vacating defendant's conviction. *Whalen, 2020 IL App (4th) 190171, ¶ 105, 443 Ill. Dec. 190, 161 N.E.3d 314*. This court explained the circuit court justifiably and understandably applied the wrong standard when ruling on defendant's petition based on this **[**3]** court's decision in *People v. Davis, 2012 IL App (4th) 110305, ¶¶ 62-63, 966 N.E.2d 570, 359 Ill. Dec. 249*, where "this court erred by equating the language 'probably change the result on retrial' with a 'reasonable probability' the result would change on retrial." *Whalen, 2020 IL App (4th) 190171, ¶ 100, 443 Ill. Dec. 190, 161 N.E.3d 314*.

[*P8] In reversing the circuit court's decision in the prior appeal in this case, this court explained a defendant has a higher burden of showing a different result is probable, not just a reasonable probability. *Whalen, 2020 IL App (4th) 190171, ¶ 100, 443 Ill. Dec. 190, 161 N.E.3d 314*. This court "direct[ed] the trial court to determine whether it is 'probable' or 'more likely than not' a jury would acquit defendant after a new trial where the new evidence in this case is considered alongside the original trial evidence." *Whalen, 2020 IL App (4th) 190171, ¶ 103, 443 Ill. Dec. 190, 161 N.E.3d 314*.

[*P9] On remand, after hearing arguments from the State and defense counsel, the circuit court denied defendant's petition. The court indicated the proper standard for it to apply was whether it was probable or more likely than not that a trier of fact would find defendant not guilty based on the "new" evidence defendant presented when considered alongside the evidence at defendant's original trial. The circuit court indicated this court's opinion, which vacated the circuit court's prior ruling, accurately summarized the circuit court's findings and the basis upon which **[**4]** the circuit court vacated defendant's conviction and granted defendant a new trial. After further review and analysis of the trial proceedings and the *section 2-1401* evidentiary hearing, the circuit court made the following additional factual findings:

> "First, the defendant was not convicted based upon biological evidence left by him at the crime scene. In fact[,] all of the trial evidence excluded the defendant as the source of any blood at the crime scene.
>
> Two. The fact that defendant's DNA evidence as established by both Dr. Reich and Cellmark Forensics was not found at the murder scene on its own does not establish that he did not commit the crime. The defendant was found guilty without any biological evidence linking him to the murder.
>
> Three. Since the defendant's trial, no one other than the victim has been identified positively as a source of DNA found at the crime scene. This is distinguishable from the facts in the *Davis* case where newly discovered DNA evidence excluded the defendant as the donor of blood and semen that were left on bedding where the victim in that case, who was both raped and murdered, occurred, as well as at defendant's trial. The State had argued how serological evidence included **[**5]** the defendant as someone who could have committed the crime. And so there was biological evidence that was submitted at Mr. Davis'[s] trial that ultimately was determined to exclude him as the donor of that DNA.
>
> The unknown mixed DNA profile that occurs on the three samples in this case from the analysis conducted by Dr. Reich, including someone other than the defendant and the

victim, includes the possibility of contamination and does not link to anyone who could be linked to this murder.
Fourth. Whoever murdered the victim may have done so without leaving behind any DNA evidence.
Fifth. Randy McKinley never opined at trial whether the latent print was a put down or take away and was never asked for his opinion. Additionally, the trial prep outline does not make any reference to the latent prints as either being put down or take away.

Michelle Triplett, although she compared the defendant's print to the palm print on the cue[,] was never asked by any attorney if the defendant's palm print was not a match. This was not any new evidence that was presented that it was not—excuse me, there was no [new] evidence that was presented that it was not the defendant's palm print on the pool cue. **[**6]**
So arguments in the alternative or statements in the alternative or the negative I should say other than the manner in which I've described it.
Seven, although the substance on the pool cue in which the palm print was left was never scientifically determined to be blood, that was also not new evidence. The substance was never tested and the State introduced trial evidence as to why.
In conclusion, the court having considered all the trial evidence along with the new evidence submitted at the evidentiary hearings on the defendant's 2-1401 petition, both the testimony and exhibits, the authorities cited by counsel, the common law record, the official transcripts of the proceedings, case law precedent and otherwise being fully advised in the premises, the court hereby finds and orders as follows.

This court does not redecide the defendant's guilt on a 2-1401 petition. The trial court is required to scrutinize the facts and surrounding circumstances more closely. The sufficiency of the State's evidence to convict beyond a reasonable doubt is not the determination the trial court must make. If it were, the remedy would be an acquittal, not a new trial. Probability, not certainty, is the key **[**7]** as the trial court in effect predicts what another jury would likely do considering all the evidence both old and new together.

The petitioner is entitled to a new trial a[s] a matter of law when the newly discovered evidence is material, not cumulative, and of such a conclusive character that it is probable or more likely than not a jury would acquit the defendant after a new trial where the evidence in this case is considered alongside the original trial evidence. Based on this record, the court finds that petitioner has not met his burden and the petition is hereby denied. Defendant's convictions [*sic*] are therefore reinstated, bond is ordered revoked."

The court then awarded defendant sentencing credit for the time defendant spent on electronic monitoring or in custody from the date of the court's prior decision to December 22, 2020.

[*P10] This appeal followed.

[*P11] II. ANALYSIS

[*P12] On appeal, defendant argues the circuit court erred in denying his *section 2-1401* petition. According to defendant, the circuit court abused its discretion (1) by failing to consider what defendant deems significant evidence that weighs on the side of his innocence and (2) by finding other evidence was insufficient to probably change **[**8]** the result if he was retried.

[*P13] To establish an actual innocence claim, a defendant must present evidence to support his claim. Our supreme court recently explained:

"[T]he supporting evidence 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. [Citations.] 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. [Citation.] Evidence is material if it is relevant and probative of the petitioner's innocence. [Citation.] Noncumulative evidence adds to the information that the fact finder heard at trial. [Citation.] Lastly, the conclusive character element refers to evidence that, when considered along with the trial evidence, would probably lead to a different result. [Citation.] The conclusive character of the new evidence is the most important element of an actual innocence claim. [Citation.]
>
> 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 **[**9]** of guilt. [Citation.] The new evidence need not be entirely dispositive to be likely to alter the result on retrial. [Citation.] 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." *People v. Robinson, 2020 IL 123849, ¶¶ 47-48*.

[*P14] The parties do not agree what standard of review should be applied to this case. Citing our supreme court's opinion in *Warrant County Soil & Water Conservation District v. Walters, 2015 IL 117783, ¶ 51, 32 N.E.3d 1099, 392 Ill. Dec. 523* , defendant states the circuit court's ultimate decision on a *section 2-1401* petition is reviewed under the abuse of discretion standard of review. However, citing *People v. Burrows, 172 Ill. 2d 169, 180, 665 N.E.2d 1319, 1324, 216 Ill. Dec. 762 (1996)*, the State argues we should apply a manifest weight of the evidence standard. For purposes of this case, we need not decide which standard is correct because under either standard we would affirm the circuit court's decision denying defendant's *section 2-1401* petition.

[*P15] A. Evidentiary Issues

[*P16] Before we reach the circuit court's ultimate decision to deny defendant's petition, we address defendant's argument the circuit court erroneously ignored evidence regarding Robert McElvaney and William Craig Elliot.

[*P17] 1. *Evidence Regarding Robert McElvaney*

[*P18] Defendant first argues the trial court erred in not considering McElvaney's invocation **[**10]** of his *fifth amendment* right not to testify as new evidence. We note defendant cites no case law supporting his assertion a witness's invocation of his *fifth amendment* right automatically constitutes evidence. This court is not a depository where an appellant can dump the burden of argument and research. *Elder v. Bryant, 324 Ill. App. 3d 526, 533, 755 N.E.2d 515, 522, 258 Ill. Dec. 132 (2001)*. "Contentions that are supported by some argument, yet lack citations of authority, do not meet the requirements of *[Illinois Supreme Court] Rule 341(e)(7)*" (*Elder, 324 Ill. App. 3d at 533, 755 N.E.2d at 522*), now *Illinois Supreme Court Rule 341(h)(7)* (eff. Oct. 1, 2020). As a result, defendant forfeited any assertion the circuit court erred by not treating McElvaney's invocation of his *fifth amendment* right as new evidence when ruling on defendant's petition.

[*P19] Defendant does cite authority for the proposition a court can draw an adverse inference from a witness's invocation of his *fifth amendment* right not to testify in certain situations. *People v. Gibson, 2018 IL App (1st) 162177, 423 Ill. Dec. 242, 105 N.E.3d 47*; *People v. Whirl, 2015 IL App (1st) 111483, 395 Ill. Dec. 647, 39 N.E.3d 114*.

