NO. 4-24-0430

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. BARTON MCNEIL, Petitioner-Appellant.	)	Appeal from the Circuit Court of McLean County, Illinois. Cir. Ct. No. 98 CF 0633 Honorable William Yoder, Judge Presiding.

BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner-Appellant Barton McNeil appeals from the circuit court's denial of his post-conviction actual innocence claim following a third-stage evidentiary hearing and the dismissal of certain pieces of evidence supporting that claim at the second stage of post-conviction proceedings. No issue is raised concerning the pleadings or charging instrument.

ISSUES PRESENTED FOR REVIEW

1. Did the circuit court err by denying post-conviction relief after an evidentiary hearing where the evidence showed that Misook Wang committed the underlying crime, confessed, invoked her Fifth Amendment rights in court, and DNA evidence connected her to the crime scene?

2. Did the circuit court err by dividing McNeil's actual innocence claim into sub-claims, each supported by one isolated piece of evidence, and then dismissing some of those judicially-created sub-claims at the second stage?

3. If it was proper for the circuit court to recast McNeil's innocence claim as multiple sub-claims each supported by one isolated piece of evidence, did the court err in dismissing sub-claims that McNeil is actually innocent based on newly-discovered evidence that: alternative suspect Misook Wang's DNA was in the bed where the victim died; she later committed a strikingly similar murder; and the State's scientific evidence at trial is debunked by modern science.

JURISDICTION

McNeil appeals from the denial of post-conviction relief. Final judgment was entered on February 1, 2024. Notice of appeal was timely filed on February 27, 2024. Jurisdiction lies in this Court under Article VI, Section 6 of the Illinois Constitution and Supreme Court Rule 651(a).

STATEMENT OF FACTS

I. Overview

Barton McNeil stands convicted of the murder of his daughter, Christina McNeil. R1272.[1] Since the day McNeil discovered his daughter's lifeless body in her bed, he has maintained that his ex-girlfriend, Misook Nowlin, had killed Christina[2]. C1453, -71. Prior to trial, the court granted the State's motion *in limine* to exclude evidence and argument that Misook[3] had committed the crime, finding that the evidence that existed at the time was too speculative. R738-40.

The evidence that existed pre-trial suggesting Misook's culpability for Christina's murder included the fact that she and McNeil had recently broken up; that they had dinner together at a restaurant the night Christina died and a restaurant employee described Misook as "really mad"; that Misook herself stated that she was so angry about the breakup that she was unable to write out a check to pay for the meal; that friends described her as "jealous" and "possessive"; that Misook told a friend that she wanted to go over to McNeil's that night; that Misook had been trying to acquire drugs to plant on McNeil in order to "get him in trouble"; that Misook called a friend after Christina's death and asked, "you don't think I did it, do you?"; that Misook took a polygraph about her involvement, with inconclusive results; that Misook had previously been convicted of domestic violence

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[1] The record is cited consistent with the numbering applied by the Circuit Clerk as follows: the report of proceedings is cited as "R__"; the common law record is divided into two volumes, the first is cited as "C__" and the second as "C__v2"; the supplement to the common law record as "Sup2 C__"; and exhibits as "E__."

[2] Because Christina McNeil shares the same last name as Appellant Barton McNeil, we refer to her as "Christina" and Barton McNeil as "McNeil."

[3] As there are other witnesses with the surname Nowlin, and because she has had different surnames at relevant points, we refer to Misook Nowlin as "Misook."

against McNeil; that she was to be sentenced as a result of that domestic violence the day after Christina's death and was admittedly upset that McNeil had refused to testify on her behalf; that Misook had beaten her young daughter, striking her multiple times with a wooden rod, held her hand over the daughter's mouth and choked her, said "I will kill you tonight," and explicitly threatened that her daughter would suffer the same fate as Christina; that she admitted to DCFS investigators that she had beaten her daughter; that she was found by a court to be an unfit parent; and that she was found guilty of domestic battery against her daughter. C728, 1422-23, 1433, 1658-60, 1698, 1702, 1719; R763, 767-69, 778-79, 781-82, 784, 795, 805-06, 819-21.

The trial judge ruled that evidence was too speculative in nature to be introduced at trial, but noted that forensic evidence tying Misook to the crime scene may have changed that conclusion. R738-40. Moreover, the trial court noted prior to the bench trial that DNA evidence connecting someone other than McNeil and Christina to the bed where Christina died would potentially be dispositive of the entire case. R844. Without the benefit of any evidence related to Misook, McNeil was convicted. R1272.

Post-conviction DNA testing identified Misook's DNA in multiple locations in Christina's bed. *See* C1383-84. McNeil filed a post-conviction petition attaching that evidence. *Id.* He also presented evidence that Misook had confessed to an ex-husband that she killed Christina. C1391. In addition, he presented evidence that Misook committed another, similar murder for which she was convicted. C1386-90. At the evidentiary hearing on McNeil's post-conviction petition, Misook invoked the Fifth Amendment as to whether she killed Christina. R645, 647-49.

Nevertheless, McNeil was denied post-conviction relief at an evidentiary hearing

where the circuit court affirmatively declined to consider the new forensic evidence. A6, A8-21. The determination not to consider the new forensic evidence was the product of the court's decision at the second stage of post-conviction proceedings to carve McNeil's actual innocence claim into multiple sub-claims where each sub-claim was supported by one isolated piece of evidence. A8-21. The court then dismissed those judicially-created sub-claims that would not directly answer the question of whether or not Misook had confessed to killing Christina. *Id.* McNeil appeals from the second-stage dismissal of these judicially-created sub-claims and the denial of post-conviction relief at the third stage.

II. Factual Background

On the morning of June 16, 1998, McNeil found his 3-year-old daughter Christina deceased in her bed. R1156. Christina was McNeil's only child, whom he shared with his ex-wife Tita.[4] C1420.

Prior to Christina's death, McNeil dated Misook Nowlin. C1423. McNeil and Misook lived together, but McNeil moved out in April 1998. *Id.*; R772. On June 15, 1998, McNeil and Misook met for dinner. C1424. Misook was upset that McNeil "did not want her anymore." *Id.* She was angry because she thought McNeil was having a "relationship with another woman" and was jealous of McNeil's relationship with his daughter Christina. C1424-25. Misook confirmed this argument occurred and that she was angry with McNeil. R818-20. Earlier that year, Misook had been convicted of domestic battery against McNeil. C1433. That conviction was a violation of her probation in a retail theft case and her probation was revoked. C1434-35. Misook's sentencing was scheduled for June 17, 1998. C1442. Misook explained that one of the reasons she was angry with McNeil at the

[4] For clarity, Tita McNeil will be referred to as "Tita."

restaurant was because McNeil refused to testify on her behalf at sentencing. R819-20.

A server from the restaurant "recalled the couple because they were arguing at the table." C1426. The cashier likewise recalled that Misook was "really mad." R778. Misook was so upset that she could not write out a check to pay for the meal without McNeil's help. R821. After dinner, McNeil left and Misook followed him in her car. C1424. McNeil pulled over and told Misook to stop following him. *Id.* Misook called her ex-husband and asked if he would plant drugs in McNeil's car to "[get] him in trouble." R804-05.

At approximately 7:00 p.m., McNeil picked his daughter Christina up from Tita's home. R1132. McNeil and Christina went to McDonald's and then to McNeil's apartment. R1133-34. McNeil put Christina to bed around 10:45 p.m. R1138. He then logged onto his computer. R1139. Around midnight, McNeil heard Christina's voice. R1141. He found Christina sitting up in bed with a book. *Id.* He told her to go back to sleep and tucked her in again. R1142. Due to the noise of a thunderstorm, McNeil did not fall asleep until about 2:45 a.m. R1147.

McNeil's alarm went off at 7:10 a.m. and again at 7:19 a.m. R1154-55. McNeil got up and called, "Christina, wake up. Time to get dressed." *Id.* He smoked a cigarette and took a shower. *Id.* After his shower, McNeil called to Christina again and realized that she had not moved and was unresponsive. R1156. On a recorded 911 call, McNeil was upset and had difficulty communicating. C1447. With help from the 911 dispatcher, McNeil attempted CPR. C1425. Paramedics and police arrived within minutes. R31-32. These first responders noted that McNeil was "very distraught." C1448. In these initial moments after the discovery of Christina's death, Misook arrived at McNeil's apartment uninvited, and McNeil asked her to leave. C1449.

It was determined at the scene that Christina was dead. R32-33. A detective later testified that the police "honestly thought it was a natural death initially." R127. After the coroner removed Christina's body, Tita and McNeil went to Tita's apartment. C1445-46, 1449. They decided that McNeil would stay at Tita's for a while. C1445-46. McNeil returned to his apartment around 5:00 p.m. to pick up some clothes. R1169. At his apartment, he noticed the bedroom window screen had been cut near the latches. R1170. He also observed that a fan was no longer in the bedroom window but was on the floor. R1171. McNeil called police and pleaded on a recorded call that, "I need a detective here...I have reason to believe now that [Christina] was murdered and I need a detective here immediately." C1454 at 00:24.

Police returned to the scene. C1456. They took photos of the cuts in the window screen, the fan knocked to the floor, and the disturbance of the window blinds. E3-8, E25, E35-46. McNeil asked the detectives to arrest Misook for killing his daughter. C1456. No arrests were made that day.

Police interviewed Misook. Misook told police that on June 15, 1998, she went home after she and McNeil argued at the restaurant. C1423. She said she later went out with friends and returned home around 9:30 p.m. *Id.* One of the friends, Susie Kaiser, stayed at Misook's and left around 11:00 p.m. *Id.* Kaiser told police Misook wanted to see McNeil that evening, but Kaiser suggested she not go to McNeil's apartment. R795.

McNeil was questioned by police on several occasions. C1424, C1453, 1470-73. He consistently maintained his innocence and that Misook had killed his daughter. C1485. However, following an autopsy—which a post-conviction expert report concluded took place "after the body was manipulated by a funeral director and beginning to

decompose"—the coroner concluded that Christina had been smothered and sexually assaulted. C1527, 1530. As a result, McNeil was arrested for Christina's murder on June 18, 1998. C1472.

