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NO. 4-24-0430

**IN THE
APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT**

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

REPLY BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

STATEMENT OF FACTS..1

Illinois Supreme Court Rule 341 1

ARGUMENT...1

I. THE CIRCUIT COURT ERRED IN DENYING MCNEIL'S ACTUAL INNOCENCE CLAIM AFTER AN EVIDENTIARY HEARING 2

A. *De Novo* Review is Warranted...2

People v. Moore, 207 Ill.2d 68 (2003)..2

Beehn v. Eppard, 321 Ill.App.3d 677 (1st Dist. 2001) 2

People v. Williams, 188 Ill.2d 365 (1999) 2

People v. Sorenson, 196 Ill.2d 425 (2001)..2

People v. Tolefree, 2011 IL App (1st) 100689 2

B. Misook's Invocation of the Fifth Amendment Requires a New Trial...2

People v. Robinson, 2020 IL 123849...3, 5

People v. Lofton, 2011 IL App (1st) 100118 3

People v. Smith, 2015 IL App (1st) 140494..3

People v. Adams, 2013 IL App (1st) 111081 3

Illinois Supreme Court Rule 341 3

People v. Whalen, 2021 IL App (4th) 210068-U..........................4, 5, 6

People v. Whirl, 2015 Il App (1st) 111483...5

C. Michelle and Dawn's Testimony Requires a New Trial 6

People v. Thompkins, 181 Ill. 2d 1 (1998)..6

People v. Carter, 2021 IL App (4th) 180581..8

People v. Ligon, 239 Ill. 2d 94 (2010) 8, 9

People v. Johnson, 2024 IL App (1st) 220419 9

People v. Patterson, 192 Ill. 2d 93 (2000) 9

People v. Plummer, 2021 IL App (1st) 200299 9

People v. Robinson, 2020 IL 123849 .... 10, 11

People v. Brooks, 2021 IL App (4th) 200573 11

People v. Gibson, 2018 IL App (1st) 162177 11

People v. Velasco, 2018 IL App (1st) 161683 11

People v. Griffin, 2024 IL App (2d) 220064-U 12

People v. Morgan, 212 Ill. 2d 148, 155 (2005) 12

D. The Totality of the Evidence Requires a New Trial 12

People v. Class, 2023 IL App (1st) 200903 .... 12, 13

People v. Coleman, 2013 IL 113307 13

People v. Velasco, 2018 IL App (1st) 161683 13

People v. Ortiz, 385 Ill. App. 3d 1 (1st Dist. 2008) 13

People v. Galvan, 2019 IL App (1st) 170150 13

People v. Ruddock, 2022 IL App (1st) 173023 13

People v. Harris, 2021 IL App (1st) 182172 13

II. MCNEIL PRESENTED ONE ACTUAL INNOCENCE CLAIM 13

People v. Harvell, 2024 IL App (4th) 230152-U 13, 14

People v. Robinson, 2020 IL 123849 14

People v. Coats, 2021 IL App (1st) 181731 14

People v. Sanders, 2016 IL 118123 14

III. IF IT WAS PROPER TO RECAST MCNEIL'S INNOCENCE CLAIM AS MULTIPLE SUB-CLAIMS, THE CIRCUIT COURT ERRED IN DISMISSING THOSE "CLAIMS" 15

A. Newly Discovered DNA Evidence Requires an Evidentiary Hearing 15

People v. Robinson, 2020 IL 123849 16

People v. Dodds, 344 Ill. App. 3d 513 (1st Dist. 2003) 17

Illinois Supreme Court Rule 341 17

B. Newly Discovered Scientific Evidence that the State's Motive Theory Was Predicated on Junk Science Requires an Evidentiary Hearing 18

Illinois Supreme Court Rule 341 18

People v. Robinson, 2020 IL 123849 19

People v. Willingham, 2020 IL App (1st) 162250 19

C. Misook's Murder of Tyda Wang Requires an Evidentiary Hearing 19

People v. Robinson, 2020 IL 123849 .... 19, 20

Illinois Supreme Court Rule 341 19

People v. Griffin, 2024 IL App (2d) 220064-U 20

CONCLUSION 20

STATEMENT OF FACTS

The State presents a frequently deceptive recitation of the facts. Just one example is the declaration that, in his interview with police, McNeil "failed to provide any past instances where [Misook] had ever threatened or physically harmed Christina." St. Br. at 8. The State then cites to a portion of the interrogation video in which McNeil and the detective discuss Christina's potty training. *Id.* (citing E14 at 11:15:14-11:17:38). In reality, McNeil told the detective that, although he never heard Misook directly threaten Christina, amongst numerous examples of her violent behavior was an instance in which Misook "waved a knife" at McNeil as he was holding Christina. E14 at 11:02:59-11:03:14. The State's effort to bolster its original case against McNeil in order to deflect from the compelling new evidence of innocence presented below should be disregarded.[1]

ARGUMENT

Underlying nearly every issue in this appeal is a single question: when faced with a post-conviction innocence claim, is a court required to engage in a balanced, comprehensive evaluation of the evidence (as longstanding precedent dictates), or should it embark on a hyper-technical, artificially constrained, and piecemeal review (as the State suggests)? This Court should reconfirm longstanding precedent requiring courts to engage in a comprehensive evaluation of all of the evidence, old and new together. Law and justice require no less. Because the circuit court did not do that here, reversal is required.

