No. 126682

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court of Illinois, No. 1-17-0295.
	)	
Respondent-Appellee,	)	There on appeal from the Circuit Court of Cook County, Illinois , No. 99 CR 4956.
-vs-	)	
	)	
	)	Honorable
HAROLD BLALOCK,	)	Vincent M. Gaughan,
	)	Judge Presiding.
Petitioner-Appellant.	)	

REPLY BRIEF FOR PETITIONER-APPELLANT

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ARGUMENT

I. This Court should find that Harold Blalock's successive post-conviction police torture claim made a *prima facie* showing of "cause" under 725 ILCS 5/122-1(f).

A. Under the Post Conviction Hearing Act, the "cause" test is satisfied when a successive petition's police torture claim is predicated on evidence that was not reasonably available during the initial post-conviction proceedings.

Blalock maintains that under Section 122-1(f) of the Post-Conviction Hearing Act ("the Act"), the "cause" test is satisfied when a successive petition raises a pattern-and-practice police torture claim that depends on evidence that did not exist, or which was not reasonably available, when the initial post-conviction petition was filed (Def. Br. 18-37). 725 ILCS 5/122-1(f).

The State responds that the discovery of new evidence can warrant consideration of a police torture claim, *but only* for petitioners who raised that issue in an losing first petition even if no corroborating evidence was available at that time (St. Br. 27). Yet it also argues that "the discovery of new evidence is irrelevant to the 'cause' requirement" (St. Br. 29), and that "[S]ection 122-1(f) has no application to a defendant who *did* raise the claim in a prior petition" (St. Br. 28). The State's analysis for police abuse claims is therefore incompatible with its own interpretation of Section 122-1(f). It instead tries to cobble together support for that analysis from case law addressing initial petitions and federal habeas petitions, which do not justify its illogical standard (St. Br. 19-33).

This Court should reject the State's convoluted analysis and instead read the Act's "cause" requirement consistently with its plain language and purpose, and the overwhelming weight of Illinois authority on this issue.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

(1) The Act's plain language requires post-conviction claims to be corroborated by evidence, so the prior unavailability of such evidence shows "cause."

Because Section 122-2 of the Act requires post-conviction claims to be corroborated with known evidence, the prior unavailability of supporting evidence shows "cause" under Section 122-1(f) (Def. Br. 20-21). 725 ILCS 5/122-1(f), 122-2; *see People v. Delton*, 227 Ill. 2d 247, 255 (2008) (failing to attach evidence is "fatal"). Indeed, such unavailability necessarily "impede[s]" the petitioner's "ability to raise a specific claim" that depends on that evidence. 725 ILCS 5/122-1(f).

The State contends that these statutory provisions should not be read together (St. Br. 24), but it offers no reason to depart from this Court's long-standing rules of statutory construction, which show otherwise. *See People v. Burge*, 2021 IL 125642, ¶¶ 20, 31 ("Statutes relating to the same subject must be compared and construed with reference to each other"; language must be viewed "in light of other relevant statutory provisions").

The State goes on to emphasize that Section 122-2 also allows a petitioner to "explain why" their supporting evidence was not attached to their petition (St. Br. 24, 27, 31). 725 ILCS 5/122-2. But that provision does not allow petitioners to raise uncorroborated claims. To the contrary, this Court recognizes that "the purpose of section 122-2 is to establish" that a petitioner's claims "are capable of objective or independent corroboration." *See Delton*, 227 Ill. 2d at 254. To fulfill that goal by attaching evidence or explaining its absence the petitioner must at least be able to identify the corroborating evidence or information. *Id.* (they "must set forth some facts which can be corroborated" or explain "why *those facts* are absent") (emphasis supplied).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

And it should be obvious that no petitioner could identify or explain the absence of evidence that *does not yet exist*, or which is (reasonably) *unknown* to them. Nor could an attorney locate and present such evidence on their behalf. Section 122-1(f)'s "cause" test is therefore satisfied when a claim relies on evidence that did not exist or was otherwise unknown (and not reasonably available) when the first petition was filed, because that claim was incapable of being corroborated with known information at that time (Def. Br. 20-21). The Act's plain language supports Blalock's argument.