III. Trial and Direct Appeal

A. The Grand Jury indicts McNeil after its concerns about Misook's culpability were addressed

At the Grand Jury, a juror asked the question that continues to hang over this case: "Was the girlfriend [Misook] ruled out as a suspect?" C72. The testifying detective responded, "By me she has been, yes." *Id.* McNeil was indicted. C31.

B. The trial court excludes evidence of Misook's culpability

Prior to trial, the State filed a motion to exclude evidence and argument related to Misook's culpability. C181-82. The trial court initially ruled that the defense would be permitted to introduce evidence that someone else entered McNeil's apartment, but not that the person was Misook. R738-40. On a motion to reconsider, the defense called witnesses in an offer of proof. R743-833.

Two detectives testified, confirming holes were present in the window screen. R747, R753. One testified the screen appeared to be off its track. R755. Another described his interview with Misook and the fact that she sat for a polygraph examination with inconclusive results. R763. A DCFS investigator testified regarding Misook's abuse of her daughter, Michelle.[5] R765-70. DCFS became involved when Michelle's school staff reported suspected child abuse. R766-67. Michelle told the principal that Misook "told her that she needed to behave or the same thing that happened to her sister would happen to

[5] Because multiple witnesses have the surname Nowlin, and because she had a different surname at relevant points in this case, we refer to Michelle Spencer (née Nowlin) herein as "Michelle."

her." C1658-59. The "sister" was Christina. C1659. The DCFS investigator testified Michelle reported being struck by Misook with a wooden rod, that Misook placed her hands over Michelle's mouth making it impossible to breathe, and told Michelle, "I will kill you tonight." R768-69.

A friend of Misook's testified that Misook called her following Christina's death and asked: "You don't think I did it, do you?" R784. During that call, Misook "show[ed] a lot of jealousy with Bart, both mad at Bart for breaking up with her and saying that if—if he didn't move out—break up with her, this would not happen." *Id.* Another friend confirmed Misook contemplated going to McNeil's apartment the night before Christina was found dead. R795. A coworker of McNeil's described Misook as "possessive" and "jealous." R781. Misook's ex-husband testified that, everyday over the course of a week, and including the night before Christina was found dead, Misook asked him to get marijuana because she wanted to put it in McNeil's car to "[g]et him in trouble." R804-05.

McNeil's landlord testified that he walked past McNeil's window at least once per week and never noticed anything wrong with the screen. R774. The cashier from the restaurant where Misook and McNeil argued confirmed that they were there that evening and that Misook "seemed really mad." R778.

Misook herself testified. R814. Misook confirmed that she and McNeil argued at dinner the night before Christina died and that she was "upset" with McNeil. R818. She admitted to being "upset and scared" because she had been counting on McNeil to testify in her pending criminal case and he was unwilling to do so. R819-20. Misook admitted she asked her ex-husband to help her plant drugs on McNeil but claimed it was a joke. R823. Misook testified she was alone in the overnight hours of June 15-16, 1998, that she received

a phone call from her brother at some point, and denied going to McNeil's apartment that night. R826. She confirmed that she did go to his apartment the next morning—immediately following Christina's discovery—and claimed it was because she missed McNeil and because he had a computer disk she wanted. R827.

The court again ruled that evidence regarding Misook's culpability would be excluded. R831-32. The court explained that "the purported motive here is not very strong in terms of commission of a murder to set someone else up, but even that aside I don't think there's sufficient other evidence indicating any close enough connection that would allow this to come in in terms of proving the former girlfriend was the perpetrator as opposed to the defendant." *Id.* However, the court noted that the presence of forensic evidence tying Misook to the scene may have altered its conclusion: "I suppose if you've got a fingerprint on the inside of the window where somebody would crawl through and it turns out to be somebody else's fingerprint, then I would have to look at that." R738

C. McNeil is convicted at a bench trial and sentenced to life in prison

A bench trial commenced on July 1, 1999. R12. The State's theory at trial was that, sometime after Christina finished eating dinner, McNeil entered the bedroom, sexually abused her, and smothered her to death. R16. A 911 operator testified to receiving McNeil's call, and that he gave McNeil directions on performing CPR. R45-47. The tape of the 911 call was played. R47. A paramedic testified that McNeil appeared "very frantic." R33. Paramedics assessed Christina and concluded that she was dead and had been for at least a couple of hours. R34.

A police officer testified that McNeil provided a timeline of events. R56-68. Another officer testified about his observations of the scene, collecting evidence, and taking photos. R80-87. Officers testified about going back to the scene that evening after

receiving McNeil's phone calls. Detective Sanders testified that, around 6:00 p.m., he examined the bedroom window and screen. R87-88. He testified that the screen was not properly in its track, that the screen just "fell out" when he attempted to remove it, and that there were dust and cobwebs on the windowsill. R120, 135, 151. He also testified about a "dried water mark" on the window trim and a potential latent fingerprint on the inside of the window which was unsuitable for comparisons. R121-22. Sergeant McKinley testified he went to the McNeil apartment that evening, and, upon arriving, McNeil flagged him down and was "very upset," so much so that the officer was "concerned about him." R354, 356, 359.

Detective Arnold testified that he interviewed McNeil twice. R61-62. He testified that the first interview was videotaped while the second was not. R63, 72. According to Detective Arnold, during the unrecorded interview, McNeil was told that "some things were not right about the body" and McNeil responded by becoming "angry" and saying, "don't tell me she was molested." R71.

A pathologist, Dr. Violet Hnilica, testified that Christina's cause of death was smothering. R324. She based this conclusion on a combination of bruises to Christina's nose and mouth, blood in her nose and mouth, and bruises on her back. R310. Hnilica also testified that Christina suffered a contusion to the back of her head, petechiae (pinpoint red spots that indicate ruptured capillaries) on the eyes, lungs, and thymus, and swelling of the brain—symptoms Hnilica testified were consistent with asphyxiation. R311, 317-19. Based on an analysis of Christina's stomach contents, Hnilica concluded that she died within two hours of eating. R322.

Hnilica further testified that Christina's genital area was "very red; the vagina and

anus were dilated, extremely red. The margin of the hymen was irregular." R311. From this, Hnilica opined that something "in the realm of molestation" had happened. R315. Noting that blood was identified on the vaginal swab, Hnilica testified there could be no explanation for the blood "besides some kind of injury." R316. Indeed, according to Hnilica, "irritation in the vagina is an exceedingly rare finding in a little girl." R331.

The State also presented evidence regarding hair microscopy, serology, and DNA. Forensic microscopist Suzanne Kidd testified that three head hairs found in Christina's left hand and on her left forearm had been forcibly removed. R204. Kidd testified these could not have come from McNeil. R200, 202-03. They could have come from Christina, but Kidd was unable to make that conclusion. R203. Kidd also testified that hair recovered from Christina's right hand was not from McNeil. R203-04. She testified the hair was from a mixed-race individual and was consistent with a child's hair. R203.

No semen was found. R240, 245-46. 251. Blood and urine were present on the fitted bed sheet and blood was present on the pillowcase. R240, 252-53. Vaginal and oral swabs indicated the presence of blood. R251. Forensic scientist Debra Minton testified that bloodstains on the bedsheet and a hair recovered from Christina's left hand both "matched" Christina's DNA profile and not McNeil's. R280-81.

The State also presented evidence regarding McNeil's online activity on June 15-16, 1998. R160-75. McNeil logged onto the internet at 10:39 p.m. on June 15 and logged off at 7:40 a.m. on June 16. R167-68. The witness could not specify when during that period McNeil was actively using the internet. R173.

A weather observer testified that it rained at times the night Christina died. R152-60. One of McNeil's neighbors testified that she remembered it being stormy but did not

hear any other noises or anyone entering or exiting McNeil's window. R180.

Finally, Christina's mother Tita testified about her divorce from McNeil, their custody arrangement, and that McNeil picked Christina up around 7:00 p.m. on June 15, 1998. R377-82.

The defense presented three witnesses. McNeil testified on his own behalf. R1127. He denied killing his daughter or having any kind of sexual contact with her at any time. R1181-82. The property manager for McNeil's apartment complex testified that he rented the apartment to McNeil in the spring of 1998 and did not notice anything wrong with the window screen at that time. R1115, -18. He also testified that tenants sometimes cut holes in screens to gain access to their apartments. R1119. The defense also called a detective, who testified that he noticed one of the holes in the screen when he responded to McNeil's apartment the morning Christina was found. R1123-24.

On July 7, 1999, McNeil was convicted of first-degree murder. R1272. In rendering the verdict, the trial judge noted this was "a classic case of circumstantial evidence." R1268. The judge said McNeil's defense—which included seeing his daughter alive at midnight—was inconsistent with the evidence of Christina's time of death. R1270. The court concluded that "the State's evidence did show sexual misconduct as a possible motive." R1272. McNeil was sentenced to natural life in prison. R457.

D. This Court affirms McNeil's conviction but reverses his sentence

On appeal, McNeil argued that the trial court erred in excluding evidence that Misook had motive and opportunity to kill Christina. C680. This Court ruled that the exclusion of that evidence was not an abuse of discretion because the evidence "showed no clear connection between [Misook] and Christina's death." C684. The Court therefore affirmed McNeil's conviction. C685, *People v. McNeil*, No. 4-99-0679 (Oct. 24, 2001).

However, the Court reversed his sentence as based on an unconstitutional statute. *Id.*

E. McNeil is resentenced to 100 years in prison

On July 18, 2002, McNeil was resentenced to 100 years in prison. C905. That sentence was upheld on appeal. C1070, *People v. McNeil*, No. 4-02-0849 (Nov. 4, 2004).