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[1] The State claims that McNeil's statement of facts fails to comply with Rule 341(h)(6) and asks that the 'objectionable portions of defendant's statement of facts be stricken and disregarded[.]" St. Br. at 3. The State does not specify what portions are "objectionable" nor why any portions fail to comply with the Rules, beyond a vague assertion that McNeil presents the facts with an "argumentative slant." *Id*. McNeil presented the facts "accurately and fairly" and his recitation facts was no more—indeed, less—argumentative than the State's. That the facts support post-conviction relief does not render those facts unfair.

I. THE CIRCUIT COURT ERRED IN DENYING MCNEIL'S ACTUAL INNOCENCE CLAIM AFTER AN EVIDENTIARY HEARING

A. *De Novo* Review is Warranted

McNeil's brief defines two categories of legal error committed by the circuit court warranting plenary review. First, the court rested its verdict on whether the testimony at the third-stage evidentiary hearing would be admissible at a retrial, instead of conducting the proper analysis, which was whether that testimony would likely alter the outcome of the pre-trial hearing regarding evidence pointing to Misook's culpability and, thereafter, probably alter the outcome of the trial. Second, the court failed to consider the significance of Misook's invocation of the Fifth Amendment. Op. Br. at 24-28, 29-33. Ignoring these arguments, the State declares that manifest error review is appropriate because McNeil supposedly failed to identify any legal errors the circuit court committed. St. Br. at 37. The State then proclaims that the case law McNeil cites with respect to the standard of review is "inapposite and irrelevant," for reasons it does not explain, beyond noting that those appeals did not involve identical fact patterns to this one. St. Br. at 38.

Plenary review is required where a lower court fails to make a determination of an issue on the merits or fails to apply governing law. Op. Br. at 22 (*citing People v. Moore*, 207 Ill.2d 68 (2003); *Beehn v. Eppard*, 321 Ill.App.3d 677 (1st Dist. 2001); *People v. Williams*, 188 Ill.2d 365 (1999); *People v. Sorenson*, 196 Ill.2d 425 (2001); *People v. Tolefree*, 2011 IL App (1st) 100689)). Both occurred here. Although reversal is warranted under either a *de novo* or manifest error standard, the *de novo* standard is most appropriate.

B. Misook's Invocation of the Fifth Amendment Requires a New Trial

There is no dispute that Misook's invocation of the Fifth Amendment with respect to her culpability for this murder is newly-discovered and noncumulative. The State claims

that the materiality of the evidence is in dispute, but provides no argument on this score, instead focusing solely on whether the evidence sufficiently undermines confidence in the judgment of guilt. St. Br. at 47. McNeil explained in his opening brief why the evidence is material. Op. Br. at 23-24 (*citing People v. Robinson*, 2020 IL 123849; *People v. Lofton*, 2011 IL App (1st) 100118; *People v. Smith*, 2015 IL App (1st) 140494; *People v. Adams*, 2013 IL App (1st) 111081). As the State does not respond, it has waived any argument to the contrary. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited").

The dispute in this appeal as to whether Misook's invocation of the Fifth Amendment undermines confidence in the verdict and requires post-conviction relief boils down to two issues: whether the circuit court erred in failing to draw an adverse inference and relatedly, whether it erred in failing to consider evidence supporting that inference.

As to the first issue, the State posits that the circuit court appropriately exercised its discretion in declining to draw an adverse inference. St. Br. at 44-47. According to the State, the circuit court based its decision on this score on "sound considerations," such as the fact that Misook had a pending post-conviction matter of her own. St. Br. at 44. This is false. The circuit court relied on no "considerations" at all. It ignored this issue—period. This was not an exercise of discretion.

But regardless, the failure to draw an adverse inference here was error. The State's argument to the contrary is essentially that, contrary to binding precedent, a court can *never* draw an adverse inference from a witness's invocation of the Fifth Amendment on post-conviction because it would be improper for a defendant to call that witness at trial for the purpose of invoking the Fifth. St. Br. at 46. This trial admissibility argument is a red herring. As McNeil explains in his opening brief, Misook's invocation of the Fifth

Amendment would have changed the outcome of the pretrial motion *in limine* regarding the admissibility of evidence pointing to her culpability. Op. Br. at 25-28. This, in turn, would have allowed for the introduction at trial of voluminous evidence of Misook's guilt. *See* Op. Br. at 26-27. The State's oversimplified argument that McNeil could not call Misook *at trial* for the sole purpose of her invoking the Fifth ignores this.