By contrast, the State's interpretation of Section 122-1(f) would create absurd, unfair results. It argues that a police abuse claim *must* be raised in the first petition in order to present new evidence in a successive petition, but also that Section 122-1(f)'s "cause" test *prohibits* claims raised in the first petition from being presented in a successive petition, irrespective of new evidence (St. Br. 24-31). Thus, in the State's view, a police abuse claim can never show "cause" under Section 122-1(f). That consequence alone justifies rejecting its analysis. *See People v. Fort*, 2017 IL 118966, ¶ 35 (Courts must "presume that the legislature did not intend unjust consequences.").

The State's erroneous interpretation of Section 122-1(f) stems from its misguided attempt to distinguish the "factual basis" of a claim from what it calls the "proof" of that claim. *See People v. Pitsonbarger*, 205 Ill. 2d 444, 460 (2002) ("cause" satisfied if a claim's factual basis was not reasonably available). It contends that evidence of a pattern and practice of police abuse is *not* part of the "factual basis" of a pattern-and practice police abuse claim, because the petitioner's own knowledge of being abused *alone* suffices to raise that claim. The State would

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

call such evidence (merely) "the proof" for that claim (St. Br. 25-26). It cites no authority for any such distinction.

Contrary to that formulation, the Act *requires* post-conviction allegations to be supported with (known, identifiable) evidence. 725 ILCS 5/122-2. Thus, when an allegation depends on previously-unavailable evidence, that "specific claim" could not have been validly brought at a prior time. *See* 725 ILCS 5/122-1(f) (asking whether a petitioner's "ability to [previously] raise" a "specific claim" was "impeded"); *Pitsonbarger*, 205 Ill. 2d at 462 ("cause" relates to the prior ability "to raise the *specific* claim *now* asserted") (emphasis supplied).

The overwhelming weight of Illinois authority therefore recognizes that pattern-and-practice evidence *is* part of "the factual basis" of a police abuse claim and that its prior unavailability shows "cause" (Def. Br. 26) (citing cases). *Cf. People v. Wrice*, 406 Ill. App. 3d 43, 52 (1st Dist. 2010) ("[C]ause" satisfied because the petitioner "raised for the first time *the argument that the Report of the Special State's Attorney significantly corroborates* his torture claims") (emphasis altered)*, affirmed by People v. Wrice*, 2012 IL 111860, ¶ 43.

This Court should reject the State's flawed interpretation of Section 122-1(f), apply the Act's plain language and purpose, and find that the discovery of new pattern-and-practice evidence shows "cause" for a police abuse claim.

(2) The overwhelming majority of judicial authority recognizes that police torture claims supported by new evidence meet the "cause" test (*see* Def. Br. I(A)(3)).

As discussed, the State (wrongly) argues that Section 122-1(f) does not allow consideration of police abuse claims in a successive petition (St. Br. 28-29, 31). It therefore tries to stitch together support for its alternative interpretation from

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

People v. Patterson, 192 Ill. 2d 93, 139-46 (2000), *People v. Jackson*, 2021 IL 124818, ¶ 34, and *McCleskey v. Zant*, 499 U.S. 467 (1991) (St. Br. 20-31). Yet none of those cases justify its purported rule, and Illinois case law instead supports Blalock's analysis.

(a) None of the State's authority justifies its rule.

Neither *Patterson* nor *Jackson* support the State's reading of Section 122-1(f). *Patterson* was an appeal from an initial not successive petition. *Patterson*, 192 Ill. 2d at 122. It also predated *Pitsonbarger* (2002) and Section 122-1(f) (2004), where this Court and our Legislature explained that the cause-and-prejudice test applies to successive petitions. *Pitsonbarger*, 205 Ill. 2d at 460; 725 ILCS 5/122-1(f). And in *Jackson*, this Court's leave-to-file analysis and citation to *Patterson* "focus[ed] primarily on . . .prejudice[,]" not "cause." *Jackson*, 2021 IL 124818, ¶¶ 30-39. Even then, the *Jackson* Court recognized Section 122-1(f)'s "cause" test and allowed for the discovery of "new" police abuse evidence to satisfy that requirement. *Id.* ¶¶ 20-21, 31. Neither case shows that Section 122-1(f) somehow bars consideration of police abuse claims.