> "In a civil action, the *Fifth Amendment* does not forbid an adverse inference against a party who refuses to testify in response to probative

> evidence of alleged misconduct. [Citations.] As long as there is 'some' evidence to support the complainant's allegations, a court may consider a party's refusal to testify as further evidence of the alleged misconduct. [Citation.]
>
> While the circuit court may draw an adverse inference from a party's refusal **[**11]** to testify, it is not automatically required to do so. [Citations.] That said, the circuit court does not have unfettered—or unreviewable—discretion to decline to draw an adverse inference. To the contrary, as we held in *Whirl*, a failure to draw an adverse inference may be error, even though the inference is permissive, if there is no good reason why the inference should not have been drawn."

Gibson, 2018 IL App (1st) 162177, ¶¶ 85-86. However, those cases are easily distinguishable from the situation here.

[*P20] In *Gibson* and *Whirl*, the defendants in both cases accused Chicago police officers of abusing them until they each made a false confession or incriminating admission. *Gibson, 2018 IL App (1st) 162177, ¶ 1, 423 Ill. Dec. 242, 105 N.E.3d 47*; *Whirl, 2015 IL App (1st) 111483, ¶ 53-65*. In *Gibson*, the Torture Inquiry and Relief Commission (Commission) found credible evidence the defendant was abused and referred the defendant's claim to the circuit court for an evidentiary hearing. *Gibson, 2018 IL App (1st) 162177, ¶ 2, 423 Ill. Dec. 242, 105 N.E.3d 47*. In *Whirl*, "[t]he Commission found that 'by a preponderance of the evidence, there is sufficient evidence of torture to conclude [Whirl's] Claim is credible and merits judicial review for appropriate relief.' " *Whirl, 2015 IL App (1st) 111483, ¶ 45, 395 Ill. Dec. 647, 39 N.E.3d 114*.

[*P21] During the judicial review in both cases, police officers who had been accused of abuse by the respective defendants invoked their *fifth amendment* right against self-incrimination. *Gibson, 2018 IL App (1st) 162177, ¶ 3, 423 Ill. Dec. 242, 105 N.E.3d 47*; *Whirl, 2015 IL App (1st) 111483, ¶ 68, 395 Ill. Dec. 647, 39 N.E.3d 114*. In both **[**12]** cases, the First District found the circuit court erred by failing to draw an adverse inference the respective officers had abused the respective defendants into making admissions. *Gibson, 2018 IL App (1st) 162177, ¶¶ 4-5*; *Whirl, 2015 IL App (1st) 111483, ¶ 107, 395 Ill. Dec. 647, 39 N.E.3d 114*. In *Gibson*, the First District stated:

> "[W]hen, in the face of a credible allegation, an officer of the court is unwilling to assure the court that he and his colleagues did *not* physically coerce a confession, when he determines that a truthful answer could subject him to criminal liability, the court should take careful note. Here, because most of the witnesses disclaimed any ability to directly address the allegations of abuse, and the only material witnesses capable of so rebutting asserted his *fifth-amendment* rights, it was error not to draw an adverse inference." (Emphasis in original.) *Gibson, 2018 IL App (1st) 162177, ¶ 108, 423 Ill. Dec. 242, 105 N.E.3d 47*.

[*P22] In the case before this court, the circuit court did not err by refusing to draw an adverse inference against McElvaney because he invoked his fifth amendment right when called to testify at the evidentiary hearing. We note defendant presented no new evidence linking McElvaney to William Whalen's murder.

[*P23] Defendant essentially argues McElvaney's guilt is established because he invoked his *fifth amendment* right when called to testify at the evidentiary hearing. We **[**13]** find no merit in this argument. McElvaney invoked his *fifth amendment* right nearly 28 years after William Whalen's murder when he knew defendant wanted to accuse him of the murder. As stated earlier, defendant had no more evidence linking McElvaney to the crime than it did when defendant was originally tried. At the time of defendant's

original trial, McElvaney did not invoke his *fifth amendment* right when defendant called McElvaney as part of an offer of proof. McElvaney answered all the questions asked of him.

[*P24] Defendant also argues the trial court here should have taken McElvaney's testimony during the offer of proof into consideration when determining whether a different result would probably occur if defendant was given a new trial. We disagree.

[*P25] At the offer of proof hearing, the trial court considered whether defendant should be allowed to present the following evidence: McElvaney was present at the tavern the night William Whalen was murdered; William Whalen asked McElvaney to leave the tavern that evening after McElvaney was in a confrontation with other customers; and the police went to McElvaney's residence the next morning, spoke to McElvaney, and McElvaney stated he would not hurt William Whalen after **[**14]** William's body was discovered but before his murder was public information. The trial court found an insufficient nexus between McElvaney and the murder based on what he told the police and his testimony before the court. The court noted McElvaney testified it was not unusual for William Whalen to ask him to leave the tavern and McElvaney showed no animosity toward William Whalen after William asked him to leave. Instead, McElvaney told William Whalen he would see him the next day.

[*P26] This court affirmed the trial court's ruling on direct appeal (see *People v. Whalen, 238 Ill. App. 3d 994, 999, 605 N.E.2d 604, 608, 178 Ill. Dec. 810 (1992)*), noting the State persuasively argued McElvaney's testimony would provide nothing more than a possible motive for murdering William Whalen. *Whalen, 238 Ill. App. 3d at 1003, 605 N.E.2d at 611*. This court also pointed to the lack of evidence linking McElvaney to the murder, stating:

> "In the present case, the only evidence linking McElvaney to the crime scene is the fact that one of a number of empty beer cans found at the scene was the same brand that McElvaney drinks. No evidence was presented that McElvaney had ever touched this can, nor is there any evidence of animosity between McElvaney and the deceased. To the contrary, all evidence points to a conclusion that their relationship was **[**15]** amicable. Finally, we are left with McElvaney's outburst to detectives that he would not hurt Bill Whalen, at a time when he had no reason to know of any injury to the deceased. This evidence is far too uncertain to form the basis for finding that the trial judge abused his discretion in excluding McElvaney's testimony." *Whalen, 238 Ill. App. 3d at 1005, 605 N.E.2d at 611*.

Our supreme court also affirmed the trial court's evidentiary ruling. See *People v. Whalen, 158 Ill. 2d 415, 431, 634 N.E.2d 725, 733, 199 Ill. Dec. 672 (1994)*. Because this evidence regarding McElvaney being asked to leave the tavern and McElvaney's statements to the police the next morning were not allowed at defendant's trial, it was not trial evidence nor was it new evidence. As a result, the trial court did not err by not considering it in determining whether it was probable a retrial would lead to a different result.

[*P27] Defendant also points to the testimony of the victim's wife that she had never seen McElvaney kicked out of the tavern. Further, defendant points to McElvaney being the son of the chief of the Bloomington Police Department at the time of the murder as a reason why the police were not more skeptical of what McElvaney told them after William Whalen's body was discovered. According to defendant, this "new" evidence puts a different **[**16]** light on McElvaney's testimony during the offer of proof. However, defendant has failed to establish this evidence was not known to defendant or could not have been discovered through the exercise of due diligence before his trial. As a result, this information does not qualify

as "new" evidence.

[*P28] 2. *Affidavit of William Craig Elliot*

[*P29] With regard to William Craig Elliot's affidavit, the circuit court ruled the affidavit did not constitute "new" evidence it would consider. Defendant provides no argument and cites no authority why the trial court erred in finding the affidavit did not constitute new evidence. As a result, we find defendant forfeited any argument the trial court erred.

[*P30] Defendant does argue the circuit court erred by failing to recognize the affidavit still impacts Elliot's potential weight as a witness at any retrial. However, if the affidavit was neither "new evidence" nor evidence from the trial, the trial court did not err in not considering this evidence in determining whether it was probable defendant would be found not guilty if he was given a new trial.

[*P31] Regardless of forfeiture, Elliott's affidavit would be of little help to defendant during a second trial. According **[**17]** to defendant's brief, "Elliott's affidavit in the 2-1401 petition avers that after [defendant's] father's death, [defendant] only had around $800 cash, not $3000 cash, as Elliot had testified at trial and that the investigating officers told Elliot that [defendant's] money had come from donations to the decedent's family."