Additionally, according to the State, the circumstances of Misook taking the Fifth are another basis for declining to draw an adverse inference, even though the circuit court did not make such a ruling. St. Br. at 46-47. The State roots this argument in a misapprehension of this Court's unpublished decision in *Whalen*. *Whalen* actually demonstrates the error of the State's reasoning. In *Whalen*, an alternate suspect named McElvaney invoked the Fifth Amendment at a post-conviction evidentiary hearing and the petitioner on appeal "essentially argue[d] McElvaney's guilt [was] established because he invoked his fifth amendment[.]" *People v. Whalen*, 2021 IL App (4th) 210068-U, ¶23.[2] This Court "[found] no merit in this argument." *Id*. This was due to the fact that the petitioner in *Whalen* "had no more evidence linking McElvaney to the crime than [he] did when [Whalen] was originally tried." *Id*. Indeed, the *Whalen* court explicitly distinguished those cases in which a court was required to draw an adverse inference from the facts at issue in that appeal because Whalen had "presented no new evidence linking McElvaney" to the murder. *Id*. at ¶22. In McNeil's case, there is considerable new evidence linking Misook to the murder, including her DNA, her hair, her confession, and her subsequent murder of another individual under shockingly similar circumstances. *Whalen* thus supports drawing an adverse inference and the circuit court erred in not doing so.

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[2] The *Whalen* decision is attached to the State's brief in accordance with Rule 23.

The State further contends that McNeil's reliance on *Whirl* is "woefully misplaced" because the facts of that case are "inapposite" where the witness that invoked the Fifth was a police officer. St. Br. at 47. This is another red herring. *Whirl* holds that a circuit court must do more than "mention in passing that [a witness] had taken the fifth amendment" and must actually consider the ways in which that invocation might affect confidence in the original judgment of guilt. *People v. Whirl*, 2015 Il App (1st) 111483, ¶107. *Whalen*, while noting that the witness in *Whirl* was a police officer and could therefore be distinguished from the facts at issue in that case, similarly ruled that the determination of whether to draw an adverse inference requires the review of any new evidence corroborating that inference. *Whalen*, 2021 IL App (4th) 210068-U, ¶¶19-23. That did not take place here. *Whirl* and *Whalen* both require that the adverse inference be drawn, thus requiring reversal.

The State then argues that, even if an adverse inference were to be drawn, post-conviction relief is unwarranted because the evidence does not totally vindicate McNeil. According to the State, Misook's "invocation would not constitute direct evidence establishing" that Misook killed Christina. St. Br. at 47. But it was not McNeil's burden to "establish" that Misook killed Christina. 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." *Robinson*, 2020 IL 123849, at ¶56. The State's contention that McNeil failed to "establish" Misook's guilt would resurrect the "total vindication" standard the Supreme Court struck down. *Id.* ¶55 ("this court specifically rejected the total vindication or exoneration standard").

Additionally, the State's argument proves too much and demonstrates the second

reason that Misook's invocation of the Fifth Amendment below undermines confidence in the judgment of guilt: the circuit court erred in failing to consider any of the voluminous evidence corroborating that adverse inference. Setting aside that it was not his burden to do so, the State's contention that McNeil cannot "establish" Misook's guilt with "direct evidence" is only true because the circuit court affirmatively chose to ignore all of the "direct evidence" that does in fact "establish" her guilt (or at least strongly suggest it such that confidence in the verdict is undermined). As *Whalen* requires, the assessment of whether to draw an adverse inference entails a review of what evidence corroborates that inference. 2021 IL App (4th) 210068-U, ¶¶12-23. That evidence is overwhelming. The adverse inference should have been drawn and reversal is required on that basis.

C. Michelle and Dawn's Testimony Requires a New Trial

There is no dispute that the testimony at the third-stage evidentiary hearing below regarding Misook's confession to killing Christina is new, material, and non-cumulative. The only dispute is whether it undermines confidence in the judgment of guilt and creates a probability of a different outcome on retrial. In contesting this prong of the actual innocence analysis, the State sets up a series of strawman arguments and invites this Court to make credibility findings in the first instance. The State further presents arguments that are outright contradicted by the record. For example, in his opening brief, McNeil cites *Thompkins* for the proposition that "Michelle and Dawn's testimony would have been admissible at [the pretrial] offer of proof hearing." Op. Br. 30 (*citing People v. Thompkins*, 181 Ill. 2d 1 (1998)). The State pretends that McNeil cites *Thompkins* for the proposition that the post-conviction court here erred by "refus[ing] to accept [McNeil's] offer of proof" and engaging in "egregious misconduct like the trial court did in *Thompkins*." St. Br. at 23. From there, the State accuses McNeil of being "misleading" and "significant[ly]

misrepresent[ing] the context" surrounding the post-conviction court's ruling. *Id.* at 24. McNeil made exactly none of those arguments. This is a strawman.