Nor does *Patterson*'s analysis (or *Jackson*'s citation to that case) otherwise justify the State's illogical rule that a police abuse claim can and must be raised in a first petition, irrespective of corroboration. Indeed, while the *Patterson* defendant raised that claim at trial and on direct appeal (St. Br. 26-27), this Court did *not* hold that doing so was a requirement that must be satisfied in order to present new abuse evidence in a post-conviction petition. *Patterson*, 192 Ill. 2d at 139-45. *Patterson*'s analysis instead turned on (1) the "newness" of the evidence (*i.e.*, not previously discoverable with due diligence, compare "cause"), and (2) that it was

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

material and conclusive enough to change the result on retrial (compare "prejudice"). *Id.*; *see* 725 ILCS 5/122-1(f).

In fact, this Court has applied that identical analysis to allow consideration of post-conviction claims that *were not* raised previously irrespective of prior knowledge, based on the discovery of new evidence (Def. Br. 32) (citing cases). *See People v. Robinson*, 2022 IL App (1st) 200483-U, ¶¶ 25, 27 (pattern-and-practice evidence was new, though defendant's witness coercion claim "was known to him and his trial counsel prior to trial"); *People v. Wilson*, 2022 IL App (1st) 192048, ¶¶ 68-71 (affidavit identifying another killer was new, despite defendant's knowledge of their innocence).

Thus, contrary to the State's position (St. Br. 31), *Patterson* recognizes that the discovery of new evidence warrants consideration of a police abuse claim *regardless* of whether that issue was raised previously. *See also Jackson*, 2021 IL 124818, ¶¶ 30-39 (acknowledging abuse evidence was "new"; claim not raised in first petition or at trial). That reasoning is consistent with Blalock's similar interpretation of Section 122-1(f)'s "cause" test.

McCleskey does not show otherwise. To the extent that *McCleskey* holds a federal habeas petitioner can have "a sufficient basis" to raise a constitutional claim *without* corroborating evidence, as the State suggests (St. Br. 20-22), it conflicts with Section 122-2's rule that Illinois's post-conviction petitions *must* be supported with available evidence. 725 ILCS 5/122-2. Indeed, there is no statutory habeas equivalent to Section 122-2's evidentiary requirement. *See* 28 USCA §§ 2241-2255 (West 1991, 2022). *McCleskey*'s discussion of what constitutes a "sufficient basis" to "support[ ] a claim for relief" (*McCleskey*, 499 U.S. at 497-98) is therefore inapt

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

with respect to the Act's "cause" analysis. That question must instead be answered through the lens of Section 122-2's evidentiary requirements.

Indeed, *McCleskey* is fatal to *the State's* formulation of police abuse claims under the Act. The State's proposed rule is grounded in the notion that a defendant's knowledge of being abused is by itself a sufficient basis to raise the issue, irrespective of corroboration (St. Br. 24-31). But *McCleskey* held that if there is "a sufficient basis" to raise a claim in the first petition, then the later discovery of previously-unknown evidence *cannot* establish "cause" for a successive petition (St. Br. 20-21). *McCleskey*, 499 U.S. at 497-98. *McCleskey* therefore destroys the State's argument that a defendant can and must raise a police abuse claim in their first petition, in order to present new abuse evidence in a successive petition.

The habeas claim and supporting evidence in *McCleskey* is also easily distinguished from this case. In *McCleskey*, a successive habeas petition argued that information gleaned from the defendant's own jail-cell conversations established a constitutional violation. *McCleskey*, 499 U.S. at 472-74, 497-98. Thus, the discovery of a "new" document that merely repeated the same information, from the same conversations, did not show "cause." *Id*. at 499-500.

Unlike the previously-known information underlying the claim in *McCleskey*, however, pattern-and-practice police abuse allegations (uniquely) depend on information that is generally *unknown* and not discoverable with due diligence: police behavior with *other* persons, in "usually unrelated[ ] cases." *See People v. Brandon*, 2021 IL App (1st) 172411, ¶¶ 57-58; *see* 725 ILCS 5/122-2.

Indeed, the State emphasizes *McCleskey*'s assertion that the "cause" rule is "based on the principle that [a] petitioner must conduct a reasonable and diligent

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

investigation." *McCleskey*, 499 U.S. at 498, 500-501. Yet Illinois courts recognize that "even the most diligent investigation into the defendant's own case will not reveal to him *who else* may have been abused by the same officers when they were interrogated in *their own* cases." *Brandon*, 2021 IL App (1st) 172411, ¶¶ 57-58.

Rather, "something more than ordinary defense diligence is always necessary to find pattern-and-practice evidence"; it is "usually a herculean task." *Id.*, ¶¶ 58, 61. Thus, when a successive petition depends on pattern-and-practice evidence that did not exist or which was not reasonably available when the first petition was filed, the defendant could not "by reasonable means [ ] have obtained[ ] a sufficient basis" to present that issue at that time. *McCleskey*, 499 U.S. at 498; *see* 725 ILCS 5/122-2.