IV. Initial Post-Conviction Proceedings

McNeil filed a *pro se* motion for post-conviction DNA testing that was denied on January 15, 2003. C710-13, C1054-55. On August 3, 2005, McNeil filed a *pro se* post-conviction petition claiming ineffective assistance of counsel and that his jury waiver was not knowing and voluntary. C1106. The trial court dismissed the petition and the dismissal was upheld on appeal. C1301, *People v. McNeil*, No. 4-04-0892 (Mar. 7, 2008); *People v. McNeil*, 229 Ill. 2d 646 (Table) (2008).

V. Misook Murdered her Mother-in-Law Linda Tyda

Misook's mother-in-law, Linda Tyda, was murdered in September 2011. C1767. Misook pleaded guilty to concealing a homicidal death by burying Tyda's body in a shallow grave in a forest preserve. C1743-52. However, Misook proceeded to trial on the murder charge itself, claiming that she killed 70-year-old Tyda in self-defense. C2668, 2691-97. The evidence at trial showed that Misook lured Tyda to the scene of her death by paying someone to falsely offer Tyda $500 to drive them to Chicago. C2571.

Misook's now-adult daughter Michelle—the daughter Misook had beaten and threatened that "the same thing that happened to [Christina] would happen to her"—testified that, following Tyda's murder, Misook told her that she (Misook) "was upset" because she believed her husband "was having an affair" with one of Tyda's employees. C1658-59, 2404-05. The alleged affair made Misook "really upset" and "very angry." C2406, 2408. Misook told a jail guard following her arrest that she "did it out of anger, you

know, when you're really mad at someone." C2393.

While in jail awaiting trial, Misook sent a letter to Michelle. Misook wrote, "I regret what I did." C2550. She explained that her husband's alleged affair "drove [her] crazy" and said, "[m]y heart just couldn't stand loneliness[.]" C2550-51. In the letter, Misook described how she committed the murder:

> I started to lose control of myself too and pushed Linda away. After that we came into a situation where we were strangling each other. I was really out of my mind.

C2575.

Misook's husband Don Wang (Tyda's son) testified that Misook "always had anger control problems, even back to 10 years ago, 20 years ago, even got into legal problems." C2347. Wang's testimony in Misook's trial took place in 2012; Christina died 14 years earlier in 1998. C2196-98, 1463. Misook was always "yelling, screaming, slamming things, slam my phone, yelling in fron of kid." C2347. The evidence at Misook's trial included a recorded jailhouse phone call with her sister in which Misook explained that she intended to ruin her husband's life: "I'll get every single thing from him, I'll completely ruin him, completely." C2611.

On December 18, 2012, Misook was convicted of first-degree murder. C2816.

VI. DNA Testing Confirms the Presence of Misook's DNA in Christina's Bed

On November 1, 2013, McNeil filed a second motion for post-conviction DNA testing. C2873-2900. With the agreement of the State, the trial court entered an order calling for DNA testing on "untested blood and urine stains on the bedsheet" and "blood stains on the pillowcase." C2968-69v2. Shortly thereafter, the court entered another order calling for DNA testing on "the stains on Christina's underwear," "the stains on Christina's t-shirt," "the bedsheet itself," "the pillowcase itself," the window screen, and a fingerprint

"on the window screen[.]" C3014-19v2.

That DNA testing determined that a hair from the pillowcase was suitable for analysis. C1557-58. The hair was determined not to be Christina's, but was overwhelmingly consistent with Misook's DNA. C1558. The testing further concluded that DNA recovered from Christina's bedsheet and pillowcase was consistent with Misook's profile. C1560-1604.

VII. The Instant Post-Conviction Proceedings

On February 23, 2021, McNeil sought leave to file a successive post-conviction petition. C1338. Finding that the proposed petition presented "exculpatory scientific evidence outside the record and [which] is not directly refuted by the record," the motion was granted, and the petition docketed. A7.

A. McNeil's successive post-conviction petition

McNeil raised two claims: actual innocence and ineffective assistance of counsel.

1. McNeil's actual innocence claim

McNeil asserted actual innocence on the basis of multiple pieces of newly-discovered evidence. McNeil argued that the DNA test results indicating the presence of Misook's DNA in Christina's bed were newly discovered, material, non-cumulative, and likely to change the result on retrial. C1398-1402.

McNeil also attached to his petition an affidavit from Michelle averring that, at the memorial service following Linda Tyda's murder by Misook, she spoke with Don Wang, and Wang told her that Misook "once told him that she had killed Christina [.]" C2838-39. Similarly, Michelle's step-mother Dawn Nowlin attended the same memorial service and averred that Wang also told her that "Misook admitted to killing Christina[.]" C2840-41. In addition, McNeil attached an affidavit from one of Misook's neighbors attesting to her

suspicious behavior the night of Christina's death. C2842-48.

McNeil's actual innocence claim also presented an affidavit from Dr. Nancy Harper of the University of Minnesota Masonic Children's Hospital and an Associate Professor of Pediatrics at the University of Minnesota. C1532. Dr. Harper concluded that, based on modern scientific principles, no evidence supported the pathologist's testimony at trial that Christina had been sexually abused and the findings the pathologist pointed to in support of that conclusion were discredited by modern science. C1550-56. In addition, McNeil presented an affidavit from Dr. Andrew Baker, the Chief Medical Examiner for Hennepin, Dakota, and Scott Counties in Minnesota, which includes Minneapolis. C1490. Dr. Baker explained that, using modern scientific principles, and contrary to the testimony presented at trial, relying on stomach contents "to make an estimate as to the time of death (or time of the last meal) is fraught with potential errors" and contains an "unacceptable degree of imprecisions." C1529.

2. McNeil's ineffective assistance of counsel claim

McNeil additionally raised, as an alternative claim, an allegation that he received constitutionally ineffective assistance of counsel. C1408-09. This claim was asserted to the extent that the circuit court concluded that McNeil's trial counsel had the ability to learn of the evidence supporting McNeil's innocence claim prior to trial. C1409. As the circuit court made no such holding, this claim is not a subject of this appeal.

B. The circuit court subdivided McNeil's innocence claim and dismissed isolated pieces of evidence

The State agreed that evidence regarding Misook's confession should be heard at an evidentiary hearing. A18. However, the State moved to dismiss "all claims except claims" directly related to Misook's confession. C3056v2. McNeil responded, explaining

that there was one actual innocence claim before the court, supported by multiple pieces of evidence. C3099-100v2. At the State's invitation, the circuit court divided McNeil's actual innocence claim into nine distinct sub-claims, each supported by one isolated piece of evidence. A8-21. Of these sub-claims, three were advanced to the third stage. A21. According to the circuit court, these three sub-claims were Michelle's affidavit, her step-mother Dawn Nowlin's affidavit, and the totality of those two specific pieces of evidence (but no other evidence). *Id.* The court dismissed the remainder of McNeil's "claims." *Id.*

C. The circuit court prevented McNeil's introduction of other pieces of exculpatory evidence

Prior to the third-stage evidentiary hearing, McNeil filed a motion seeking to introduce evidence that would corroborate Misook's confessions to killing Christina. C3136v2. McNeil argued that whether Misook's out-of-court confessions would probably change the result upon retrial requires an evaluation of the extent to which those confessions were credible and corroborated. C3137v2. Among the evidence McNeil sought to present regarding these indicia of trustworthiness was the evidence the court had ruled did not warrant a third-stage hearing in isolation. *Id.* This included evidence that Misook's DNA was present in Christina's bed; an affidavit regarding Misook's suspicious behavior on the night of Christina's death; evidence that the scientific evidence the State introduced at trial was faulty; and evidence Misook went on to commit another similar murder. *Id.* The court denied McNeil's motion on the basis that a post-conviction hearing "is not a re-trial or a mini-trial of the original case." R580. The court further explained that "the entirety of the petition is a part of the record" and that the corroborating evidence "will remain part of the record but are not admitted for purposes of this third stage hearing." R651-52.

D. The evidentiary hearing

On November 21, 2023, the circuit court held an evidentiary hearing considering only evidence that Misook confessed to Don Wang. R599. Misook's daughter Michelle testified that she is her incarcerated mother's "full support system." R621. Michelle stated she had "a lot of emotions" about testifying, and that being called upon to testify about her mother's wrongdoing "wasn't the easiest thing I've been through to say the least." R621.

Michelle testified that she had known McNeil since she was eight years old and that her mother and McNeil lived together for a period during her childhood. R619. Michelle testified that McNeil was "like a father figure" to her, that he was a "nice gentleman," and that he "would never do, you know, any harm to me." R620. Michelle testified that she "saw [Christina] as my sister. I loved her very much." R620.

Michelle testified that she had a conversation with Don Wang at a "celebration of life" ceremony for Linda Tyda. R624. During that conversation, Wang "just out of the blue said, you know, you know what your mom told me one time? .... that she had killed Christina." R625.

Dawn Nowlin[6] testified that she has been married to Andy Nowlin—Misook's ex-husband and Michelle's father—for 25 years, and that Michelle has been her stepdaughter since Michelle was eight years old. R637-38. Dawn testified she had a conversation with Wang during Tyda's celebration of life ceremony. R641. During this conversation, Wang said that "him and Misook was in a big fight and that [Misook] confessed to killing Christina." R642.

Misook was also called as a witness after being advised of her rights and given the

[6] Referred to herein as "Dawn."

opportunity to speak with an attorney who represented her at the hearing. R645-46. Misook invoked her Fifth Amendment right against self-incrimination to every question regarding Christina's death. *See, e.g.*, R647. When asked if she killed Christina, Misook stated, "I'm taking my Fifth." R647. She invoked the Fifth Amendment when asked if she told her daughter Michelle that the same thing would happen to her as happened to Christina. R650. When asked if, during her marriage to Don Wang, she told him that she had killed Christina, Misook again testified, "The Fifth I plead the Fifth." R651.[7]

For its part, the State called Detective Steven Fanelli. Detective Fanelli testified that he used to be a Bloomington police officer and that he interviewed Don Wang in 2012, following Misook's murder of his mother. R652-53. He spoke to Wang about allegations that Misook had confessed to killing Christina. R654.