Likewise, the State contends that McNeil argued that the post-conviction court was required to consider Dawn's and Michelle's affidavits as true, and then explains why that was not the case given that they testified at the third-stage. St. Br. at 39. McNeil did not argue that the post-conviction court should have taken those affidavits as true. Rather, McNeil argued that the evidence the trial court ignored because it was rejected at the second stage must be taken as true as the law requires. Op. Br. at 33, 41. This is another strawman.

The State also falsely asserts that there was "conclusive proof that no one entered the victim's bedroom via the window on the night in question." St. Br. at 41. As noted in McNeil's opening brief, the original trial court specifically stated, on at least two occasions, that the reason it excluded evidence of Misook's culpability was not because of any "conclusive proof" that no one broke into the apartment—it was because corroborating evidence was lacking. R738 ("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."); R844 ("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."). The trial lacked evidence regarding Misook's entry to the apartment *because* the corroborating evidence presented on post-conviction was not available at the time of trial. The State's sweeping declaration that this issue was "conclusively" resolved at trial is incorrect and circular.

The State also invites this Court to decide on Michelle and Dawn's credibility, even

though the court below did not question it. St. Br. at 41. This contradicts well-settled precedent that the circuit court is in the best position to assess credibility. *People v. Carter*, 2021 IL App (4th) 180581, ¶78 ("We do not second-guess credibility determinations or substitute our judgment for that of the fact finder."). The State even goes so far as to claim that the circuit court concluded that Michelle and Dawn's testimony "was unreliable." St. Br. at 41 (citing C3176 V2). The page in the record the State cites contains no such finding. In fact, the circuit court *never* questioned the reliability of these witnesses. The State's reimagining of the record is wrong.

The State's brief additionally ignores much of McNeil's argument. For example, the State does not dispute that Don Wang's out-of-court statements that contradict Michelle and Dawn's testimony were ambiguous and equivocal at best. *See* Op. Br. at 31-32.

The State ultimately presents only one real argument in support of the circuit court's holding on this issue. As the State's brief makes plain, the only way for this Court to uphold the circuit court's denial of post-conviction relief is for it to make two findings that are squarely contradicted by precedent: first, the Court must find that circuit courts are forbidden from considering the role of newly-discovered evidence on pretrial proceedings that fundamentally shape the evidence presented at a subsequent trial; and second, the Court must then find that a hypothetical assessment of trial admissibility is a valid basis for denying post-conviction relief in the face of newly-discovered, material, non-cumulative, and otherwise sufficiently conclusive evidence of innocence.

As to the first issue, the State contends that consideration of Misook's culpability is barred by *res judicata*. For this, the State cites *People v. Ligon*. St. Br. at 22. However, *Ligon* is silent on this issue. All *Ligon* holds in this regard is the familiar proposition that

post-conviction "is a collateral attack on the prior conviction" and "any issues considered by the court on direct appeal are barred by the doctrine of *res judicata*[.]" 239 Ill. 2d 94, 103 (2010). This in no way contradicts the bedrock principle of post-conviction law that "[f]undamental fairness requires that *res judicata* be relaxed, permitting re-examination of a claim where a defendant presents substantial new evidence." *People v. Johnson*, 2024 IL App (1st) 220419, ¶143. Contrary to the State's position, courts routinely consider how newly-discovered evidence might affect the resolution of pretrial matters. Op. Br. at 25-26 (collecting cases). For example, in *Patterson*, the Supreme Court explicitly held that *res judicata* is relaxed in the face of new evidence potentially affecting the outcome of a pretrial motion to suppress. *People v. Patterson*, 192 Ill. 2d 93, 139 (2000).

Factual developments that take place on post-conviction might alter the outcome of pretrial proceedings and, thereafter, the trial itself. Confessions might be suppressed the second time around in light of new evidence. *Patterson*, 192 Ill. 2d 93, 145 (postconviction evidence relevant to officer's "credibility at the suppression hearing"); *People v. Plummer*, 2021 IL App (1st) 200299, ¶105 (post-conviction evidence "could have changed the result of the motion to suppress if known"). So too, evidence that was suppressed the first time around regarding an alternate offender might be admitted the second time around in the face of newly-discovered evidence. The State's contention that postconviction courts should ignore pretrial proceedings is contradicted by precedent.