[*P32] This does not accurately reflect what Elliot's affidavit stated. According to the affidavit, Elliot never counted the money defendant had and could not say exactly how much money defendant had when they went to Chicago to purchase drugs. Elliot stated in the affidavit that after arriving in Chicago, he discovered defendant did not have as much money with him as he had led Elliot to believe. Because Elliot did not count the money defendant had, Elliot's affidavit does not establish how much money defendant possessed, only the amount defendant told Elliot he possessed.

[*P33] Elliot noted he was frustrated with defendant because Elliot ended up having to pay more than he expected for the drugs. Elliot did not contradict his testimony that defendant told him he had $5000 and wanted to go to Chicago to buy drugs. The affidavit only contradicted Elliot's testimony that defendant **[**18]** paid $3000 for four ounces of cocaine in Chicago. According to the affidavit, when Elliot and defendant returned to Bloomington, Elliot gave defendant an ounce of cocaine because of the amount of money he paid. Elliot recalled he was able to purchase an ounce of cocaine for around $800 at that time.

[*P34] As the State points out in its brief, the State's evidence of defendant's motive for killing his father would not be hampered by Elliot's affidavit. We agree with the State the exact amount or source of cash defendant used to purchase cocaine shortly after the murder carries little importance when defendant was having money problems before the murder. Further, this was only part of the State's case establishing defendant's motive. The State presented other evidence of the strained relationship between defendant and his father and defendant's financial problems. Defendant's father had kicked him out of the familial residence. Defendant had borrowed $350 from his father and was trying to avoid him. Further, defendant had a fight with his father about a month before the murder. After his father's death, defendant moved back into the family home, cashed numerous checks from his mother, and **[**19]** sold the family's lawn mower for $500, which his mother and brother later reported as stolen.

[*P35] B. Circuit Court's Ultimate Ruling

[*P36] Finally, defendant argues the circuit court erred in finding it was not probable a new trial would lead to a different result based on the new evidence and the original trial evidence. As noted above, defendant has not established the trial court

erred in not considering information regarding McElvaney or Elliot's affidavit. As a result, we do not consider this information in our review of the denial of defendant's petition.

[*P37] While defendant was able to present evidence his DNA was not found at the murder scene, this evidence does not place the trial evidence in a different light for at least two reasons. First, defendant was not convicted based on biological evidence. At defendant's trial, evidence was presented excluding defendant as the source of any blood found at the crime scene. Second, the new DNA evidence did not identify another possible assailant. Dr. Karl Reich noted he was confounded by the lack of DNA evidence of anyone other than the victim at the crime scene. According to Dr. Reich, a person using a knife without a blade guard—like the ones **[**20]** used in this case—likely would have cut him or herself and left DNA evidence at the scene. However, in this case, the murderer apparently was not cut. While a minute amount of DNA found on the knives belonged to neither the victim nor defendant, Dr. Reich acknowledged the presence of the third-party DNA could have resulted from contamination after the murder. The knives were stored for 15 years in an open box with other evidence.

[*P38] As to the palm print on the pool cue stick and whether the print was in blood or some other substance, defendant's expert, Michele Triplett, did not testify the palm print did not belong to defendant. Defense counsel never asked Triplett this question. Triplett did testify the print was suitable for comparison and appeared to be a "put-down" palm print, which was consistent with the State's evidence. As to whether the palm print was left in blood or some other substance, the State's evidence at defendant's trial noted the substance was never scientifically tested to avoid compromising the latent print. However, a similarly colored substance from another part of the pool cue was tested and determined to be blood. The jury at defendant's trial would have inferred **[**21]** testimony the palm print was in blood was based on the non-scientific observations of the witnesses at trial.

[*P39] Defendant also notes at a new trial he could argue the palm print was left on the pool cue in a substance other than blood before the murder while defendant was at the tavern. However, while defendant could point out the substance the print was in was not scientifically determined to be blood, the State could inform the jurors the pool cue was recovered near wet blood and the print appeared to be in blood. Further, a similar looking substance on the pool cue was determined to be blood through scientific testing.

[*P40] Further, the new evidence did not affect the shoeprint evidence in this case. As discussed in our prior opinion, the police discovered a bloody shoeprint at the murder scene. The size and type of defendant's shoe matched the shoe print although the wear pattern was not a match. However, defendant admitted to the police he had recently thrown away a pair of the same style shoes. *Whalen, 2020 IL App (4th) 190171, ¶¶ 12-13*. Finally, the new evidence in this case does not hamper the State's motive evidence, which we discussed earlier.

[*P41] Based on the new evidence and the prior trial evidence, the circuit court did **[**22]** not err in determining it was not probable a retrial would lead to a different result in this case.

[*P42] III. CONCLUSION

[*P43] For the reasons stated, we affirm the circuit court's denial of defendant's *section 2-1401* petition for relief from judgment.

[*P44] Affirmed.

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People v. Harvell

Appellate Court of Illinois, Fourth District

January 23, 2024, Filed

NO. 4-23-0152

Reporter
2024 IL App (4th) 230152-U *; 2024 Ill. App. Unpub. LEXIS 132 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MARKUS HARVELL, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Prior History: [1]** Appeal from the Circuit Court of Sangamon County No. 01CF775. Honorable Raylene D. Grischow, Judge Presiding.

People v. Harvell, 357 Ill. App. 3d 1101, 895 N.E.2d 701, 2005 Ill. App. LEXIS 3754, 324 Ill. Dec. 206 (Ill. App. Ct. 4th Dist., July 13, 2005)

Disposition: Reversed and remanded.

Judges: JUSTICE KNECHT delivered the judgment of the court. Presiding Justice Turner and Justice Steigmann concurred in the judgment.

Opinion by: KNECHT

Opinion

ORDER

[*P1] *Held*: The appellate court reversed and remanded for further proceedings, concluding defendant set forth a colorable claim of actual innocence.

[*P2] Defendant, Markus Harvell, appeals from the trial court's judgment denying him leave to file a successive postconviction petition. On appeal, defendant argues this court should reverse and remand for further proceedings because he sufficiently set forth a claim of actual innocence based upon newly discovered evidence. For the reasons that follow, we reverse and remand for further proceedings.

[*P3] I. BACKGROUND

[*P4] On August 9, 2001, 13-year-old Antonio McGrone was shot and killed at the Brandon Court housing complex (Brandon Court) in Springfield. Defendant was later arrested and charged with the first degree murder of McGrone.

[*P5] Shortly before the shooting that resulted in McGrone's death, another shooting occurred at Brandon Court. Edwin Jones was later arrested and charged with aggravated **[**2]** discharge of a firearm for that shooting, a charge which was later dismissed on motion of the State due to insufficient evidence. The record indicates defendant and his trial counsel were aware of the charge brought against Edwin Jones prior to defendant's trial.

[*P6] A. Jury Trial

[*P7] At defendant's trial, the evidence showed defendant, Andre Jones, and Nicholas Gates went together to Brandon Court on the evening of August 9, 2001. While at Brandon Court, a man wearing a wig, glasses, and white gloves approached a group of people, including defendant. When the group laughed at the man, the man, who

was referred to as the "wig man," responded by firing a gun at defendant. The group dispersed. McGrone, who was also nearby, fled.

[*P8] Defendant was later seen with a gun in his hand. A witness who saw defendant with the gun testified defendant told that witness not to run. Another witness, who was fleeing with McGrone following the shooting, testified he looked up and saw defendant with a gun immediately after hearing a man yell "'who's that?'" That witness and McGrone continued to flee. Witnesses heard additional shots. McGrone was struck in the back by a bullet.

[*P9] The witness who was with McGrone continued **[**3]** to flee, later coming upon defendant in a vehicle. Defendant pointed a gun out the window of the vehicle, to which the witness said, "[I]t wasn't me." The vehicle then sped away. Later that evening, the witness who was with McGrone identified defendant as the person who shot McGrone.

[*P10] Gates and Andre Jones left Brandon Court in defendant's vehicle. Gates testified defendant stopped the vehicle and pointed a gun at a man standing on the street and said, "'[I]s it you, is it you.'" The man put up his hands and responded, "'Ain't me, ain't me,'" and defendant drove away. Days later, Gates, who had been arrested on unrelated charges, gave a statement to police indicating defendant possessed a .22-caliber revolver when they left Brandon Court and stated, "Man, I done f*** around and killed a kid." Andre Jones testified he did not see defendant with a gun, nor did he hear a second set of gunshots. In a statement to police days after the incident, when arrested on unrelated charges, Andre Jones indicated he observed defendant open and remove six empty shells from a gun's cylinder and heard him say "he needed to get rid of the clothes he was wearing" and "needed to get some money up together **[**4]** and get him a good lawyer."