None of the State's cited authority shows that a police abuse claim must be raised in the first petition, in order for new evidence to be considered in a successive petition. This Court should reject the State's argument and follow Blalock's plain language analysis.

(b) The overwhelming weight of authority supports Blalock's analysis.

The State contends that this Court's *Wrice* opinion does not apply because prosecutors "conceded the 'cause' prong" in that case (St. Br. 23-24). But the *Wrice* Court acknowledged the appellate court's holding that new evidence showed "cause" under Section 122-1(f), and asserted that "the State conceded that defendant *has satisfied* the cause prong" under those circumstances. *Wrice*, 2012 IL 111860, ¶¶ 43, 48-49 (emphasis supplied). Yet the State would now interpret Section 122-1(f) *to prohibit* the *Wrice* defendant's police abuse claims from showing "cause," irrespective of his new evidence (St. Br. 28-29). *Id.*; *see Jackson*, 2021 IL 124818,

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶¶ 30-39 (where the State did not argue that Section 122(f) precludes "cause" for police abuse claims, in a case decided last year).

The State also repeatedly cites *People v. Terry*, 2016 IL App (1st) 140555 (St. Br. 23-24, 27, 30). But *Terry* appears to recognize that "cause" *would* be established if the defendant "did not come into possession of information" until after his petition was filed. *Id.*, ¶ 35. And even if *Terry* supports the State's analysis, it is an outlier case that should not be followed (Def. Br. 26). *See also People v. Williams*, 394 Ill. Def. 3d 236, 245-46 (1st Dist. 2009) (cited by the State; rejecting "cause" for a non-abuse claim resting on *previously-available* evidence).

The State admits that Illinois appellate courts have held that new evidence establishes "cause" for police torture claims *regardless* of whether that issue was raised in the first petition (St. Br. 28-29). *See Brandon*, 2021 IL App (1st) 172411, ¶¶ 57-61, 69 (so holding; issue not raised in first petition); *People v. Dixon*, 2021 IL App (1st) 161641, ¶¶ 7, 11 (same). And while it tries to emphasize only those cases in which the petitioner previously raised a police abuse claim, none of those decisions placed any importance on that fact. Rather, they held that Section 122-1(f)'s "cause" test turned on the prior unavailability of the evidence presented in the petition (Def. Br. 26) (citing cases).[1]

This Court should similarly recognize that new pattern-and-practice evidence

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[1] The State wrongly argues that *People v. Whirl*, 2015 IL App (1st) 111483 (Def. Br. 26, 35) "has no application" here because that defendant's petition was later combined with a Torture Inquiry Relief Commission (TIRC) petition (St. Br. 29, n. 3). But *Whirl* granted relief "under the Post-Conviction Act" and expressly declined to address an "identical" claim "under the TIRC Act." *Id.* ¶ 111. And the fact remains that the defendant's successive petition advanced despite him pleading guilty, not appealing, and not raising an abuse claim in his first petition.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

shows "cause" for a police abuse claim irrespective of whether that issue was raised in the first petition.

(3) The Act's purpose also demonstrates that the discovery of previously-unavailable evidence shows "cause." (*See* Def. Br. I(A)(2)).

There is no legal, logical, or moral justification for a rule that would prohibit courts from considering a police abuse victim's corroborated petition, simply because they did not raise the issue in an earlier petition *before such corroboration existed* or was reasonably known to them.

Again, police abuse claims rely on unknown evidence of police misconduct "toward unknown individuals" in "usually unrelated[ ] cases," which generally cannot be discovered with normal diligence. *See Brandon*, 2021 IL App (1st) 172411, ¶¶ 57-61. The State's proposed rule would require petitioners to know they had to present losing, frivolous abuse claims without evidentiary support contrary to Section 122-2 on the off-chance that they may yet discover new corroboration years into the future. Punishing police abuse victims for failing to file unnecessary, doomed claims is fundamentally unfair and would reward the bad actors who keep this misconduct hidden. *Id*. ¶ 57 (they "have every incentive to remain mum, if not deny everything"); *see* Def. Br. 21-25.