This Court's inquiry can and should end here. The circuit court erred in refusing to consider how the proffered evidence would likely alter the outcome of the pretrial hearing and, thereafter, the trial itself. That legal error necessitates reversal. However, to the extent this Court agrees with the State that pretrial adjudications are beyond the scope of what a

court may consider in postconviction proceedings, the question of trial admissibility relied upon by the circuit court becomes relevant. Binding Illinois Supreme Court precedent requires reversal of the circuit court on this score as well.

Trial admissibility questions are to be resolved *after* a new trial is ordered and are not a proper consideration in the post-conviction context. Op. Br. at 30; *Robinson*, 2020 IL 123849, ¶81. The State contends that this Court need not follow *Robinson*, but bases that contention on an incorrect statement of what *Robinson* held and what the State calls "logic." As to the first, the State claims that all *Robinson* held was that hearsay affidavits can be considered "without needing to find that the affidavits satisfied any sort of trustworthiness-reliability criteria necessary for their admission at trial." St. Br. at 43. The State cites paragraph 81 of *Robinson*, however that paragraph explicitly holds that the State's position is wrong: "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***." 2020 IL 123849, ¶81 (emphasis added). As the State's own citation confirms, the admissibility of evidence related to Misook's confession "cannot, and should not, be made until after" McNeil has overcome the hurdle of third-stage proceedings. The circuit court here erred in failing to follow this precedent.

The State further seeks to limit *Robinson*'s holding to cases at the leave to file stage of post-conviction proceedings. St. Br. at 43. The State does not, and cannot, explain how this purported limitation on *Robinson's* reach could be squared with its explicit holding that it applies to "second- and third-stage proceedings." 2020 IL 123849, ¶81.

As to the State's "logic" argument, it claims that a circuit court must be "free at the

third stage to consider whether the new evidence would ultimately be admissible at a retrial" because "being free to admit hearsay evidence at postconviction proceedings, without the court needing to consider reliability criteria" is a different question from whether that evidence is "of little value to the ultimate merits determination of an actual innocence claim." Op. Br. at 43. It is difficult to parse what the State means here. In support, the State cites paragraph 53 of this Court's opinion in *Brooks*, which simply quotes the First District's statement in *Gibson* noting that hearsay is admissible in both sentencing and post-conviction proceedings. *People v. Brooks*, 2021 IL App (4th) 200573, ¶53 (quoting *People v. Gibson*, 2018 IL App (1st) 162177, ¶139).

Although unclear the State's argument may be that trial admissibility is a valid consideration for a circuit court assessing what weight to give post-conviction evidence. However, the Supreme Court in *Robinson* held that it is not. This dispute ends there.

Admittedly, this Court in *Brooks* did explain in dicta that "any disagreement about the [trial] admissibility" as to a piece of evidence "should have been reserved for the third-stage evidentiary hearing" and reversed a second-stage dismissal that relied on trial admissibility. *Brooks*, 2021 IL App (4th) 200573, ¶61. The *Brooks* court continued, explaining that a postconviction court could, at the third stage, base a finding that the evidence deserves no weight on a determination that the evidence would be inadmissible at retrial. *Id*. Similarly, the State points to *Velasco* for a similar proposition. *People v. Velasco*, 2018 IL App (1st) 161683, ¶118. Respectfully, these holdings are contradicted by *Robinson*. However, regardless of whether *Robinson* controls, the inquiry is whether confidence in the verdict is undermined in light of *all* of the evidence, and at a new trial that would include overwhelming evidence pointing to Misook's guilt, regardless of

whether Dawn and Michelle's testimony was admitted at the new trial itself, or at the motion *in limine* pretrial hearing. That is sufficient to undermine confidence in the verdict.

Similarly unavailing is the State's citation to the unpublished, out-of-district *Griffin* decision. St. Br. at 42. In *Griffin*, the appellate court found that the circuit court did not manifestly err in considering whether hearsay affidavits regarding a third party's recantation of his trial testimony would be admissible at a new trial. *People v. Griffin*, 2024 IL App (2d) 220064-U, ¶44.[3] *Griffin* did not address *Robinson*'s contrary holding. *See id*. Moreover, *Griffin* dealt with affidavits, not in-court testimony. Additionally, *Griffin* arose in the context of recantations, which are "inherently unreliable," and therefore rendered it an "extraordinary circumstance" involving evidence of a different character than that at issue in this appeal. *Id*. ¶39 (citing *People v. Morgan*, 212 Ill. 2d 148, 155 (2005)).