[*P11] At the scene of the initial shooting, police recovered five 9-millimeter cartridge cases, all of which were later revealed to have originated from the same handgun. A .22-caliber projectile was recovered from McGrone's body.

[*P12] In closing, the State argued defendant hunted down the "wig man" after the "wig man" shot at him, a pursuit which resulted in defendant discharging a firearm and killing McGrone. Conversely, the defense argued the State had not proven defendant was the perpetrator. Neither the State nor the defense tendered second degree murder instructions.

[*P13] After deliberations, the jury found defendant guilty of first degree murder. He was later sentenced to 50 years' imprisonment. Defendant appealed.

[*P14] B. Direct Appeal

[*P15] In July 2005, this court, following a remand for proper admonishments, affirmed defendant's conviction on direct appeal. *People v. Harvell, 357 Ill. App. 3d 1101, 895 N.E.2d 701, 324 Ill. Dec. 206 (2005)* (unpublished order under *Supreme Court Rule 23*).

[*P16] C. Initial Postconviction Petition

[*P17] In June 2006, defendant filed a *pro se* postconviction petition. In his petition, defendant alleged (1) "he fired the shot that resulted in the unfortunate death of a young boy" and (2) there was "never any intent to kill Antonio McGrone." Defendant asserted, **[**5]** amongst other claims, ineffective assistance based upon trial counsel's failure to seek second degree murder instructions. The trial court summarily dismissed the petition, and defendant appealed.

[*P18] In July 2008, this court reversed the summary dismissal of defendant's postconviction petition and remanded for further proceedings.

People v. Harvell, 382 Ill. App. 3d 1227, 967 N.E.2d 504, 359 Ill. Dec. 774 (2008) (unpublished order under *Supreme Court Rule 23*).

[*P19] In April 2010, defendant, through appointed counsel, filed an amended postconviction petition.

[*P20] In January 2011, the trial court conducted an evidentiary hearing on defendant's amended postconviction petition, where it heard from both defendant and his trial counsel. Based upon the evidence presented, the court denied the petition, and defendant appealed.

[*P21] In October 2012, this court affirmed the denial of defendant's amended postconviction petition. *People v. Harvell, 2012 IL App (4th) 110079-U*.

[*P22] D. Petition for Relief From Judgment

[*P23] In June 2017, defendant filed a *pro se* petition for relief from judgment. In his petition, defendant alleged he had discovered through a freedom of information request new evidence material to his innocence, which had been wrongfully concealed from him. Defendant attached the new evidence, a redacted police statement, to his petition. The typed statement **[**6]** indicated it was taken on October 18, 2001, from an inmate in the Sangamon County jail. Identifying information not redacted from the statement included the inmate's date of birth, the charge for which the inmate was incarcerated, and the block where the inmate was housed. The inmate stated he had spoken with another inmate about a "shooting over at Brandon." That inmate disclosed "he got into a shootout" with another individual and the other individual was "the one who shot the boy in Brandon right after he and [redacted] was shooting at each other." Defendant alleged the redacted police statement set forth a confession by Edwin Jones to another inmate.

[*P24] In July 2017, the trial court denied defendant's petition for relief from judgment, finding he "state[d] no new credible evidence to support his motion." Defendant appealed.

[*P25] In February 2020, this court affirmed the denial of defendant's petition for relief from judgment, rejecting his argument that the denial was procedurally flawed. *People v. Harvell, 2020 IL App (4th) 170582-U*.

[*P26] E. First Motion for Leave to File a Successive Postconviction Petition

[*P27] In November 2017, defendant, while his appeal from the denial of his petition for relief from judgment was pending, filed a *pro* ***[**7]*** *se* motion for leave to file a successive postconviction petition. In his motion, defendant asserted a claim of actual innocence based upon newly discovered evidence. In support of his claim, defendant relied upon the redacted police statement.

[*P28] In February 2018, the trial court denied defendant leave to file a successive postconviction petition, finding he presented "no new arguments from the previously denied petition."

[*P29] In October 2018, defendant moved to file a late notice of appeal, which this court denied.

[*P30] F. Second Motion for Leave to File a Successive Postconviction Petition

[*P31] In October 2022, defendant filed a second *pro se* motion for leave to file a successive postconviction, which is the subject of this appeal. In his motion, defendant asserted a claim of actual innocence based upon newly discovered evidence. Specifically, defendant alleged he was actually innocent of the charge upon which he was convicted because he acted in self-defense. In support of his claim, defendant attached an affidavit of Andre Jones, the redacted police statement, and his own affidavit. As to his own affidavit,

defendant averred his account of how the shootings transpired. With respect to the affidavit **[**8]** of Andre Jones, Andre Jones averred he was approached by Marcus Dale in late 2021. They spoke about defendant's imprisonment for the murder of McGrone. During that conversation, Dale stated, while he was incarcerated in 2001, Edwin Jones "told him everything regarding the shooting in Brandon Drive." Dale then told Andre Jones about the specifics of Edwin Jones's account. Amongst other things, Edwin Jones allegedly told Dale "that he then saw [defendant] trying to climb a gate that enclosed Brandon Drive so he raised his gun to fire shots towards [defendant], but [defendant] saw him and returned fire back to Edwin." Edwin Jones said "it was then that he realized that [defendant] had accidentally shot [McGrone]." Dale also told Andre Jones "that he had reported to police what Edwin had told him about the shooting" and "was never *** contacted by [defendant's] attorney regarding this statement." Defendant alleged in his motion he did not know about Dale until Andre Jones revealed his conversation with him and there was no indication his counsel knew of Dale.

[*P32] In December 2022, the trial court denied defendant leave to file a successive postconviction petition, finding he had not presented **[**9]** any newly discovered evidence to support his claim of actual innocence. With respect to the affidavit of Andre Jones, the court found the evidence was not newly discovered because the record showed the defense was aware of both Andre Jones and Dale prior to defendant's trial. With respect to its finding as to Dale, the court relied upon a typed police statement admitted at defendant's trial referencing someone named "Marcus." The court also found the evidence was not newly discovered because the record showed the defense was aware that other witnesses had indicated defendant was shot at and believed he did not intend to shoot McGrone.

[*P33] In January 2023, defendant filed a motion to reconsider the denial of leave to file a successive postconviction petition, which the trial court later denied.

[*P34] This appeal followed.

[*P35] II. ANALYSIS

[*P36] On appeal, defendant argues this court should reverse and remand for further proceedings because he sufficiently set forth a claim of actual innocence based upon newly discovered evidence. The State disagrees.

[*P37] The *Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 et seq.* (West 2022)) provides a "statutory procedure by which a defendant can pursue a claim that his conviction or sentence was based on a substantial denial **[**10]** of his constitutional rights." *People v. Clark, 2023 IL 127273, ¶ 38, 216 N.E.3d 855, 466 Ill. Dec. 22*. The Act contemplates the filing of only one postconviction petition. *Id. ¶ 39*. There are, however, circumstances where a successive postconviction petition may be filed. *People v. Taliani, 2021 IL 125891, ¶ 55, 174 N.E.3d 503, 447 Ill. Dec. 486*. One such circumstance is where a defendant asserts a claim of actual innocence based upon newly discovered evidence. *People v. Edwards, 2012 IL 111711, ¶ 23, 969 N.E.2d 829, 360 Ill. Dec. 784*.

[*P38] A claim of actual innocence based upon newly discovered evidence requires evidence that is "(1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial." *People v. Robinson, 2020 IL 123849, ¶ 47, 181 N.E.3d 37, 450 Ill. Dec. 37*. Newly discovered evidence, as it has been defined by our supreme court, "is evidence that was discovered after trial and that the [defendant] could not have discovered earlier through the exercise of due diligence." *Id.* Evidence is material and not cumulative where it is relevant and probative of the defendant's innocence and adds to the information presented at trial. *Id.*

Finally, the conclusive character of the new evidence, the most important element of a claim of actual innocence, "refers to evidence that, when considered along with the trial evidence, would probably lead to a different result." *Id.*

[*P39] Where a defendant seeks to file a **[**11]** successive postconviction petition asserting a claim of actual innocence based upon newly discovered evidence, that defendant must first obtain leave of court. *Edwards, 2012 IL 111711, ¶ 24*. The pertinent question when reviewing a request for leave to file such a petition is whether the materials submitted by the defendant "set forth a colorable claim of actual innocence." *Robinson, 2020 IL 123849, ¶ 50*. In considering this question, all well-pleaded allegations not positively rebutted by the record are to be taken as true, and "the court is precluded from making factual and credibility determinations." *Id. ¶ 45*. As our supreme court has explained, "the standard for alleging a colorable claim of actual innocence falls between the first-stage pleading requirement for an initial petition and the second-stage requirement of a substantial showing." *Id. ¶ 58*.