A videotape of the interview is in the record. When asked if Misook ever confessed to him that she killed Christina, Wang replied, "not that I remember if she said something like that." E58, 12:24-:37. When asked if he ever told anyone Misook confessed to killing Christina, Don stated, "I don't believe so." E58 12:36-:52. Don asked the detective a clarifying question, "'confess' means you tell me the whole story and how she did it?" E58, 13:53-:57. Detective Fanelli then asked if Misook ever told him—even without telling him the whole story—that she killed Christina, to which Don replied, "not to my knowledge." E53-54, 13:54-14:12.

E. The circuit court denies post-conviction relief

On February 1, 2024, the circuit court denied post-conviction relief. A1. In its

[7] At one point, Misook blurted out, "I never killed Christina McNeil," which her lawyer asked to be stricken from the record. R648. When McNeil's counsel attempted to follow up, Misook reinvoked the Fifth Amendment. R649.

ruling, the court analyzed the testimony of Michelle and Dawn with respect to whether McNeil had met his burden. A2-3. The court acknowledged that Misook had invoked her Fifth Amendment rights, but did not otherwise consider that invocation in its ruling. A4. Aside from Michelle and Dawn's testimony, the testimony of Detective Fanelli, and the video of Fanelli's interview of Wang, the court did not consider any other evidence. *See* A2-6.

The circuit court ruled that Michelle and Dawn's testimony was newly discovered. A5-6. Similarly, it did not find that their testimony was immaterial or cumulative. *Id.* The circuit court denied post-conviction relief on the basis that Michelle and Dawn's testimony would "almost certainly not be admissible at a retrial" and, therefore, found the evidence to be insufficiently conclusive. A5. This timely appeal followed.

ARGUMENT

McNeil has presented compelling evidence of his actual innocence that should have resulted in the circuit court ordering a new trial. In concluding otherwise, the circuit court did not address *at all* the significance of Misook's repeated invocation of her Fifth Amendment right against self-incrimination when faced with questions about her culpability for Christina's death. Similarly, the circuit court disregarded vast swaths of exculpatory evidence that were attached to McNeil's post-conviction petition, which it acknowledged were part of the record but affirmatively chose to ignore. Because McNeil has satisfied his burden, this Court should reverse the denial of post-conviction relief and remand for a new trial.

Alternatively, the Court should remand for a new evidentiary hearing. The circuit court erroneously redefined McNeil's actual innocence claim as multiple sub-claims each based on a single, isolated piece of evidence, and then granted the State's motion to dismiss

those hollowed out "claims." That was error and, to the extent this Court declines to remand for a new trial, it should remand for a new evidentiary hearing at which all of the evidence can be appropriately considered.

I. The Circuit Court Erred in Denying McNeil's Actual Innocence Claim After an Evidentiary Hearing

Under familiar principles, post-conviction relief is warranted where a petitioner asserting actual innocence presents evidence that is (1) newly discovered, (2) material and not merely cumulative, and (3) of such conclusive character that it would probably change the result on retrial. *People v. Robinson*, 2020 IL 123849, ¶47. "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." *Id.* (citing *People v. Coleman*, 2013 IL 113307). "Material" evidence is anything "relevant and probative of the petitioner's innocence." *Id.* (citing *Coleman*, 2013 IL 11307). "Noncumulative evidence adds to the information that the fact finder heard at trial." *Id.* (citing *Coleman*, 2013 IL 11307; *People v. Molstad*, 101 Ill. 2d 128 (1984)). "The conclusive character element refers to evidence that, when considered along with the trial evidence, would probably lead to a different result." *Id.* (*citing Coleman*, 2013 IL 113307; *People v. Ortiz*, 235 Ill. 2d 319 (2009)). Conclusive evidence "need not be entirely dispositive[.]" *Id.* ¶48. "Rather the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Id.* ¶56. "Probability, rather than certainty, is the key[.]" *Id.* ¶48.

At a third-stage evidentiary hearing, "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 (citing *People v. English*, 2013 IL 112890). Typically, a circuit court's denial of post-conviction relief following an evidentiary hearing is reviewed for manifest error. *People v. Johnson*, 206 Ill. 2d 348, 357 (2002). However, when the lower court fails to follow and apply governing law, the court commits legal error necessitating *de novo* review. *See, e.g., People v. Moore*, 207 Ill.2d 68, 75 (2003); *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680 (1st Dist. 2001); *People v. Williams*, 188 Ill.2d 365, 369 (1999); *People v. Sorenson*, 196 Ill.2d 425, 431 (2001). Similarly, when the court simply fails to address an argument, *de novo* review applies. *People v. Tolefree*, 2011 IL App (1st) 100689, ¶25 ("Our supreme court has held that if the trial court made no determination on the merits, then our standard of review is *de novo*.") (citing *Moore*, 207 Ill.2d at 68). Here, the lower court's ruling was premised on errors of law and ignored certain issues altogether. *De novo* review is appropriate. In addition, the court based its ruling on factual findings that were manifestly erroneous. Under either standard of review, justice requires reversal.

A. Misook's invocation of the Fifth Amendment warrants a new trial

Misook invoking the Fifth Amendment with respect to her culpability for Christina's death is new, material, noncumulative evidence that would likely change the result on retrial. Misook taking the Fifth would likely change both the outcome of the pretrial order *in limine* excluding evidence of her guilt and the outcome of the trial itself. In denying post-conviction relief, the circuit court did not conclude otherwise. Instead, it simply ignored the legal and factual import of Misook's testimony. When that testimony is considered as it should have been, McNeil should be granted a new trial.

As noted above, prior to trial, the State sought to exclude "any and all evidence or suggestion that Misook Nowlin was involved in, or committed the murder of Christina McNeil." C182. The court granted that motion, finding that, in the absence of direct

evidence connecting Misook to the crime scene, "it's just speculation." R739. Misook's invocation of the Fifth Amendment takes the evidence of her culpability squarely out of the realm of speculation—before ever considering the forensic and other evidence that the circuit court chose to ignore which directly ties her to the crime scene.

1. Misook's invocation of the Fifth Amendment is new, material, and noncumulative

There can be no doubt that Misook's invocation of the Fifth Amendment is new. As noted above, prior to McNeil's trial, Misook testified as part of an offer of proof as to why McNeil should be allowed to present evidence at trial of Misook's culpability for Christina's death. Prior to her testimony, the trial judge advised Misook of her right not to testify, ensured she had consulted with an attorney, and admonished her that anything she said could be used against her in court. R814-15. Misook indicated that she understood and elected to testify. *Id.* In that testimony, Misook acknowledged that she had an argument with McNeil the evening before Christina's death and was "upset at that time," but denied going to McNeil's home at all that night. R818-19, 826.

However, at the post-conviction evidentiary hearing, after again being advised of her rights and consulting with an attorney, Misook invoked the Fifth Amendment in response to every question, including whether she killed Christina and whether she had confessed to Don Wang. R646, 651.

Given that Misook's invocation of the Fifth Amendment—and the adverse inference to be drawn from it—occurred after trial, contradicted her previous testimony, and could not have been discovered sooner through any amount of diligence, it is newly discovered. *Robinson*, 2020 IL 123849, ¶47.

Likewise, the evidence is material because it is relevant and probative of McNeil's

innocence. *Id.*; *People v. Lofton*, 2011 IL App (1st) 100118, ¶ 38 ("evidence that someone else was the shooter and Lofton was not present is certainly material"); *People v. Smith*, 2015 IL App (1st) 140494, ¶ 20 ("Evans' assertion that 'Spanky' and not Smith was the shooter is certainly relevant and supports Smith's innocence."); *People v. Adams*, 2013 IL App (1st) 111081, ¶ 35 ("evidence that someone other than defendant killed the victim and that defendant was not present at the scene is certainly material").

At trial, all evidence of Misook's culpability was excluded, rendering this evidence necessarily noncumulative. *Robinson*, 2020 IL 123849, ¶47; *Smith*, 2015 IL App (1st) 140494, ¶ 20 ("given the absence of any evidence at trial pointing to Spanky as a suspect, Evans's affidavit is likewise not cumulative").

2. Misook's invocation of the Fifth Amendment, along with forensic evidence tying her to the crime scene, would probably lead to a different result on retrial

Misook's invocation of the Fifth Amendment likewise satisfies the conclusive character prong of the actual innocence analysis, particularly when considered along with the forensic evidence linking her to the crime scene. The evidence places the trial evidence in a different light, undermines confidence in the judgment of guilt, and creates a probability of a different result. *See Robinson*, 2020 IL 123849, ¶¶47-48, 57.

"A postconviction proceeding, as a collateral attack on the judgment of conviction, is civil in nature." *People v. Whirl*, 2015 IL App (1st) 111483, ¶106 (citing *People v. Johnson*, 191 Ill.2d 257, 270 (2000)). "It is the prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* (quoting *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van*, 177 Ill.2d 314, 332 (1997)). "[A]lthough a court may draw a negative inference from a party's refusal to testify, it is not required to

do so." *Id.* That said, "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 (citing *Whirl*, 2015 IL App (1st) 111483, ¶107); *People v. Martinez*, 2021 IL App (1st) 190490, ¶70 ("the trial court does not have unfettered discretion to decline to draw an adverse inference").

Here, the trial court had no good reason to decline to draw an adverse inference from Misook's invocation of the Fifth Amendment. Indeed, the court provided no reason at all for failing to do so. Rather, the circuit court made a passing reference to the fact that Misook had taken the Fifth and moved on, never considering whether to draw an adverse inference at all. A4. That was the exact circumstance in *Whirl*, where "the trial court mentioned in passing that Pienta had taken the fifth amendment at the evidentiary hearing," but did not otherwise address it. *Whirl*, 2015 IL App (1st) 111483, ¶107. The appellate court reversed. *Id.* ¶113. The same result should obtain here.