D. The Totality of the Evidence Requires a New Trial

The circuit court erred where it failed to consider the collective significance of all of the evidence: the evidence already in the trial record, the evidence offered in McNeil's post-conviction petition that was rejected at the second stage (and which must therefore be taken as true), and the evidence ultimately adduced at the evidentiary hearing. The requirement that a court engage in this comprehensive review of the evidence is a bedrock principle of post-conviction law. *See* Op. Br. at 34, 37; *see also People v. Class*, 2023 IL App (1st) 200903, at ¶58 ("The fundamental problem with the trial court's analysis … is that, rather than employing the 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,

[3] The *Griffin* decision is attached to the State's brief in accordance with Rule 23.

standing alone, was sufficient to make the necessary showing of actual innocence."); *People v. Coleman*, 2013 IL 113307, at ¶96-97; *Velasco*, 2018 IL App (1st) 161683, at ¶118; *People v. Ortiz*, 385 Ill. App. 3d 1, 12 (1st Dist. 2008); *Class*, 2023 IL App (1st) 200903, at ¶56; *People v. Galvan*, 2019 IL App (1st) 170150, at ¶67; *People v. Ruddock*, 2022 IL App (1st) 173023, at ¶47; *People v. Harris*, 2021 IL App (1st) 182172, ¶57. Relying on the principle that courts have discretion to determine what evidence to admit at a postconviction hearing, the State ignores that precedent and instead critiques what it labels "defendant's attempt at creating a per se rule" that evidence "deemed insufficient" at the second stage must nevertheless be considered at the third stage. St. Br. at 23. However, the rule that a court must engage in a comprehensive analysis of *all* of the evidence is not McNeil's suggestion—it is binding law reiterated countless times by this Court and the Illinois Supreme Court. The circuit court erred when it failed to follow it.

II. MCNEIL PRESENTED ONE ACTUAL INNOCENCE CLAIM

The crux of the dispute with respect to this how many innocence claims McNeil presented is whether or not, at the second stage, it is proper for a court to redefine a petitioner's claim such that it may analyze each piece of evidence in isolation, or whether second-stage review must be comprehensive and assess the evidence collectively.

In support of the principle that this second-stage analysis must be comprehensive, McNeil cited a host of Appellate and Supreme Court precedent. *See* Op. Br. at 36-38. For its part, the State cites one unpublished opinion, which arose at the leave to file stage of post-conviction proceedings. St. Br. at 21. In *Harvell*, this Court stated that, in evaluating a motion for leave to file, "we consider each piece of evidence individually to determine whether it is sufficient to establish a colorable claim of actual innocence." *People v.*

Harvell, 2024 IL App (4th) 230152-U, ¶42.[4] The State fails to recognize that the analysis undertaken at the leave to file stage with respect to reviewing the evidence is fundamentally different than that undertaken at the second stage. *Harvell* is thus inapposite.

The State further contends that a court need not consider evidence at a third-stage evidentiary hearing where that evidence conflicts with the trial evidence. However, that notion was explicitly rejected in *Robinson*, which called the State's position "fundamentally illogical." 2020 IL 123849, ¶57 ("If the new evidence of innocence does not contradict the evidence of petitioner's guilt at trial, the filing of the successive petition would be pointless, and the purpose of the Act would be rendered meaningless"). The State couches its argument on this score in the language "positively rebutted" in order to avoid *Robinson*'s holding, but a review of what the State would deem "positively rebutted" demonstrates that this is a sleight of hand. Indeed, the State practically concedes that it is seeking to redefine "positively rebutted" to mean "conflicts with." St. Br. at 23 ("defendant's 'new evidence' most certainly conflicted and was rebutted by the record"). "Positively rebutted" means the new evidence "is affirmatively and incontestably demonstrated to be false or impossible." *Robinson*, 2020 IL 123849, ¶60; *People v. Coats*, 2021 IL App (1st) 181731, ¶36 ("irrefutably impossible"). The *Robinson* Court cited *Sanders* as an example of evidence that was "positively rebutted" by the trial record. 2020 IL 123849, ¶60. In *Sanders*, the newly-discovered evidence indicated that the murder victim had been shot once; the autopsy evidence at trial showed that he had suffered two gunshot wounds. *People v. Sanders*, 2016 IL 118123, ¶48. Here, the State contends that newly-discovered, modern scientific evidence is "positively rebutted" because it conflicts

[4] Consistent with Rule 23, a copy of *Harvell* is attached to the State's brief.

with the faulty and outdated evidence presented at trial. St. Br. at 31. None of the newly-discovered evidence that was rejected at the second stage—and which therefore must be taken as true for purposes of this appeal—has been shown to be "irrefutably" or "incontestably" false or impossible. The State is wrong to suggest that this Court should affirm on this basis.

The State also advances the nonsensical argument that McNeil should not complain about the piecemeal treatment of his innocence claim because this approach actually benefitted him somehow. St. Br. at 24. The circuit court's failure to consider the newly-discovered evidence did not benefit McNeil. In the event there is any doubt on this score, one need look no further than the State's vociferous defense of that failure.