[*P40] The denial of leave to file a successive postconviction petition alleging actual innocence based upon newly discovered evidence is reviewed *de novo*. *Id. ¶ 40*. Under *de novo* review, we perform the same analysis a trial court would perform. *People v. McDonald, 2016 IL 118882, ¶ 32, 77 N.E.3d 26, 412 Ill. Dec. 858*.

[*P41] In this case, there is no dispute defendant's claim of actual innocence is based upon a viable assertion of self-defense. See *People v. Horton, 2021 IL App (1st) 180551, ¶ 46, 192 N.E.3d 710, 455 Ill. Dec. 881* ("Self-defense may serve as the basis for an actual **[**12]** innocence claim because it is a justifying or exonerating circumstance." (Internal quotation marks omitted.)). Instead, the dispute concerns whether the evidence submitted in support of defendant's claim is sufficient to establish a colorable claim of actual innocence. Accordingly, our focus will be on the evidence submitted by defendant.

[*P42] In considering whether the evidence submitted by defendant is sufficient to establish a colorable claim of actual innocence, we note both he and the State collapse their consideration of the evidence into a single analysis. Following the guidance from our supreme court, we consider each piece of evidence individually to determine whether it is sufficient to establish a colorable claim of actual innocence. See *Robinson, 2020 IL 123849, ¶¶ 51-83*.

[*P43] We begin with the affidavit of defendant. In his affidavit, defendant sets forth his account of how the shooting transpired. This information was known to defendant before trial. Therefore, the information is not newly discovered, and the affidavit cannot support defendant's claim of actual innocence. See *id. ¶¶ 51-53*.

[*P44] Next, we consider the redacted police statement. As defendant recognizes, this court has found evidence is not newly discovered **[**13]** where it "was available at a prior posttrial proceeding." *People v. Snow, 2012 IL App (4th) 110415, ¶ 21, 964 N.E.2d 1139, 358 Ill. Dec. 117*; see *People v. Wideman, 2016 IL App (1st) 123092, ¶ 58, 52 N.E.3d 531, 402 Ill. Dec. 610* ("Keeping in mind the desire to avoid piecemeal post-conviction litigation, we find it is appropriate, for *res judicata* purposes, to review not only whether the [evidence] could have been discovered at the time of trial, but whether that evidence was available when the defendant filed his previous postconviction pleadings." (Internal citation and quotation marks omitted.)); *People v. Warren, 2016 IL App (1st) 090884-C, ¶ 114, 58 N.E.3d 714, 405 Ill. Dec. 453* ("Typically, evidence of which the defendant was aware in earlier postconviction proceedings will not be considered newly discovered."). Recently, a panel of the First District found such "preclusion should only apply when the evidence has been previously considered and definitively ruled upon."

People v. Beard, 2023 IL App (1st) 200106, ¶ 48, 221 N.E.3d 636, 468 Ill. Dec. 808. Even applying the rule as it is set forth in the recent decision from the First District, we find the redacted police statement is precluded from further consideration—the statement was previously submitted and found to be not credible, a finding which was not appealed. Therefore, the information is not newly discovered, and the statement cannot support defendant's claim of actual innocence.

[*P45] Last, we consider the affidavit of Andre Jones. In the affidavit, **[**14]** Andre Jones conveys a conversation he had with Marcus Dale in late 2021 about Edwin Jones's previous account of the 2001 shootings at Brandon Court. During that conversation, Dale conveyed to Andre Jones that Edwin Jones told him "that he *** saw [defendant] trying to climb a gate that enclosed Brandon Drive so he raised his gun to fire shots towards [defendant], but [defendant] saw him and returned fire back to Edwin." Edwin Jones said "it was then that he realized that [defendant] had accidentally shot [McGrone]."

[*P46] We first observe the trial court's initial grounds for finding the affidavit of Andre Jones was not newly discovered are incorrect. As defendant explains and the State does not dispute, the fact the defense was aware of Andre Jones prior to defendant's trial does not show the information set forth in Andre Jones's affidavit was available to the defense prior to trial. Additionally, the typed police statement relied upon by the court does not show the defense was aware of Dale. While the statement does refer to a person named "Marcus," that reference, considered in context, indicates it was referring to defendant—"Markus."

[*P47] The trial court also found the affidavit of Andre **[**15]** Jones was not newly discovered because the record showed the defense was aware that other witnesses had indicated defendant was shot at and believed he did not intend to shoot McGrone. While we agree the record shows the defense was aware of this information, the affidavit sets forth additional information the defense was allegedly not aware of—that Edwin Jones had indicated McGrone was shot only after Edwin Jones raised his gun to fire shots at defendant and defendant returned fire at Edwin Jones. There is nothing in the record to suggest the defense was aware of this account from Edwin Jones.

[*P48] The State suggests the trial court's judgment may nevertheless be affirmed because defendant should have been able to discover Edwin Jones's account sooner. We are not convinced. First, the record does not refute defendant's allegation that the State did not tender the redacted police statement, which he believed referenced a conversation between Edwin Jones and Dale, until 2016. Upon its receipt, defendant, who was imprisoned and did not have the assistance of counsel, had to determine the identity of the person who made the redacted police statement as well as that person's whereabouts. Defendant **[**16]** then would have had to elicit additional information from that person about the statement. We are not convinced, particularly given the State's failure to cite any supporting authority, the delay in uncovering this information amounted to a lack of due diligence. At this stage of the proceedings, we find the affidavit of Andre Jones meets the criteria for newly discovered evidence.

[*P49] The State also suggests the trial court's judgment may be affirmed because the affidavit from Andre Jones does not present any noncumulative information. We disagree. The affidavit of Andre Jones provides an alleged account of the moments immediately prior to the shooting which resulted in McGrone's death. This information was not before the jury. It is further, although not addressed by the State, relevant and probative of defendant's innocence. At this stage of the proceedings, we find the affidavit of Andre Jones meets the criteria for being evidence that is not cumulative, as well as material.

[*P50] Finally, the State briefly suggests the trial court's judgment may be affirmed because the

affidavit from Andre Jones is not sufficiently conclusive. We disagree. The State asserts the information from the affidavit **[**17]** "merely contradicts" the trial evidence, which it contends "is insufficient to require allowing defendant to file a successive postconviction petition." Our supreme court recently rejected such an inquiry at this stage in the proceedings:

> "We now clarify that the inquiry applicable at the leave-to-file stage of successive proceedings does not focus on whether the new evidence is inconsistent with the evidence presented at trial. Rather, the well-pleaded allegations in the petition and supporting documents will be accepted as true unless it is affirmatively demonstrated by the record that a trier of fact could never accept their veracity. In assessing whether a petitioner has satisfied the low threshold applicable to a colorable claim of actual innocence, the court considers only whether the new evidence, if believed and not positively rebutted by the record, could lead to acquittal on retrial." *Robinson, 2020 IL 123849, ¶ 60*.

We further note the court held "questions regarding the admissibility and reliability of such evidence are not relevant considerations at the motion for leave to file stage of a successive postconviction proceeding." *Id. ¶ 81*. At this stage of the proceedings, we find the affidavit of Andre Jones is **[**18]** sufficiently conclusive.

[*P51] In sum, we find the affidavit of Andre Jones is sufficient to support defendant's claim of actual innocence at this stage of the proceedings. We further find, based upon that affidavit and the well-pleaded allegations in defendant's motion, he has set forth a colorable claim of actual innocence. Accordingly, defendant is entitled to leave to file a successive postconviction petition.

[*P52] III. CONCLUSION

[*P53] We reverse the trial court's judgment and remand for further proceedings.

[*P54] Reversed and remanded.

End of Document

People v. Griffin

Appellate Court of Illinois, Second District

March 18, 2024, Order Filed

No. 2-22-0064

Reporter

2024 IL App (2d) 220064-U *; 2024 Ill. App. Unpub. LEXIS 571 **

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. STEPHEN E. GRIFFIN, Defendant-Appellant.

Notice: THIS ORDER WAS FILED UNDER *SUPREME COURT RULE 23* AND MAY NOT BE CITED AS PRECEDENT BY ANY PARTY EXCEPT IN THE LIMITED CIRCUMSTANCES ALLOWED UNDER *RULE 23(e)(1)*.