Misook is the only witness who could have directly addressed whether she killed Christina. She declined to do so. It was error not to draw an adverse inference in that circumstance. *Gibson*, 2018 IL App (1st) 162177, ¶108 ("Here, because most of the witnesses disclaimed any ability to directly address the allegations of abuse, and the only material witness capable of so rebutting asserted his fifth-amendment rights, it was error not to draw an adverse inference.").

When the adverse inference is properly drawn, the outcome of the State's pretrial motion to exclude evidence of Misook's culpability would likely have been different. The law is clear that, where newly-discovered evidence would likely change the outcome of important pre-trial hearings, post-conviction relief is warranted. *See, e.g.*, *Whirl*, 2015 IL

App (1st) 111483, ¶80 (citing *People v. Patterson*, 192 Ill.2d 93, 145 (2000)); *People v. Harris*, 2021 IL App (1st) 182172, ¶50; *People v. Galvan*, 2019 IL App (1st) 170150, ¶74; *People v. Almendarez*, 2020 IL App (1st) 170028, ¶71.

As noted, prior to McNeil's trial, the court excluded evidence of Misook's culpability as too speculative. At that time, the evidence consisted of testimony from police officers that the bedroom screen was cut near the latch and off its track; testimony from McNeil's landlord that he had never noticed damage to the screen and that it is possible to gain access to the apartment by cutting the screen; evidence that Misook had taken a polygraph with inconclusive results; testimony from a cashier at the restaurant where McNeil and Misook ate who recalled Misook as "really mad"; testimony from a mutual friend of McNeil's and Misook's who described Misook as "jealous" and "possessive"; testimony from a friend who recalled Misook saying she wanted to go to McNeil's apartment that night; testimony from Misook's ex-husband that Misook had asked him multiple times during the week prior to Christina's death if he could get marijuana that she could plant in McNeil's car; testimony from a DCFS investigator who learned that Misook had beaten Michelle with a wooden dowel, striking her 5-8 times, put her hand over Michelle's mouth, and said "I will kill you tonight" and threatened her with the same fate as Christina's; evidence that Misook had previously been charged in a domestic violence complaint with McNeil as the victim; testimony that Misook called a friend after Christina's murder and asked, "you don't think I did it, do you?"; and testimony from Misook herself acknowledging that she was angry with McNeil for a variety of reasons, including that he refused to testify on her behalf at a sentencing hearing. R763, 766-69, 778-79, 781-82, 784, 795, 805, 819; R819-20, 1115, 1118-19, 1170. After hearing that

evidence, the trial court concluded that "I don't think there's sufficient other evidence indicating any close enough connection that would allow this to come in in terms of proving the former girlfriend was the perpetrator as opposed to the defendant." R831-32. Misook taking the Fifth changes that.

"It has been long recognized that one accused of a crime may prove any fact or circumstance tending to show that someone else committed the crime." *People v. Wilson*, 149 Ill. App. 3d 293, 297 (3d Dist. 1986) (citing *People v. Nitti*, 312 Ill. 73 (1924)). "Such evidence may be excluded on the grounds of irrelevancy if it is too remote in time (*People v. Ward* (1984), 101 Ill.2d 443 [...]), or too speculative in nature, *People v. Dukett* (1974), 56 Ill.2d 432 [...]." Misook's invocation of the Fifth Amendment, together with evidence the circuit court chose to ignore on post-conviction, would have allowed evidence of Misook's culpability to come in at McNeil's trial.

No longer is there an absence of a "clear connection between" Misook and Christina's death. Indeed, in addition to all of the evidence before the court at the time it excluded evidence of Misook's culpability, there is now evidence that Misook's hair and DNA were recovered from Christina's bed, that Misook later committed another strikingly similar murder, that she was seen behaving suspiciously on the night of Christina's death, that she confessed to killing Christina, and that she took the Fifth when asked about it under oath. That adds up to much more than a close connection and takes the argument that Misook is the real killer firmly out of the realm of speculation. In *Wilson*, the appellate court reversed the exclusion of evidence of an alternate suspect where the victim and the alternate suspect had a fight the day prior to the crime and "other factors indicating a connection between [the alternate suspect] and the crime such as the fingerprints and the

fact that [the alternate suspect] had the victim's car in his possession the day after the bodies were discovered. *People v. Wilson*, 149 Ill. App. 3d at 297. Likewise, in *Simmons*, the appellate court reversed the exclusion of alternate suspect evidence where witnesses observed incriminating behavior by the alternate suspect and heard him confess to it. *People v. Simmons*, 372 Ill. App. 3d 735, 746-50 (1st Dist. 2007). This case is analogous.

Importantly, all of the newly-discovered scientific evidence, the evidence that Misook committed another strikingly similar murder, and the evidence that she was observed behaving suspiciously on the night of Christina's death must be credited on appeal because this portion of the innocence claim was dismissed at the second stage, where evidence and well-pleaded allegations must be taken as true. *See, e.g., People v. Wilson*, 2022 IL App (1st) 192048, ¶ 75.

Owing to the court's pretrial decision to exclude the evidence, McNeil was unable to present evidence that Christina—who died while in McNeil's sole custody—was killed by Misook. Now, in light of all of the newly-discovered evidence, including Misook's invocation of the Fifth Amendment and her DNA at the crime scene, evidence of her culpability would be admitted at trial. The entire character of the trial would be different and there is a reasonable probability of a different outcome. This Court should reverse.

B. Michelle and Dawn's testimony warrants a new trial

At the post-conviction evidentiary hearing, Misook's daughter Michelle and her step-mother Dawn both testified that Don Wang told them, at the funeral for his mother whom Misook had recently murdered, that Misook confessed to killing Christina. R617-32, 636-44.

1. There is no dispute that Michelle and Dawn's testimony was newly discovered, material, and noncumulative

Michelle and Dawn testified that Don Wang told them at Linda Tyda's funeral that Misook confessed to killing Christina. R617, 624-26; R 637, 642-42. The circuit court ruled that the evidence is new. A5. Similarly, there can be no dispute that the evidence is material and noncumulative. Evidence that someone else committed the crime is material because it is probative of innocence. *Robinson*, 2020 IL 123849, ¶47; *Lofton*, 2011 IL App (1st) 100118, ¶ 38; *Smith*, 2015 IL App (1st) 140494, ¶ 20; *Adams*, 2013 IL App (1st) 111081, ¶ 35. Likewise, it is noncumulative as no similar evidence was presented at trial. *Robinson*, 2020 IL 123849, ¶47; *Smith*, 2015 IL App (1st) 140494, ¶ 20.

2. Michelle and Dawn's testimony would probably lead to a different result on retrial

The circuit court denied McNeil post-conviction relief on the basis that Michelle and Dawn's testimony was insufficiently conclusive. A6. It did not find that either witness lacked credibility. Indeed, the court did not question that Michelle and Dawn's testimony about Misook's confession to Wang was truthful. Rather, the circuit court's conclusion that the evidence was insufficiently conclusive was based exclusively on a narrow, erroneous, and premature finding that the evidence would be inadmissible at trial. A5.

The circuit court concluded that Michelle and Dawn's testimony would be inadmissible at retrial after imagining a circumstance in which McNeil "would first call Don Wang to testify," Wang would deny that Misook confessed to him, and McNeil would then attempt to impeach Wang with testimony from Michelle and Dawn. *Id.* The circuit court posited that this attempted impeachment would not be allowed because the testimony it theorized Wang would give "would not damage the defendant's case but would only fail to support its theory." *Id.* The circuit court's analysis was erroneous for multiple reasons.

First, and most fundamentally, the circuit court erred in engaging in this trial admissibility analysis at all. The Illinois Supreme Court has been clear that this type of admissibility analysis takes place *after* a new trial is ordered, not during post-conviction proceedings. *Robinson*, 2020 IL 123849, ¶81 ("The final determination as to the admissibility of Tucker's extrajudicial confession cannot, and should not, be made until after petitioner has overcome the hurdles of second- and third-stage proceedings."). The Supreme Court's decision makes sense where the precise manner in which evidence may be presented at a new trial is not something that can be predicted, particularly in the context of evidence related to an alternate offender. For example, in *Simmons*, the appellate court noted as follows with respect to police reports regarding an alternate offender:

> [W]e note that it is difficult to ascertain exactly what the evidence would have been because the witness testimony contained in the written statements and police reports ... were merely summaries of what the witnesses said. Additionally, many of the statements contained in the reports are hearsay and may not be admissible at trial. Nevertheless, we believe that the evidence with which the trial court was presented was not so uncertain or speculative and defendant should have been given the opportunity to present it.

Simmons, 372 Ill. App. 3d at 749-50.

Second, the circuit court erred by ignoring that this evidence would have altered the outcome of the trial court's decision to exclude evidence of Misook's culpability. There can be no dispute that Michelle and Dawn's testimony would have been admissible at that offer of proof hearing. *People v. Thompkins*, 181 Ill. 2d 1, 9-13 (1998) (requiring courts to allow testimony in offers of proof). And for the reasons described above, the testimony—especially when coupled with Misook's invocation of the Fifth Amendment and all of the other newly-discovered evidence of her guilt (which must be credited because it was dismissed at the second stage)—would have changed the outcome of that pretrial hearing and, subsequently, the trial itself. On this basis alone, this Court should reverse the denial

of post-conviction relief.

In addition, underlying the circuit court's analysis that the evidence would be inadmissible at trial is an assumption that Wang would deny that Misook confessed to him if he were called to testify under oath. The circuit court assumed that Wang's under-oath testimony would be identical to what he said in his out-of-court, hearsay interrogation. A5. Decisions about post-conviction relief should not be based on assumptions. There are many reasons Wang may have wanted to avoid telling the police that Misook had confessed to him. Perhaps he regrets knowing of Misook's guilt and not coming forward. Perhaps he feels guilty that he knew Misook was capable of murder—based on her confession to him that she had killed Christina—and yet stayed in a relationship with her until she murdered his own mother. It was inappropriate to deny post-conviction relief on the basis of an unsubstantiated assumption that Wang's under-oath testimony would be the same as his out-of-court statements in a police interrogation room.