III. IF IT WAS PROPER TO RECAST MCNEIL'S INNOCENCE CLAIM AS MULTIPLE SUB-CLAIMS, THE CIRCUIT COURT ERRED IN DISMISSING THOSE "CLAIMS"

Even if it was proper for the lower court to review each piece of evidence supporting the actual innocence claim in a piecemeal fashion, each piece of evidence should have been advanced to a third-stage hearing.

A. Newly Discovered DNA Evidence Requires an Evidentiary Hearing

Post-conviction DNA evidence revealed that Misook's DNA was present on Christina's pillowcase and in six locations on Christina's sheet. Misook's hair was also located in the bed. The State did not dispute below that the DNA evidence is newly-discovered and the circuit court likewise held that it was new. *See* Op. Br. at 39. The State now contends, for the first time, that the DNA evidence is not newly-discovered. The State arrives at that conclusion via a series of assumptions and factual leaps that are inappropriate at the second stage. In an apparent attempt to justify this assumption-based fact-finding, the State characterizes its argument as reliant on "judicial admissions" made by McNeil.

However, these supposed "admissions" serve only to emphasize the inappropriate factfinding underlying the State's argument.

The State's argument that the evidence is not new boils down to a contention that McNeil has always known that Misook had been in that bed previously, and so confirmation that her DNA was present is not new. St. Br. at 29. The State goes so far to suggest that it "stands to reason" that Misook's DNA may have travelled with the bed from the apartment McNeil and Misook shared months earlier to McNeil's new apartment. St. Br. at 28. The State contends that some of the DNA perhaps belonged to Misook's daughter Michelle. *Id*. All of this fact-finding is inappropriate for the second stage. This DNA evidence was not available until long after McNeil's trial. There can be no legitimate question that it is newly discovered.

The circuit court did not conclude that the evidence was immaterial. A15-17. DNA evidence putting Misook at the crime scene is the precise type of probative evidence the original trial court said was lacking. R738, 844. Nevertheless, the State contends that the DNA evidence is immaterial for two reasons. First, the State says it is not material in light of the reasons it is not new. St. Br. at 28-29. That issue is addressed above. Second, the State contends the evidence does not indicate *when* Misook's DNA was deposited in the bed. St. Br. at 29. The State thus invites this Court to engage in improper second-stage fact-finding. More fundamentally, the State's line of reasoning on this score is based on a misapprehension of what "materiality" means. Material evidence is relevant and probative. *Robinson*, 2020 IL 123849, ¶47. The DNA obviously is. The State would have the Court redefine materiality to resurrect the overruled definition of the conclusiveness prong that required total vindication. *See id*. ¶55. The fact is, this evidence is relevant and probative.

The DNA evidence also undermines confidence in the judgment of guilt sufficient to require third-stage review. Before addressing the State's arguments on this score, it is important to note that the State failed to respond to the fact that this entire analysis is inappropriate at the second stage and has therefore forfeited the issue. *See* Op. Br. at 40 (citing *People v. Dodds*, 344 Ill. App. 3d 513 (1st Dist. 2003); Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited"). A determination as to the conclusiveness of the DNA evidence relies on a host of factual questions that can only be resolved at the third stage: What is the significance of the quantity of DNA present? What does that say about when the DNA was deposited? How long does DNA persist on bedding? When was the bedding laundered and what role does that play? How significant is this DNA evidence in light of the presence of Misook's hair in the bed? How significant is the DNA in light of other newly-discovered evidence that the trial court ignored? Factual questions such as these can only be resolved at a third stage hearing. *Dodds*, 344 Ill. App. 3d at 522 ("an evidentiary hearing is necessary to determine the legal significance of the results"). Reversal is required.

The State contends that this DNA evidence does "not alter the trial evidence, which conclusively established that no one entered the bedroom through the window[.]" St. Br. at 29. This is another example of the State redefining "positively rebutted" in order to encourage the Court to reject evidence which contradicts what was presented at trial. As explained, the original trial judge specifically noted that this type of corroborating evidence was lacking and that is the reason why no evidence was introduced at trial pointing to Misook's entry into the apartment. The State's circular argument must be rejected. At minimum, an evidentiary hearing is required on the issue.

B. Newly Discovered Scientific Evidence that the State's Motive Theory Was Predicated on Junk Science Requires an Evidentiary Hearing

Although McNeil was not charged with any sexual crime, the State repeatedly told the factfinder at trial that McNeil killed Christina to cover up his alleged molestation of her. *E.g.*, R16. The trial judge relied on this evidence in rendering the guilty verdict. R1272. The only evidence of molestation came from a pathologist's now-debunked testimony. R311-16. McNeil presented expert evidence in his post-conviction petition that those findings were erroneous in light of scientific advances. Op. Br. at 42. There is no dispute in this appeal that the evidence is material and noncumulative.