Prior History: [1]** Appeal from the Circuit Court of Kane County. No. 92-CF-239. Honorable Mark A. Pheanis, Judge, Presiding.

People v. Griffin, 291 Ill. App. 3d 1131, 716 N.E.2d 884, 1997 Ill. App. LEXIS 5142, 240 Ill. Dec. 290 (Ill. App. Ct. 2d Dist., Oct. 9, 1997)

Disposition: Affirmed.

Judges: PRESIDING JUSTICE McLAREN delivered the judgment of the court. Justices Schostok and Birkett concurred in the judgment.

Opinion by: McLAREN

Opinion

ORDER

[*P1] *Held*: We affirm the trial court's denial of the defendant's postconviction petition based on actual innocence after a third-stage hearing where the defendant presented an affidavit recanting an eyewitness' trial testimony and two affidavits that corroborated the recanting affidavit; the trial court's judgment was not manifestly erroneous.

[*P2] At issue here is whether the trial court's denial of defendant's postconviction petition based on actual innocence after a third stage hearing was manifestly erroneous. Defendant argues that the trial court erred by disregarding the affidavit of an eyewitness who recanted his trial testimony and the affidavits of two family members who averred that they heard the eyewitness recant. We affirm.

[*P3] I. BACKGROUND

[*P4] In 1994 a jury found defendant guilty of first-degree murder (Ill. Rev. Stat. 1989, ch. 38, ¶ 9-1(a)(1) (now *720 ILCS 5/9-1(a)(1)* (West 2022)) by accountability for the shooting death of Michael Brown, and the court sentenced him to 60 years' imprisonment.

[*P5] A. Trial **[**2]** Testimony

[*P6] We summarize the relevant facts appearing in the record. On February 5, 1992, at 9:55 p.m., the body of Michael Brown was found unresponsive and bleeding from the head on the side of Kautz Road. The State charged defendant, codefendant Perez Funches, and Anthony Gibson with the first-degree murder of Brown.

[*P7] Aurora Police Officer Robert Mangers testified that earlier that day, around 12:30 p.m., he responded to a call of shots fired at defendant's mother's house at 123 Kendall in Aurora. When Mangers arrived at the scene, defendant told

Mangers that he was in front of his mother's house when a maroon Mitsubishi drove up slowly. There were three people in the car, and one of the occupants asked defendant if he was "Steve G" and to "stop f***ing with my boy when he comes out here." Defendant told Mangers that he replied, "F*** you," and then one of the occupants pointed a gun at him, so he pulled out a .380 revolver and fired it six or seven times at the car. The car drove to the end of the block, stopped, and the same occupant who pointed the gun at him then fired at defendant approximately three times.

[*P8] Evidence was introduced that the victim, Brown, ordered the drive-by shooting **[**3]** of defendant's house on February 5. Brown had been selling cocaine in the area. Tommy "Momo" Neal testified that four days earlier, on February 1, he heard defendant and co-defendant Perez Funches tell Brown "if he did not get them what they wanted, that they was [*sic*] going to beat him up." Defendant then took Brown's gold chain. Defendant and Funches indicated that they wanted "dope, money." Neal also testified that, later, defendant told Brown he knew that Brown was responsible for the drive-by shooting and that "I should shoot you in the back of the head."

[*P9] Kevin Groom and Brian Adams testified that at about 8:15 to 8:30 on the night of Brown's death they arrived at Pepe's Restaurant on Lake Street in Aurora (Pepe's) to watch a Bulls game. Terry Mishos and Brown were also there. Groom and Mishos testified that Brown made several phone calls from a payphone in the restaurant regarding a coat that Groom believed Neal had stolen from him. Groom testified that, after the phone calls, Brown told Groom that the coat would be there in a few minutes.

[*P10] Anthony Gibson and Neal testified that, on the night of Brown's death, defendant drove him and Funches to Pepe's Restaurant. Neal added that **[**4]** defendant drove to Pepe's to meet Brown to straighten out who shot at defendant's mother's house and the issue regarding Groom's coat. Neal also stated that defendant parked the car in the Wendy's parking lot that was next to Pepe's parking lot. The parking lots were in the back of the restaurants. Gibson and Neal testified that when they arrived at Pepe's, defendant and Funches exited the car while Gibson and Neal waited in the car. According to Groom, while inside Pepe's, defendant asked Brown to go with him to get the coat. Defendant and Brown then walked outside to the back of the Wendy's. The last time Groom saw defendant was between 9:30 and 9:45 p.m. Mishos saw Brown leave Pepe's with defendant and Gibson between 9:30 and 10:00 p.m. Brown was near defendant's car in the Wendy's parking area.

[*P11] Neal testified that, while in the Wendy's parking lot, defendant threw Brown to the ground and Funches had his knee in Brown's back and a gun to Brown's head. Then defendant got into the driver's seat of his car, Gibson got into the passenger seat, and Funches "tossed" Brown in the back seat. Neal and Funches sat on either side of Brown. Funches placed the gun inside a hat and continued **[**5]** to point it at Brown. Defendant asked Brown who "shot up" his mother's house. Defendant told Brown, "I should kill you." Neal identified the gun recovered by the police as the gun he saw Funches point at Brown and identified the hat recovered by the police as the hat Funches used to hide the gun. After leaving Pepe's, defendant stopped the car on the east side of town and ordered Neal out of the car. Defendant and Funches threatened to shoot Neal if Neal told anyone anything he had seen.

[*P12] Gibson testified that after defendant drove away from Neal, he saw Funches still pointing a gun at Brown and heard defendant tell Brown, "[Y]ou're a dead b***." Gibson asked defendant to drop him at home, but defendant refused. Instead, defendant drove to Kautz Road, which Gibson stated was about fifteen minutes away from Pepe's. Gibson further testified that defendant stopped the car and told Brown, "Get out b***." Brown got out of the car with defendant and Funches, and they

moved to the back of the car. Gibson heard a gunshot, turned, and then heard three to four more gunshots. Gibson saw Funches shoot the gun. Defendant and Funches ran back to the car, and Funches stated, "Go man, I just shot somebody **[**6]** for you." Defendant let Gibson out of the car near Gibson's father's house and told Gibson not to say anything.

[*P13] Aurora Police Officer Greg Thomas testified that on February 9, 1992, he was with two fire department divers who found two pieces of the gun that was used to commit the murder. Defendant led Thomas to the gun that he admitted he had thrown into the river.

[*P14] Defendant testified on his own behalf as follows. On February 5, 1992, Brown called defendant about a missing coat. At around 9 p.m. defendant called Funches, Gibson, and Neal, and they picked up defendant in his car. Defendant asked Neal about the stolen coat, but Neal denied that he had the coat. The four men went to Pepe's to talk to Brown about the coat. Defendant parked between Pepe's and Wendy's, and he and Funches entered Pepe's. Defendant spoke to Brown about the coat. Gibson was present during the conversation. Groom came over to defendant and said that it was his coat that was taken. Groom and defendant walked outside, and Groom identified Neal as the person that took his coat. Defendant was at Pepe's for about five minutes. Brown got into defendant's car with defendant, Funches, Gibson, and Neal and they left **[**7]** Pepe's to get the coat. Defendant told Neal to stop lying about the coat, dropped Neal off, and told him to get the coat. Defendant drove to his house, arriving there "after 9:30." He let Funches, Gibson, and Brown take his car. Defendant then drove to Paula Thomas' house in Betty's car.

[*P15] Defendant testified that the day after the incident, Funches gave him a gun inside a hat and told him the gun had been used to kill Brown. Defendant threw the gun over the Indian Trail bridge and later led an officer to the area where the gun was recovered.

[*P16] During cross-examination, defendant testified that he told officers James Brummett and Davis that he last saw Brown at about 6:30 p.m. when he left Pepe's, and that Brown never got into defendant's car. Defendant also told Officer Anderson that Brown was still at Pepe's when defendant left there. Defendant denied that he told Anderson he was at his girlfriend Paula Thomas' house at 9:15 p.m., but then admitted that he told Anderson that he was at Paula's house at that time. Defendant's cousin, Betty Williams, was at his mother's house. Defendant stated that he changed his alibi after the police told him that witnesses placed him at Wendy's with **[**8]** Brown at 9:45 p.m. and saw Brown depart in defendant's car. Defendant then admitted that he actually left Pepe's with Funches, Gibson, Neal, and Brown, and that he dropped Neal off. Defendant testified that he was dropped off at his mom's house before the murder was committed. Defendant told the police that he watched as Funches and Gibson fought with Brown, and then as Funches and Brown left in the car.