Citing nothing, the State speculates that "many" defendants will have been able to support their claims with "some evidence," like "a photograph" or a "jail intake evaluation" (St. Br. 31). But even when such evidence exists, it is generally insufficient without pattern-and-practice corroboration. *See*, *e.g.*, *Wrice*, 2012 IL 111860, ¶¶ 10-11, 35, 39, 40, 41 (abuse claims denied at trial and in petitions despite paramedic *and* doctor testimony about abuse-related injuries, until defendant

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

acquired sufficient pattern-and-practice evidence); *see also United States v. Burge*, 711 F.3d 803, 806 (7th Cir. 2013) (Chicago police developed methods of "torture [ ] designed to . . leav[e] minimal marks").

The State's proposed test would also have absurd results, as it admits that it interprets Section 122-1(f) to preclude police abuse claims from ever showing "cause" (St. Br. 24-25, 28-29). And if a defendant's knowledge of being abused is by itself a sufficient basis to raise a police abuse claim, as the State maintains (St. Br. 25, 29, 31), then the prior unavailability of corroborating evidence could *never* justify relaxing procedural default for post-conviction review (*see* Def. Br. 33-34) (responding to the same argument). The State disagrees and points to *Patterson* (St. Br. 31), but that analysis shows that the prior unavailability of evidence *does* warrant consideration of a police abuse claim *irrespective* of whether it could have been previously raised directly contrary to the State's rule.

The State further complains that Blalock would allow multiple petitions "whenever new supporting evidence comes to light" (St. Br. 24). Yet it is its own proposed rule that requires petitioners to pointlessly raise uncorroborated police abuse claims, and would appear to mandate additional claims each time new evidence is discovered (*see* St. Br. 25, 31) (a petitioner must "bring his claim as soon as he is aware" of its factual basis).

As Blalock explained, however, the Act forbids petitioners from raising uncorroborated claims (Def. Br. 20-21). 725 ILCS 5/122-2. And this Court discourages "piecemeal" post-conviction litigation. *See People v. Erickson*, 183 Ill. 2d 213, 227 (1998). Defendants are therefore unlikely to sprinkle different pieces of evidence throughout multiple successive fillings, rather than waiting to accumulate sufficient

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

evidence to present the strongest possible pattern-and-practice claim in one petition (*see* Def. Br. 21-25).

Finally, this Court should reject the State's argument that the TIRC procedure justifies its analysis or substitutes for the post-conviction process (St. Br. 32-33). Unlike post-conviction courts, the Commission is not required to consider torture claims; it has "discretion." 775 ILCS 40/40 (b). Petitioners must also give up certain statutory and constitutional rights (*Id.*), and any review can be terminated if they are perceived as "uncooperative." *Id.* (g). Moreover, defendants must convince at least *five* members of the Commission that they were abused by a preponderance of the evidence, instead of one judge. *Id.* (c). If they do, their claim is referred to the circuit court for *another* review, in *another* hearing. *Id.* 40/50 (a). And regardless, TIRC rulings do not "affect the convicted person's rights to other post-conviction relief." 775 ILCS 40/55(b).

The State's illogical position finds no support in the Act or any other authority. This Court should instead find that a police abuse claim that depends on new pattern-and-practice evidence shows "cause," which reflects the Act's plain language and the overwhelming body of Illinois case law.

B. Blalock's police torture claim made a *prima facie* showing of "cause."

Blalock first alleged police abuse more than 20 years ago in a 1999 pre-trial suppression motion, and he has since gathered substantial corroborating evidence. Yet the State does not acknowledge Blalock's best evidence: TIRC database reports compiling dozens of abuse accusations against Detectives James O'Brien and John Halloran. Nor does it dispute that those reports as well as several other affidavits and decisions did not exist when Blalock filed his prior petitions (*see* Def. Br. 28).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

That alone established "cause" for Blalock's police abuse claim.