In his opening brief, McNeil explains why the circuit court erred in concluding that this evidence is not new, based on an erroneous and improper second-stage conclusion that the evidence was previously available. Op. Br. at 42-43. In response, the State simply repeats the circuit court's factual assumptions and declares that the evidence was previously available. St. Br. at 30. McNeil's explanation to the contrary, which relies on well-pleaded allegations that must be taken as true at this stage, thus stands unrebutted. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited").

The new scientific evidence also undermines confidence in the judgment of guilt sufficient to warrant an evidentiary hearing. The circuit court held otherwise without providing reasoning. A13-14. The State attempts to fill that gap with a contention that this evidence "merely challenged the merit of the original forensic evidence" and that the evidence is positively rebutted by that trial testimony. St. Br. at 30-31. These contentions are contradictory. If the new evidence "challenges the merits" of the original evidence, it is not positively rebutted by it. More fundamentally, the State's attempt to minimize the new evidence as "merely challeng[ing] the merit of the original forensic evidence" fails as

a matter of law. Newly-discovered evidence that challenges the merits of the original evidence is the very nature of an actual innocence claim. *Robinson*, 2020 IL 123849, ¶57. In pointing out that this evidence challenges the merits of the old evidence, the State confirms the necessity of a third stage hearing.

As to the State's contention that the new evidence is positively rebutted by the old, the State's argument is unavailing for the reasons described above. The State's efforts to redefine "positively rebutted" as "contradicted by" must fail. Factual disputes like this must be resolved at an evidentiary hearing. *People v. Willingham*, 2020 IL App (1st) 162250, ¶ 37 ("While the affidavit conflicts with other trial testimony, it is not positively rebutted by any evidence in the record, and this is not the stage at which the court should resolve that conflict by making a credibility determination.").

C. Misook's Murder of Tyda Wang Requires an Evidentiary Hearing

The dispute regarding whether evidence of Misook's murder of Tyda Wang requires an evidentiary hearing centers on whether the evidence is material and likely to change the result on retrial. There is no dispute that it is new and noncumulative.

This evidence is material because it suggests someone else committed Christina's murder. Op. Br. at 48. In response, the State contends it is irrelevant because it does not "establish[] that" Misook committed this crime. St. Br. at 34. As an initial matter, the State is yet again conflating the materiality and conclusiveness inquiries and arguing that the evidence is immaterial because it would not prove Misook's guilt. As noted, material evidence is relevant and probative. *Robinson*, 2020 IL 123849, ¶47. Although the State claims to be disputing materiality, it is not. Its arguments relate solely to conclusiveness. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited").

In attempting to justify the circuit court's refusal to consider this evidence at an

evidentiary hearing, the State argues that it "in no way established" that Misook killed Christina and does not "establish[ ] [Misook's] identity as the 'true' perpetrator[.]" St. Br. at 34. The State's attempt to resurrect the total vindication standard was rejected in *Robinson*. 2020 IL 123849 at ¶55. It was never McNeil's burden to "establish that" Misook murdered Christina. The evidence, when considered with all of the other evidence, undermines confidence in the judgment of guilt and necessitates an evidentiary hearing.

The State further contends that the evidence does not satisfy the conclusive character prong because it would not be admissible at a retrial. St. Br. at 32. The State's own case confirms that this type of trial admissibility analysis cannot take place at the second stage. *Griffin*, 2024 IL App (2d) 220064-U, ¶ 43. Further, the State again overlooks that the evidence would surely be admissible with respect to the pretrial motion *in limine* and, thereafter, would probably change the result on retrial as factfinder would hear voluminous other evidence connecting Misook to this crime as well. *See supra* at 8-12. The evidence was sufficient to warrant consideration at an evidentiary hearing.

CONCLUSION

Barton McNeil has been incarcerated for 26 years for a crime he did not commit even though overwhelming evidence points to another offender. A new trial is required on the evidence of innocence presented at the evidentiary hearing. Alternatively, an evidentiary hearing is required on the totality of the innocence evidence.

Respectfully Submitted,

BARTON McNEIL

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

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on December 27, 2024 I caused to be filed the attached Reply Brief and Argument of Petitioner-Appellant, a copy of which is hereby served on you.

DATED: December 27, 2024 /s/ Karl Leonard
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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 December 27, 2024, I caused the foregoing Reply Brief and Argument of Petitioner-Appellant to be filed via the Court's Odyssey electronic filing system, thereby serving counsel of record.

DATED: December 27, 2024

/s/ Karl Leonard
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