[*P17] Betty Williams testified that on the night of the incident, she saw defendant at his mother's house at about 9:40 p.m. Williams drove defendant to Paula Thomas' house.

[*P18] In rebuttal, Aurora Police Officer James Brummett testified that he interviewed defendant on February 7, 1992, at 8:10 a.m. Defendant told Brummett that he last saw Brown at Pepe's at 6:30 p.m.

[*P19] Aurora Police Officer Gregory Anderson testified that he interviewed defendant on February 7, 1992, at 9:50 p.m. Defendant told Anderson that he left Pepe's with Funches, Gibson, and Neal, and that he was at Thomas' house by 9:15 p.m. Defendant also told Anderson that Brown stayed at Pepe's.

[*P20] During closing argument, the State argued

that defendant was guilty of first-degree murder on accountability. The jury was instructed regarding **[**9]** accountability. The jury found defendant guilty of first degree murder, and the trial court, Judge James T. Doyle presiding, sentenced defendant to 60 years' imprisonment.

[*P21] B. Posttrial Proceedings

[*P22] On direct appeal we affirmed defendant's conviction and sentence. *People v. Griffin*, 2-95-1249 (1997) (unpublished order under *Illinois Supreme Court Rule 23*), and our supreme court denied leave to appeal (*People v. Griffin, 176 Ill. 2d 582, 690 N.E.2d 1384, 229 Ill. Dec. 57 (1998)* (table)).

[*P23] In his post-conviction petition, defendant alleged: (1) that the State suborned perjury by Gibson and Neal in their trial testimony, especially regarding what they received in return for their testimony; (2) ineffective assistance of counsel for (a) failure to offer in evidence telephone records to impeach Gibson and (b) failure to poll the jury and to tell the court that two jurors later told counsel that they did not believe that defendant was guilty but the jury room was too cold, and they did not want to stay overnight because of an upcoming holiday weekend; and (3) that the State withheld exculpatory evidence. Defendant attached a February 17, 1992, unsworn handwritten "voluntary statement" from Funches, who had not testified at defendant's trial, in which Funches stated that he would testify that defendant **[**10]** was not present at Brown's killing, had no knowledge of it, and was not involved in the planning or ordering of it. Defendant also filed a motion for an evidentiary hearing and appointment of counsel. The trial court, Judge James T. Doyle presiding, found the petition to be "without merit and patently frivolous" and dismissed it.

[*P24] In March 1999, defendant filed a "first amended" petition for postconviction relief. Defendant made the same allegations he made in his original petition but attached affidavits of his sister and mother regarding (1) conversations that they had with defendant's trial attorney about the two jurors who did not believe that defendant was guilty, and (2) a conversation with Gibson in which Gibson stated that defendant had nothing to do with the murder and that the State had paid both himself and Neal for their trial testimony. None of the attachments to his 1998 petition were attached to the first amended petition. Another copy of the first amended petition was file-stamped April 14, 1999, but did not include the affidavit of defendant's sister.

[*P25] On July 9, 1999, defendant filed a second amended petition for postconviction relief, noting his prior allegations and **[**11]** raising "newly discovered evidence" in the form of an attached affidavit of Gibson in which Gibson averred, "some of the testimony I gave at trial was false. *** I committed perjury in giving this false testimony after I was arrested and decided to completely exonerate myself and cooperate with the police and State's Attorney, by saying what they wanted me to say. *** [Defendant] was not present when [Brown] was shot." The trial court appointed the public defender to represent defendant.

[*P26] After years of continuances and discovery, in 2008 defendant filed a third amended petition (petition) alleging, *inter alia*, the claim that Gibson had recanted his testimony. In addition to Gibson's affidavit, defendant attached the affidavits of Dillar and Gloria Griffin, wherein they averred that Gibson told them that he lied at trial and that the prosecutor paid Gibson for his testimony. Gloria added that Gibson offered to come forward with "the truth" if he was paid $5000. The State filed a motion to dismiss.

[*P27] In 2009, the trial court, Judge Timothy Q. Sheldon presiding, determined that it would "give effect" to the court order from 1998 that summarily dismissed the petition, and that defendant **[**12]** could appeal that dismissal. On appeal, we reversed

the trial court's judgment and remanded "for the State to expeditiously and timely file an answer to defendant's third amended petition and for further appropriate and timely proceedings on the petition." *People v. Griffin, 2013 IL App. (2d) 110631, ¶ 32-33*.

[*P28] In October 2013, the State filed its answer to defendant's petition. In September 2017 defendant filed his response. In July 2019 the trial court, Judge Mark A. Pheanis presiding, ordered the matter set for a third stage evidentiary hearing. In October 2021, the trial court issued a writ of *habeas corpus* to secure the presence of Gibson—who was being held in the Du Page County Jail—for the evidentiary hearing.

[*P29] On October 25, 2021, at the evidentiary hearing, neither party presented any witnesses. Defendant presented the affidavits that were attached to his third amended petition. The trial court admitted the affidavits.

[*P30] Following the evidentiary hearing, the trial court denied defendant's postconviction petition. The court found defendant failed to meet his burden to prove his actual innocence by a preponderance of the evidence. The court noted that defendant's claim was based on the two inadmissible hearsay affidavits of defendant's **[**13]** mother and sister and the terse recantation affidavit of Gibson. The court gave little weight to Gibson's affidavit because Gibson did not testify as a witness at the hearing under oath and was, therefore, was not subject to cross-examination, and did not allow the court to assess Gibson's credibility. The court also found that Gibson's recantation would not affect the outcome on retrial because it was contradicted by Gibson's "detailed and lengthy trial testimony." In addition, Gibson's recantation contradicted the trial testimony of "multiple witnesses who placed [defendant] and [Brown] together in [defendant's] car."

[*P31] Defendant timely appealed.

[*P32] II. ANALYSIS

[*P33] The Post-Conviction Hearing Act provides a three-stage procedure by which a criminal defendant can assert that "in the proceedings which resulted in his or her conviction there was a substantial denial of his or her rights under the Constitution of the United States or of the State of Illinois or both." *725 ILCS 5/122-1 et seq.* (West 2022). At the first stage, the circuit court has 90 days to review a petition and may summarily dismiss it if the court finds it is frivolous and patently without merit. *Id. § 122-2.1(a)(2)*. If the petition is not dismissed within that **[**14]** 90-day period, the circuit court must docket it for further consideration. *Id. § 122-2.1(b)*. At the second stage of postconviction proceedings, counsel may be appointed for defendant, if defendant is indigent. *Id. § 122-4*. After counsel has made any necessary amendments to the petition, the State may move to dismiss a petition or an amended petition pending before the court. *Id. § 122-5*. If that motion is denied, or if no motion to dismiss is filed, the State must answer the petition, and, barring the allowance of further pleadings by the court, the proceeding then advances to the third stage, a hearing wherein the defendant may present evidence in support of the petition. *Id. § 122-6*.

[*P34] At a third-stage hearing, the defendant bears the burden of showing a deprivation of his constitutional rights by a preponderance of the evidence. *People v. Coleman, 2013 IL 113307, ¶ 92, 996 N.E.2d 617, 374 Ill. Dec. 922*. The trial court serves as the fact finder and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts. See *People v. English, 2013 IL 112890, ¶ 23, 987 N.E.2d 371, 369 Ill. Dec. 744*. Thus, we will not reverse the court's denial of a postconviction petition following an evidentiary hearing unless the denial was manifestly erroneous. *People v. Eubanks, 2021 IL 126271, ¶ 47, 454 Ill. Dec. 577,*

190 N.E.3d 177. A decision is manifestly **[**15]** erroneous only if it contains error that is clearly evident, plain, and indisputable. *Id.* At the evidentiary hearing, the defendant bears the burden of making a substantial showing of a deprivation of a constitutional right. *Id. ¶ 29*.

[*P35] Here, defendant appeals only the denial of his petition regarding his claim of actual innocence. The *due process clause of the Illinois Constitution of 1970 (Ill. Const. 1970, art. I, § 2*) affords postconviction petitioners the right to assert a freestanding claim of actual innocence based on newly discovered evidence. *People v. Prante, 2023 IL 127241, ¶ 73, 469 Ill. Dec. 163, 223 N.E.3d 160* (citing *People v. Washington, 171 Ill. 2d 475, 665 N.E.2d 1330, 216 Ill. Dec. 773 (1996)*). Evidence in support of a claim of actual innocence must be (1) newly discovered, (2) not discoverable earlier through the exercise of due diligence, (3) material and not merely cumulative, and (4) of such conclusive character that, when considered along with the evidence that was presented at trial, the new evidence would probably change the result on retrial. *Id. ¶ 73*.