The State, though, contends that Blalock should have raised a police abuse claim in his first successive petition in 2009, based on the 2006 Report of the Special State's Attorney (St. Br. 30-31). But the "cause" test is measured by a petitioner's ability to raise a specific claim in their "*initial* post-conviction proceedings." *See* 725 ILCS 5/122-1(f) (emphasis supplied); *People v. Dupree*, 2018 IL 122307, ¶ 31 (the Act's "language . . . must be given its plain and ordinary meaning"; courts "must not . . . read into it exceptions, limitations, or conditions"). Blalock's inability to attach the 2006 Report to his initial 2003 petition therefore establishes "cause." *See Dixon*, 2021 IL App (1st) 161641, ¶¶ 7-8, 11 (post-2005 abuse articles established "cause" for initial 1995 petition, despite post-2005 petitions); *People v. Rivera*, 2020 IL App (1st) 171430 , ¶ 21, n. 2 (measuring "cause" from initial, not successive, petition).[2]

The State notes that some of Blalock's other supporting evidence "predate[d]" his first petition (St. Br. 30). As Blalock explained, however, this evidence was still "not reasonably available" to him and should be considered alongside his indisputably new evidence (Def. Br. 28-30). The State does not acknowledge or respond to any part of that argument, including that:

- Blalock's pleadings that the officers' misconduct "was not widely or publicly known," and that his evidence was "unavailable" and "newly discovered"

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[2] The 2006 Report was not also not reasonably available to Blalock (*see infra*),nor was it sufficient pattern-and-practice evidence by itself. It did not mention O'Brien, and merely listed Halloran as a subpoenaed officer. Thus, it only "show[ed] that O'Brien and Halloran worked at Area 3" with Burge and other detectives (St. Br. 31) when cross-referenced with "Blalock's other post-conviction evidence" which was not known or reasonably available to him. It only "buttresses" or provides "additional support" to his new evidence (*see* Def. Br. 45).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

must be construed liberally in his favor and taken as true (Def. Br. 28-29);

- Illinois authority allows consideration of "new" evidence even if some other evidence predated the trial or a prior petition (Def. Br. 29-30, 32, 35-36);

- Illinois authority recognizes that pre-existing pattern-and-practice evidence can be considered "new" because it is unreasonable to expect even attorneys to uncover evidence that *other* people were abused in *unrelated* cases (Def. Br. 29-30, *see* 21-25). *See People v. Tyler*, 2015 IL App (1st) 123470, ¶162 (relaxing procedural default for abuse claims against the same officers, relying on nearly identical pre-existing evidence); *see also Brandon*, 2021 IL App (1st) 172411, ¶¶ 57-61, 66 (citing *Tyler*); and that

- *Patterson* held that pre-existing evidence of police abuse can "be considered new" for post-conviction purposes if can be connected to "new" evidence, to show a pattern and practice of abuse. *Patterson*, 192 Ill. 2d at 140.

The State's failure to "respond or address" Blalock's arguments on any of these points "essentially concede[s] these issues on appeal." *See In re Deborah S.*, 2015 IL (1st) 123596, ¶ 27. This Court should reject the State's contentions and find that Blalock's police torture claims made a *prima facie* showing of "cause."

II. This Court should find that Blalock made a *prima facie* case of "prejudice" under 725 ILCS 5/122-1(f).

The State does not deny that Blalock's petition and evidence made a *prima facie* showing of prejudice. It instead argues only that the trial record "affirmatively rebut[s]" Blalock's police abuse allegations (St. Br. 33-38). That contention misconstrues the record and ignores Illinois law.

The State erroneously contends that Blalock's written statement to Assistant State's Attorney Clarissa Palermo had nothing to do with police abuse (St. Br. 35). To the contrary, Blalock's affidavit alleged that Halloran and O'Brien subjected him to various forms of physical harm. At one point, while Halloran was beating

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

Blalock, he threatened to charge Blalock's brother with a crime.[3] Blalock then agreed to provide a "false statement" rather than continue with his denials. After that, O'Brien told Blalock what to say to Palermo and Detective Murray for his written statement (C. 128-31).

The record demonstrates that O'Brien informed Palermo about Blalock's (coerced) story before she took down Blalock's written statement. Indeed, O'Brien claimed that Blalock made an inculpatory statement to him (TR. E19-20), and both he and Palermo testified that they spoke about Blalock before Palermo took down his written statement (TR. E21, 85-86).

The record also shows that Palermo then refused to accept any statement from Blalock that differed from the coerced story she was told he gave to O'Brien. Blalock repeatedly tried to tell Palermo and Detective Murray he acted in self-defense, but they cut him off, refused to listen, and called him a liar (R. 242, 245). They did not tell Blalock exactly what to say, but they would only listen to "the story they wanted to hear" (TR. E243, 244; C. 131). They kept redirecting Blalock back to O'Brien's story by refusing to accept his self-defense account and emphasizing Tara Coleman's alleged statements (C. 131; TR. E242-44) (They "kept coming back to repeat the issue[,]" and were "trying to get [him] down to pursue the story.").[4]

Blalock explained that he eventually gave up and went "along with" a "made up" story (TR. E244-45) the same coerced story O'Brien primed him (and Palermo)

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[3] Blalock's brother was present during an unrelated shooting (TR. E72, 77).