Moreover, even if Wang were to testify identically to his out-of-court statements, many of those statements are equivocal and ambiguous at best:

> Q. Did she ever at any time ever confess to you or tell you that she killed Christina?
>
> -- 3 second pause --
>
> A. Not that I remember if she said something like that.

E58; 12:24.

> Q. Somebody told me that they've spoken with a female ... and they said that this lady ... will testify that Don Wang told her that Misook confessed to killing Christina. Now is that true?
>
> A. No.
>
> Q. Okay, so

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

Q. That she basically, yeah, or, okay, or did she ever, without telling you the whole story, did Misook ever tell you something like, 'I killed Christina.' Did Misook ever say that to you?

-- 5 second pause --

A. Not to my knowledge.

E66; 13:26.

Although Wang eventually did give a direct "no," after being led by the detective to say so (Q: "so you have no knowledge of Misook ever telling you um that she had killed Christina?" A: "No."), this is hardly definitive evidence. E67. Moreover, as noted, the circuit court did not question that Michelle and Dawn testified truthfully and credibly when they said Wang told them that Misook had confessed.

The circuit court legally erred when it engaged in a trial admissibility analysis in the first place. It further erred in failing to consider that the evidence could undoubtedly be presented at a pretrial hearing on the State's motion to exclude evidence and that it would likely change the outcome of that hearing. It also erred in failing to consider how Michelle and Dawn's testimony is corroborated by Misook's invocation of the Fifth Amendment and all of the newly-discovered evidence of her guilt (which must be credited at this stage). *See Chambers v. Mississippi*, 401 U.S. 284 (1973); *People v. Tenney*, 205 Ill. 2d 411 (2002); *People v. Cruz*, 162 Ill. 2d 314, 343 (1994). The court further erred in assuming that Wang's testimony would be identical to what he said during his out-of-court interrogation. And it further erred by failing to consider the ambiguous and equivocal nature of Wang's statements.

As the Supreme Court explains, "A confession is like no other evidence." *Arizona*

v. Fulminante, 499 U.S. 279, 296 (1991). When someone confesses, it: "is probably the most probative and damaging evidence that can be admitted .... [T]he admissions... come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury[.]" *Id.* Illinois courts are similarly clear: "a confession is the most powerful piece of evidence...and its effect on a jury is incalculable." *People v. R.C.*, 108 Ill.2d 349, 356 (1985). *See also People v. St. Pierre*, 122 Ill.2d 95, 114 (1988) ("Confessions carry 'extreme probative weight.'") (citations omitted); *People v. Clay*, 349 Ill. App. 3d 24, 30 (1st Dist. 2004) ("confessions frequently constitute the most persuasive evidence"). Evidence of Misook's confession would have likely changed the outcome of the State's motion to exclude evidence of her guilt and would have proven McNeil's innocence at trial.

For all of those reasons, this Court should reverse.

C. The totality of the evidence—Dawn and Michelle's testimony, Misook's invocation of the Fifth Amendment, and all of the newly-discovered evidence the circuit court chose to ignore—warrants a new trial

Misook confessed to killing Christina and took the Fifth about doing so. That confession is corroborated by an affidavit—which must be taken as true on appeal because it was dismissed at the second stage—that Misook was behaving suspiciously the night of Christina's death. The confession is further corroborated by Misook's conviction of a strikingly similar murder.

Moreover, newly-discovered evidence demonstrates that Misook's DNA was found at the crime scene. Prior to trial, the trial judge specifically indicated that scientific evidence connecting Misook to the crime scene may have changed its ruling regarding the exclusion of evidence of Misook's culpability: "I suppose if you've got a fingerprint on the inside of the window where somebody would crawl through and it turns out to be somebody else's

fingerprint, then I would have to look at that." R738. Indeed, the trial court suggested that forensic evidence indicating a third party's presence in Christina's bedroom would likely be dispositive of the whole case. Speaking about potential forensic testing, the court stated: "if the blood here was found to be the victim's that would be one thing. If it was found to be the defendant's that would be something that could harm the defense. And if it was found to not be either's, then I think that would be a very significant matter." R844. McNeil has presented precisely that evidence and it must be credited on appeal because it was dismissed below at the second stage.

At no point did the circuit court consider the totality of the evidence in denying post-conviction relief. However, in reviewing post-conviction matters, the Illinois Supreme Court directs courts to take a "comprehensive approach" and "in effect predict[] what another jury would likely do, considering all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶¶ 96-97; *see also People v. Carter*, 2013 IL App (2d) 110703, ¶ 75 (citing *People v. Gonzalez*, 407 Ill.App.3d 1026, 1034 (2d Dist. 2011)) ("[A] new trial is warranted if all of the facts and surrounding circumstances, including the new evidence, warrant closer scrutiny to determine the guilt or innocence of the defendant"). *See also Ortiz*, 235 Ill.2d at 336-37; *People v. Velasco*, 2018 IL App (1st) 161683, ¶92; *Gonzalez*, 2016 IL App (1st) 141660, ¶¶28, 120, 126; *People v. Class*, 2023 IL App (1st) 200903, ¶58. The totality of the evidence demonstrates that the circuit court erred in denying post-conviction relief. This Court should reverse.

II. McNeil Presented One Actual Innocence Claim and the Circuit Court Erred in Redefining it as Distinct Sub-Claims, Each Supported by One Isolated Piece of Evidence, and Then Dismissing Some of Those "Claims"

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

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

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

Because the sufficiency of the allegations in a post-conviction petition is a legal inquiry, this Court reviews a second-stage denial of an evidentiary hearing *de novo*. *Coleman*, 183 Ill.2d at 388; *People v. Snow*, 2012 IL App (4th) 110415, ¶15.

McNeil put forward one actual innocence claim below. *See* C1392-94. The claim was supported by numerous pieces of evidence, including newly-discovered evidence demonstrating that Misook's hair and DNA were found at the crime scene, that she confessed to the murder, that she went on to commit another similar murder, and that the State's forensic evidence at trial is debunked by modern science. C 1396-1407. At the

second stage, at the State's invitation, the circuit court divided McNeil's actual innocence claim into distinct sub-claims, each supported by one isolated piece of evidence. A8-21. It then advanced three of those isolated, judicially-created sub-claims to a third-stage hearing. A18-19. The "claims" the court advanced were those that the State agreed should be heard: Michelle's affidavit (which it deemed "Claim I.G"), Dawn's affidavit (deemed "Claim I.H"), and the "totality of the evidence" but only insofar as that "totality" comprises those two affidavits (deemed "Claim I.I"). A18-19.

The remaining "claims" were dismissed. Specifically, the court dismissed what it labelled "Claim I.C," containing newly-discovered scientific evidence that Misook's hair was in Christina's bed (C1398, A15-16); "Claim I.D," containing newly-discovered evidence that Misook's DNA was present on Christina's bedding (C1400, A16-17); "Claim I.H," containing evidence that Misook committed and was convicted of the 2011 murder of Linda Tyda under stunningly similar circumstances (C1406, A18); "Claim I.E," containing an affidavit from Susanne Burns's averring that she observed Misook behaving suspiciously the night of Christina's death (C1402, A17); "Claim I.B," based on newly-discovered evidence that the State's trial evidence regarding motive was predicated on junk science because modern science demonstrates that there is no scientific evidence that Christina had been sexually abused (C1396, A14); and "Claim I.A.," based on newly-discovered evidence regarding errors in Christina's autopsy conclusions (C1394, A12). McNeil's post-conviction petition also contended that the totality of the evidence, not each piece in isolation, warrants a new trial. C1408. The court recast this as "Claim I.I"

Rather than rule on the one actual innocence claim actually before it, the circuit court accepted the State's invitation to rule on multiple separate strawman "claims" that

the State found individually wanting. This approach of reimagining claims and then ruling on those reimagined claims is squarely contradicted by precedent. It is well-settled that adjudication of newly-discovered evidence claims requires a cumulative assessment of whether the new evidence "when considered along with the trial evidence, would probably lead to a different result." *Coleman*, 2013 IL 113307, ¶96 (citing *Ortiz*, 235 Ill.2d at 336-37). The analysis of an actual innocence claim requires a "comprehensive approach ... [which] consider[s] all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶97. "The evidence must be considered together, and not in isolation." *Velasco*, 2018 IL App (1st) 161683, ¶92 (citing *Gonzalez*, 2016 IL App (1st) 141660, ¶28); *id.* ¶126 ("The new testimony provided on postconviction, taken as true at the second stage, and *considered collectively*, would provide the evidence (lacking at trial) to support the defense theory.") (internal citations omitted; emphasis added); *id.* ¶120 ("defendant's petition is supported not only by the hearsay affidavits of [two witnesses] but, also, by the corroborative, nonhearsay affidavits of [two others], *all of which we will now consider together*") (emphasis added).

Indeed, the circuit court's piecemeal approach to analyzing an actual innocence claim has been explicitly rejected by the Appellate Court: "The fundamental problem with the trial court's analysis in its order granting the State's motion to dismiss ... is that, rather than employing a comprehensive review described above—an analysis that considers *all* of the evidence 'both new and old together'—it employed a piecemeal approach, assessing each of the affidavits individually and finding that none of them, standing alone, was sufficient to the necessary showing of actual innocence." *Class*, 2023 IL App (1st) 200903, ¶58 (quoting *Coleman*, 2013 IL 113307, ¶97) (emphasis in original). "More importantly,

while each claim in a successive petition must be analyzed separately ... actual innocence is but *one* claim and it is a claim that our supreme court has made clear requires a comprehensive approach." *Id.* ¶61 (emphasis in original). The circuit court erred by deviating from these well-established principles.

Because McNeil's actual innocence claim made a substantial showing of a constitutional violation at the second stage—something all parties and the circuit court agreed on—it was error to divide McNeil's actual innocence claim into isolated subclaims, advance individual pieces of evidence to the third stage, and dismiss other pieces of evidence. This is all the more true where all of the evidence was relevant to the court's third-stage determination. If this Court does not grant McNeil a new trial, it should, at minimum, reverse and remand for an evidentiary hearing where the circuit will consider all of the evidence.