[*P36] To be newly discovered evidence means evidence that was discovered after trial and that the defendant could not have discovered earlier through the exercise of due diligence. *People v. Jackson, 2021 IL 124818, ¶ 42, 450 Ill. Dec. 782, 182 N.E.3d 594*. Evidence is material if it is relevant and probative of the defendant's innocence. *Robinson, 2020 IL 123849, ¶ 47*. Evidence is noncumulative if it adds to the information that the fact finder heard at trial. *Id.* Lastly, **[**16]** the conclusive character element refers to evidence that, when considered along with the trial evidence, would probably lead to a different result on retrial. *Id.* The conclusive character of the new evidence is the most important element of an actual innocence claim. *Id.*

[*P37] On appeal, here, the parties dispute only the conclusive character of the new evidence, the three affidavits. Defendant maintains that the affidavits of Gibson, Dillar, and Gloria Griffin are of such conclusive character that it would likely change the result on retrial.

[*P38] The purpose of the third stage evidentiary hearing in this case was to determine whether the affidavits were of such conclusive character that it would probably change the result on retrial. Our supreme court has described the role of the trial court as follows: "the circuit court serves as the fact finder, and, therefore, it is the court's function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts." *People v. Domagala, 2013 IL 113688, ¶ 34, 987 N.E.2d 767, 370 Ill. Dec. 1*; see also *People v. Gonzalez, 407 Ill. App. 3d 1026, 1036, 944 N.E.2d 834, 348 Ill. Dec. 593 (2011)* ("Credibility determinations such as this [at a third-stage evidentiary hearing] are properly made by the trier of fact, and we have no basis in the record for second-guessing **[**17]** the trial court's judgment."). "This is a comprehensive approach and involves credibility determinations that are uniquely appropriate for trial judges to make." *Coleman, 2013 IL 113307, ¶ 97*. Because the affiants did not testify at the hearing, the trial court was required to assess the credibility of the affidavits. We examine each affidavit in turn.

[*P39] Regarding Gibson's affidavit we note that a witness's recantation of his prior testimony is viewed as inherently unreliable (*People v. Morgan, 212 Ill. 2d 148, 155, 817 N.E.2d 524, 288 Ill. Dec. 166 (2005)*), particularly where the recantation involves a confession of perjury (*People v. Steidl, 142 Ill. 2d 204, 254, 568 N.E.2d 837, 154 Ill. Dec. 616 (1991)*). A court should not grant a new trial on the basis of a witness's recantation except in extraordinary circumstances. *Morgan, 212 Ill. 2d at 155*. Gibson's affidavit stated that some of his trial testimony was false and that defendant was not present when Brown was shot. However, the recantation affidavit offered in this case was not so extraordinary as to overcome the inherent lack of

reliability attached to such statements. See *Morgan, 212 Ill. 2d at 155*; *Steidl, 177 Ill. 2d at 260*; *People v. Jones, 2012 IL App (1st) 093180, ¶ 63*.

[*P40] Gibson's affidavit lacked detail about who participated in the offense, how the offense occurred, or when defendant allegedly withdrew from the scene. Gibson also failed to explain when and why he decided to recant.

[*P41] Further, Gibson's affidavit that defendant was **[**18]** not present during the shooting was contradicted by evidence presented at trial. The record establishes that defendant was with Brown shortly before Brown was shot. Neal testified at trial that just prior to Brown's murder, defendant threw Brown to the ground in the Wendy's parking lot. Then, while in defendant's car, Funches held a gun to Brown's head while defendant drove, and defendant asked Brown who "shot up" his mother's house. Then, defendant told Brown, "I should kill you." A few minutes later, defendant ordered Neal out of his car and threatened to shoot Neal if he said anything. Shortly thereafter, Brown's body was found on Kautz Road. Defendant led the police to the murder weapon where he had disposed of it. Further, the record establishes that defendant blamed Brown for the shooting at his mother's house the day of the shooting and threatened to kill Brown. Neal testified that defendant knew Brown was responsible for the shooting of his mother's house and threatened Brown that he "should shoot [Brown] in the head."

[*P42] We also note that because Gibson did not testify at the evidentiary hearing, his terse averments contained in his affidavit were not subject to cross-examination. **[**19]** Recantation evidence bears on a witness's credibility. *People v Fillyaw, 2018 IL App (2d) 150709, ¶ 60, 428 Ill. Dec. 649, 123 N.E.3d 113*. The trial court, as finder of fact, considers and determines the credibility of the witnesses, including the circumstances and weight to be accorded their testimony. *Steidl, 142 Ill. 2d 204, 253-55, 568 N.E.2d 837, 154 Ill. Dec. 616* (in determining the weight to be given a witness's recanting testimony, the finder of fact can consider the conditions and circumstances under which the recantation was obtained). Here, Gibson failed to testify, thereby denying the trial court the opportunity to consider his credibility, probe him with questions, and observe him during cross-examination. Therefore, in light of the trial evidence and the vague nature of Gibson's affidavit we cannot say that the trial court committed manifest error in finding that Gibson's affidavit was unreliable.

[*P43] Defendant also argues that Gibson's recantation was corroborated by the affidavits of Dillar and Gloria Griffin wherein they averred that Gibson told them that he lied at defendant's trial and that defendant was not involved in Brown's murder. The State argues that the trial court properly disregarded these affidavits because they contained hearsay and would not be admissible at a new trial. Hearsay affidavits are admissible **[**20]** in postconviction hearings under *Illinois Rule of Evidence 1101(b)(3)* (eff. Sept. 17, 2019). Such affidavits must be taken as true at a second stage postconviction hearing in determining whether to advance the petition to a third-stage evidentiary hearing. *People v. Velasco, 2018 IL App (1st) 161683, ¶ 119, 430 Ill. Dec. 817, 127 N.E.3d 53*. However, when, as here, the petition advances to a third stage evidentiary hearing, a defendant "no longer enjoys the presumption that the allegations in his petition and accompanying affidavits are true." *People v. Gacho, 2016 IL App (1st) 133492, ¶ 13, 403 Ill. Dec. 417, 53 N.E.3d 1054*. Instead, at a third stage hearing, the court decides the weight to be given the testimony and evidence, makes credibility determinations, and resolves any evidentiary conflicts. *Velasco, 2018 IL App (1st) 161683, ¶ 118*. In determining the weight to be given the new evidence and whether all the evidence, new and old, is of such conclusive character that it would likely change the result on retrial, the court at the third stage must necessarily consider whether the new evidence would

ultimately be admissible at a retrial. *Id.* Here, at the third stage, the hearsay affidavits of Dillar and Gloria Griffin were subjected to credibility, reliability, and weight-testing. The trial court properly weighed the hearsay affidavits and considered the possibility of their admissibility at a new trial.

[*P44] Next, defendant **[**21]** contends that the trial court's rejection of the affidavits was improper because the State presented no witnesses or evidence to refute them. Defendant fails to recognize that it was *his* burden to show a substantial violation of a constitutional violation by a preponderance of the evidence. *Coleman, 2013 IL 113307, ¶ 92*. Therefore, the State did not need to present any witness or evidence.

[*P45] We hold that the affidavits at issue were not so conclusive that their admission on retrial would likely result in a different outcome. *Id. ¶ 84*. In sum, defendant failed to demonstrate manifest error where the trial court's decision was based on the evidence, was not arbitrary, and was reasonable. *People v. Jones, 2012 IL App (1st) 093180, ¶ 49*. We, therefore, determine that the trial court properly dismissed defendant's postconviction petition alleging his actual innocence based on newly discovered evidence following a third stage evidentiary hearing.

[*P46] III. CONCLUSION

[*P47] For the reasons stated, we affirm the judgment of the circuit court of Kane County.

[*P48] Affirmed.

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No. 4-24-0430

IN THE

APPELLATE COURT OF THE STATE OF ILLINOIS

FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 11th Judicial Circuit,
Plaintiff-Appellee,	)	McLean County, Illinois.
	)	
-vs-	)	No. 98 CF 0633
	)	
BARTON MCNEIL,	)	Honorable
	)	William Yoder,
Defendant-Appellant.	)	Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under the penalties provided in law pursuant to Section 1-109 of the Code of Civil Procedure, I hereby certify that appellee's brief and argument in the above-entitled cause are being electronically filed with the Clerk of the Appellate Court, Fourth District, on November 26, 2024. Upon acceptance of the filing from this Court, the party listed above will be served using the court's electronic filing system.

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