III. If It Was Proper to Recast McNeil's Actual Innocence Claim as Multiple Sub-Claims, Each Supported by One Isolated Piece of Evidence, the Circuit Court Erred in Dismissing Those "Claims"

As noted above, this Court reviews a second-stage denial of an evidentiary hearing *de novo*. *Coleman*, 183 Ill.2d at 388; *Snow*, 2012 IL App (4th) 110415, ¶15.

A. Newly-discovered DNA evidence warrants an evidentiary hearing

In 2014, the circuit court granted, with the State's agreement, McNeil's motion for post-conviction DNA testing pursuant to 725 ILCS 5/116-3. C2968v2, 3014v2. Section 116-3 allows for post-conviction forensic testing where certain criteria are met, including that "the result of the testing has the scientific potential to produce new, noncumulative evidence ... materially relevant to the defendant's assertion of actual innocence[.]" 725 ILCS 5/116-3(c)(1).

That testing was performed and produced new, noncumulative evidence that was

materially relevant to McNeil's assertion of innocence. The circuit court granted McNeil leave to file his successive petition presenting that evidence, "because at least one of the grounds for relief allege [sic] exculpatory scientific evidence outside the record[.]" A7. Then, the State—which had agreed to the DNA testing being done pursuant to Section 116-3 which necessarily means it agreed that the testing had "the scientific potential to produce new, noncumulative evidence ... materially relevant [McNeil's] assertion of actual innocence" (725 ILCS 5/116-3(c)(1))—had a change of heart and asked the court to dismiss "claims" based on those very DNA results without an evidentiary hearing. C3056-96v2. The circuit court agreed and dismissed the DNA "claims" at the second stage. A8-21. That was error.[8]

The DNA evidence is new, material, and noncumulative. The circuit court correctly held that the DNA findings were newly discovered. A15 ("the mtDNA findings are new")[9]. The trial court, correctly, did not find that the evidence was immaterial or cumulative. A15-17. For the reasons set forth above, evidence Misook committed the crime is relevant and probative of his innocence, and no such evidence was presented at his trial.

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[8] The circuit court labelled DNA evidence of Misook's hair in Christina's bed as "claim I.C" and DNA from the bedsheet as "claim I.D." The fact that the court treated Misook's genetic material as two distinct "claims" further shows the error of its piecemeal approach. We discuss the DNA results together, rather than burden the Court with identical arguments.

[9] After twice referring to the hair evidence as "new," the circuit court wrote in the concluding sentence regarding this "claim" that it was dismissed as "not constituting newly discovered evidence nor conclusive evidence[.]" A16. The court also noted that "Evidence of these strands of hair is not new evidence." A15. But obviously the existence of the hairs themselves is not new evidence—the evidence at issue are the DNA results. The only explanation for the incongruity between "the mtDNA findings are new" and the inclusion of "not constituting newly discovered evidence" in the conclusion is that the latter was a scrivener's error.

The DNA evidence is sufficiently conclusive. The circuit court found evidence that post-conviction DNA testing proved that Misook's hair and DNA were in Christina's bed was insufficiently conclusive to warrant post-conviction relief. A16, A17. But the circuit court erred in undertaking this analysis at all at the second stage. Rather, an evidentiary hearing on the DNA evidence should have been automatic. "[O]nce DNA testing is ordered and the results are favorable, at least in part, to a defendant, such as where a non-match is revealed, an evidentiary hearing is necessary to determine the legal significance of the results because such results would make a substantial showing of a constitutional violation. In other words, the trial court is obligated to conduct an evidentiary hearing to determine whether the DNA results would or would not likely change the results upon a retrial." *People v. Dodds*, 344 Ill. App. 3d 513, 522 (1st Dist. 2003). This alone requires reversal.

Moreover, the circuit court's ruling that the DNA evidence was insufficiently conclusive stands in stark contrast with the words of the trial judge himself, who explained that this very type of forensic evidence would likely have changed the outcome of the pretrial ruling excluding evidence of Misook's guilt and the trial itself. The trial judge specifically indicated that there was a probability that scientific evidence connecting Misook to the crime scene would have changed the pretrial ruling: "I suppose if you've got a fingerprint on the inside of the window where somebody would crawl through and it turns out to be somebody else's fingerprint, then I would have to look at that." R738. As it did with respect to Michelle and Dawn's third-stage testimony, the circuit court's dismissal of the DNA "claims" ignored how the newly-discovered evidence would likely change the outcome of the motion to exclude evidence of Misook's culpability. That was error.

The newly-discovered DNA evidence would have also changed the outcome of the

trial itself. Indeed, the trial judge indicated that there was a probability that forensic evidence connecting someone other than McNeil and Christina to the bedroom would have led to acquittal: "if the blood here was found to be the victim's that would be one thing. If it was found to be the defendant's that would be something that could harm the defense. And if it was found to not be either's, then I think that would be a very significant matter." R844. The post-conviction court erred by ignoring this.

According to the circuit court, the presence of Misook's DNA in Christina's bed was inconclusive because it could be explained by the fact that McNeil and Misook had previously had a sexual relationship and the bed in which Christina died was McNeil's on nights Christina was not there. A15, A17. The court posited this theory in spite of testimony in the record that the two never had sexual relations in that apartment and evidence that the sheets had just been washed. R1162, C1212, C2893. With respect to the hair, the court theorized that the DNA evidence also suggested the hair could have belonged to Misook's daughter, Michelle. A15. These sorts of (assumption-based) fact-finding are inappropriate at the second stage. To the extent there were factual questions about how and when Misook's DNA was deposited at the crime scene, those are issues that could only be resolved at the third stage. *People v. Sanders*, 2016 IL 118123, ¶42 ("All well-pleaded factual allegations not positively rebutted by the trial record must be taken as true for purposes of the State's motion to dismiss.") (*citing People v. Pendleton*, 223 Ill.2d 458 (2006); *People v. Childress*, 191 Ill.2d 168, 174 (2000)); *People v. Jones*, 399 Ill. App. 3d 341, 357 (1st Dist. 2010) (courts are "foreclosed from engaging in any fact-finding at a dismissal hearing as well-pleaded facts are to be taken as true at this point").

The circuit court's dismissal of the DNA "claims" at the second stage was error. If

this Court does not grant McNeil a new trial, it should reverse and remand for an evidentiary hearing where the circuit will consider all of the evidence.

B. Newly-discovered scientific evidence that the State's motive theory was predicated on junk science warrants an evidentiary hearing

At trial, the State repeatedly told the fact finder that McNeil killed Christina in order to cover up the fact that he had molested her. *E.g.*, R16. The only evidence supporting this purported motive was a pathologist's testimony that autopsy findings suggested that Christina had been sexually abused the night she died and on prior occasions. R314-15. The pathologist based this conclusion on findings that Christina's vagina and anus were red, her hymen was irregular, and that there was blood on a vaginal swab and on the sheets. R311, R315-16.

New evidence, based on modern science, demonstrates that these conclusions were wrong and that there is no evidence Christina was sexually abused. Attached to McNeil's post-conviction petition is an expert report from Dr. Nancy Harper, a pediatrician specializing in child abuse issues, including sexual abuse. C1532-56. Relying on modern scientific principles, Dr. Harper concluded that "there are no findings considered indicative of acute anogenital trauma or the residua of prior anogenital trauma." C1555. Dr. Harper found that "[t]he hymenal appearance is considered a normal variant." C1554. Further, Dr. Harper found that hyperemia and redness "is a common finding in girls with or without a history of sexual abuse." C1555. That is in stark contrast to the pathologists testimony at trial that "irritation in the vagina is an exceedingly rare finding in a little girl." R331. Dr. Harper explained that, "at the time of the postmortem examination" performed on Christina's body, "there was a debate in the literature on the significance of the transverse or horizontal measurement of the hymen." *Id.* That debate has now been settled and

demonstrates that the pathologist's testimony at trial was wrong. *Id.* "The current scientific literature does not support an association between the transverse diameter of the hymenal opening and child sexual abuse." *Id.*

The circuit court recognized that this evidence is "contradictory" to the trial evidence, but dismissed this "claim" on the basis that the evidence is not newly-discovered and not sufficiently conclusive. A14.

The evidence is new. The circuit court ruled that Dr. Harper's conclusions are not new, despite the expert's explicit explanation in her report that "there was a debate in the literature" about these issues at the time of McNeil's trial and that the debate has now been resolved in a manner that proves the falsity of the trial evidence. The trial court reached this conclusion via improper second-stage fact-finding.

According to the circuit court, "the sources cited by Dr. Harper in her report establish that through the exercise of due diligence, the information and opinion she sets forth would or could have been available at the time of trial and/or 1st Post Conviction Petition." *Id.* The court does not specify what "sources" it was referring to or how they "establish" that the evidence contained in Dr. Harper's report would have been available at the time of trial. Regardless, this is quintessential fact-finding that should not have taken place at the second stage. *Sanders*, 2016 IL 118123, ¶42; *Pendleton*, 223 Ill.2d at 473; *Childress*, 191 Ill.2d at 174; *Jones*, 399 Ill. App. 3d at, 357.

Similarly, the circuit court found it significant that this issue was not raised on direct appeal or in McNeil's first post-conviction petition. A14. However, any conclusion regarding waiver necessarily involves the same sort of improper fact-finding because it entails a conclusion that Dr. Harper's evidence was available at the time of direct appeal

or the first post-conviction petition. Any conclusion that the evidence is not new requires fact-finding that can only take place at the third stage. Reversal is required.

The evidence is material and noncumulative. The State did not dispute that this evidence is material and noncumulative, and the circuit court did not find otherwise. C3063-67v2; A13-14. This element is not in dispute.

The evidence is sufficiently conclusive. The circuit court stated, without providing reasoning, that this "claim" also failed to satisfy the conclusive character prong of the actual innocence analysis. *See* A13-14. Although the court mentioned in passing that the State does not have to prove motive in order to convict a defendant, it did not connect this statement to its declaration that that the newly-discovered evidence was therefore unlikely to change the result on retrial. However, assuming that was the basis for the conclusion that the evidence was unlikely to change the result, it was erroneous.

In rendering his verdict, the trial judge specifically cited McNeil's alleged "sexual misconduct as a possible motive" in finding McNeil guilty. R1272. Although the State was not required to prove that motive in order to convict McNeil, the fact that the State *did* rely—extensively—on motive evidence at trial, and the judge relied on that evidence in rendering his guilty verdict, means that newly-discovered evidence proving the State's motive evidence wrong creates a probability of a different result on retrial. *See, e.g.*, *People v. Montanez*, 2016 IL App (1st) 133726, ¶¶ 39-40 (reversing denial of post-conviction relief in light of newly-discovered evidence that left State's motive evidence "all but refuted" and rendered it "questionable").

C. Misook's 2011 murder of Tyda Wang is evidence of her culpability for Christina's death and warrants an evidentiary hearing

Evidence that Misook killed her mother-in-law under circumstances that parallel

Christina's murder would likely change the outcome of the pretrial motion to exclude evidence of her culpability and, thereafter, the outcome of McNeil's trial. The circuit erroneously dismissed any "claim" based on this evidence as "nothing more than an interesting fact." A18.

On September 4, 2011, Misook brutally murdered her mother-in-law, Linda Tyda. She pleaded guilty to concealing the homicidal death by burying Tyda's body in a shallow grave in a forest preserve. C1743-52. However, she proceeded to trial on the murder charge itself. On December 18, 2012, Misook was convicted of first-degree murder. C2816. The details of Tyda's and Christina's murders bear extraordinary similarities.

Misook's anger and jealousy at the ending of romantic relationships. Both murders occurred when Misook's romantic relationships fell apart, specifically after she came to believe that her partner had cheated. Misook's now-adult daughter Michelle testified at Misook's trial for the Tyda murder that Misook admitted she "was upset" because she believed her husband "was having an affair" (C2404), and a letter Misook sent Michelle explained that the affair she imagined her husband was having "drove me crazy" and said, "[m]y heart just couldn't stand loneliness" (C2550-51). Misook told a jail guard that she "did it out of anger, you know, when you're really mad at someone." C2393. Don Wang testified that Misook "always had anger control problems, even back to 10 years ago, 20 years ago, even got into legal problems." C2347. Wang's testimony in Misook's trial took place in 2012; Christina died 14 years earlier in 1998. C2196, 2198, 1463.

Christina's case involved the same circumstances. Misook told police that McNeil had recently ended their four-year relationship. C1423. Misook believed that McNeil had cheated on her. C1424. When asked at the evidentiary hearing below whether she believed

he McNeil had been seeing another woman, she took the Fifth. R647-48.

Surreptitious phone record access. In each case, Misook used trickery and deception to check her partners' phone records for evidence of their supposed affairs. C2364-65, 2557-58, 1424.

Nighttime confrontations at the victims' homes. In the weeks preceding both murders, Misook went to the victims' homes and banged on the door at night. C1421, 2006.

Misook blamed the victim for the collapse of her romantic relationships. In both cases, Misook blamed her partner's closest female relative—at least in part—for the failure of her relationship. With Christina, Misook resented that McNeil spent time with Christina and paid child support. C1425. With Tyda, Misook believed that Wang was having an affair with Tyda's secretary and that Tyda supported that relationship. C2404-05.

Misook's efforts to ruin the lives of her ex-lovers. Upon coming to believe her partners were having affairs, in each case, Misook endeavored to ruin her partner's life. With respect to Christina's case, Misook attempted to plant drugs in McNeil's car, before ultimately killing his child. R804-05. In the Tyda matter, Misook went to her husband's workplace, alleged that he had been stealing from the business, and "got him fired" before ultimately killing his mother. C2407. Misook said in a recorded jailhouse phone call to her sister: "I'll completely ruin him, completely." C2611.

The similar identity of the victims. In each case, the victim was the closest female relative of the man with whom Misook had a collapsing romantic relationship: Christina was McNeil's daughter; Tyda was Wang's mother. C1448, C2306.

Asphyxiation. In Christina's case, the pathologist concluded that she died from asphyxiation. R324. With respect to the Tyda murder, Misook described how she

committed the crime in her jailhouse letter to Michelle: "we came into a situation where we were strangling each other. I was really out of my mind." C2575-77.

Blame-shifting. Lastly, during questioning in both murders, Misook shifted blame away from herself. When detectives interviewed Misook about Christina, she told them to look into the fact that Christina "had a lot of problems in health" and was "always sick." C1444 at 17:05. After killing Tyda, Misook told detectives that Tyda was involved with dangerous people and suggested that a "group out of New York" may have killed her. C1980.

Presented with this overwhelming evidence of an idiosyncratic pattern of killings and an argument that there was a reasonable probability that, in light of the new evidence, the outcomes of the pretrial decision to exclude the Misook evidence and the trial itself would likely have differed, the circuit court shrugged it off: "The fact that Misook Nowlin has been convicted of killing Linda Tyda 13 years after the murder of Christina McNeil is nothing more than an interesting fact and in no way relevant or probative of defendants [sic] claim of actual innocence." A18. That was error.

The evidence is new and noncumulative. There is no dispute that Misook's murder of Linda Tyda—over a decade after McNeil's trial—is newly discovered. A18, C3087-92v2. As all Misook evidence was excluded from McNeil's trial, there can also be no dispute that this evidence is noncumulative.

The evidence is both material and conclusive. The circuit court dismissed this "claim" based on an erroneous conclusion that evidence that Misook killed Tyda under strikingly similar circumstances to Christina is "not material nor conclusive" and is instead just an "interesting fact." A18.

Evidence indicating that a third-party committed a crime is material. *Lofton*, 2011 IL App (1st) 100118, ¶ 38; *Smith*, 2015 IL App (1st) 140494, ¶ 20; *Adams*, 2013 IL App (1st) 111081, ¶ 35. Evidence that someone else committed a crime includes evidence that the alternate offender has a pattern of committing similar offenses. *Cruz*, 162 Ill. 2d at 350 (other crimes evidence can contain "significant probative value to the defense"); *see also People v. Beaman*, 229 Ill. 2d 56, 76 (2008) ("The evidence that Doe was charged with domestic battery and had physically abused his girlfriend on many prior occasions also could have been used by petitioner in a pretrial hearing to establish Doe was a viable suspect"). Thus, evidence that Misook had a pattern of believing that her romantic partners were cheating on her, surreptitiously accessing their phone records, setting out to "ruin" their lives, blaming the partner's closest female relative for the collapse of the relationship, and killing that female relative by asphyxiation—not to mention a history of violence against children, which included choking her own child, threatening her with death, and promising her that "the same thing that happened to [Christina] would happen to her"—is relevant and probative evidence, and therefore material.

The evidence is also sufficiently conclusive. Had the trial judge known that Misook would go on to kill under similar circumstances, it likely would have denied the State's motion to exclude evidence of her culpability for at least two reasons. First, in granting the motion, the court heard Misook's testimony during which she denied going to McNeil's apartment the night of Christina's death. R825-26. That testimony would now lack all credibility (indeed, as we know, that testimony would now consist of her taking the Fifth). Second, evidence that Misook had gone on to kill again under similar circumstances would have removed the allegation that Misook killed Christina from the realm of "speculation,"

such that the court would have allowed it to be presented at trial. As described above, had McNeil been able to present this Misook evidence at trial, he likely would have been acquitted. The circuit court erred in dismissing McNeil's "claim" based on the "interesting fact" that Misook has a patterned and idiosyncratic history of killings.

The circuit court also included a sentence in this section of its ruling which implies it may have ignored evidence of Misook's conviction of the Tyda murder altogether. The circuit court wrote: "In People v. Sanders, 2016 IL 118123 (2016), the Illinois Supreme Court rejected the argument that a '... trial court may consider the record of proceedings not involving the petitioner whose case is before the court.' (Sanders at Para 44)." The circuit court did not elaborate. In *Sanders*, the Supreme Court reversed the dismissal of a post-conviction petition based on witness testimony at a co-defendant's proceeding over which the same judge had presided, a transcript of which was not in the record. *Sanders*, 2016 IL 118123, ¶42. The Supreme Court held that the lower court "erred in considering matters outside the record of petitioner's case." *Id.* ¶43. Here, the transcripts from Misook's trial *were* in the record. C1725-2830. To the extent the circuit court's quotation of *Sanders* is an indication that it ignored evidence before it, that was error.

CONCLUSION

Barton McNeil has been in custody since 1998. The overwhelming evidence shows that Misook Nowlin / Wang committed the crime. McNeil respectfully asks this Court to reverse the circuit court's denial of his post-conviction petition and remand for a new trial. In the alternative, McNeil asks the Court to reverse the denial of his post-conviction petition and remand with instructions to the circuit court to hold a new evidentiary hearing at which it will weigh all of the evidence.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Appellant's attorney hereby certifies that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to brief under Rule 342(a) is 50 pages.

/s/ Karl Leonard
Karl Leonard

NO. 4-24-0430

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, v. BARTON MCNEIL, Petitioner-Appellant.	)	Appeal from the Circuit Court of McLean County, Illinois. Cir. Ct. No. 98 CF 0633 Honorable William Yoder, Judge Presiding.

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on August 22, 2024 I caused to be filed the attached Brief and Argument of Petitioner-Appellant, a copy of which is hereby served on you.

DATED: August 22, 2024

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CERTIFICATE OF SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I hereby certify that the statement set forth in this Certificate of Service are true and correct. I further certify that, on August 22, 2024, I caused the foregoing Brief and Argument of Petitioner-Appellant to be filed via the Court's Odyssey electronic filing system, thereby serving counsel of record. I further certify that I caused counsel identified above to be served via electronic mail as indicated.

DATED: August 22, 2024

/s/ Karl Leonard
Karl Leonard