[4] O'Brien had also elicited Coleman's statement, and was present when Palermo took her written statement, before Palermo spoke to Blalock (TR. E25-32, 85-86, 88). Coleman later recanted at trial (*see* Def. Br. 5), testifying that officers "stuck [her] with pens" during her interrogation (Supp. TR. 128-31).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

with (C. 131; R. 85-86). His trial testimony was therefore consistent with his abuse allegations. *People v. Sanders*, 2016 IL 118123, ¶ 31 (post-conviction pleadings must be liberally construed in the petitioner's favor).

The State nonetheless points to a single question at trial, and Blalock's two-word answer: "But no one ever threatened you to say anything in the statement, correct?", "No, sir" (TR. E245; St. Br. 14, 35). It argues that Blalock thus "explicitly testified at trial that he was not abused for the purposes of obtaining his statement" (St. Br. 35). That contention is also meritless, for at least five reasons.

First, the record does not establish that Blalock's negative answer "No, sir" was an affirmative response to the prosecutor's question (*e.g.*, "Yes, sir."). It is just as likely that Blalock meant to convey that *he disagreed* that "no one threatened him to say anything in the statement"(TR. E245). The prosecutor did not follow up to clarify that answer.

Second, Blalock's answer may have related only to Palermo and Murray's conduct. Indeed, in the five pages of transcript preceding that inquiry, every one of the prosecutor's 30-plus questions pertained to Blalock's interaction with Palermo and Murray when they took his written statement (TR. E240-45). He therefore could have understood the prosecutor's question ("no one ever threatened you to say anything in the statement") to ask whether *Palermo or Murray* had threatened him about his written statement. If so, his answer did not "positively rebut" his physical abuse claims against Halloran and O'Brien.

Third, the prosecutor did not ask Blalock about physical abuse, the crux of his post-conviction claim. He instead asked a very specific question about whether Blalock was "threatened" to "say anything in the statement" (TR. E245). That

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

referred to *a verbal* act; or at the very least, Blalock could have reasonably interpreted it that way. *See* Cambridge Dictionary Website ("Threaten") ("*to tell someone* that you will kill them or hurt them or cause problems if they do not do what you want").[5] Blalock's answer therefore did not "positively rebut" his physical abuse claims for that reason, as well (*see* C. 36, 126-31).

Fourth, if Blalock answered that he was not threatened to "make him say any part of his statement" (St. Br. 35; TR. E245), that also fits with his post-conviction claims. To the extent that his affidavit suggests that O'Brien and Halloran made threats of harm (*in addition to* physically abusing him), none of those threats were tied to him making any particular assertion in his written statement (C. 126-131). Rather, O'Brien first told him what to say *after* he had agreed to give a "false statement" (C. 131).

Fifth, the prosecutor asked whether someone "threatened you," referring to Blalock (TR. E245). Blalock's affidavit said he agreed to give a false statement when Halloran, while beating him, "threatened to charge his brother" with a crime (C. 130) (cleaned up). Blalock's answer is therefore also consistent with his abuse claims in that context.

Given these plausible readings of Blalock's testimony, it was not "clear from the trial record" that his vague two-word answer to one question "affirmatively and incontestably demonstrated" that his physical abuse claims against O'Brien and Halloran were "false or impossible." *Robinson*, 2020 IL 123849, ¶ 60; *Sanders*, 2016 IL 118123, ¶ 31 (requiring a liberal construction in the petitioner's favor).

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[5] https://dictionary.cambridge.org/us/dictionary/english/threaten (emphasis supplied)

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

This Court should reject that argument.[6]

The State alternatively asserts that Blalock did not testify about police abuse at trial (St. Br. 35-37). But his *silence* on that subject necessarily cannot "positively" or "affirmatively" prove his claim was "false or impossible." *Robinson*, 2020 IL 123849, ¶ 60. And in any event, Blalock's affidavit explained that he followed counsel's advice not to present such evidence (C. 131; Def. Br. 51-52) not that he "lied" about abuse (*see* St. Br. 35).

To that point, despite the State's argument, it is not clear that Blalock's affidavit's assertion that counsel withdrew his abuse testimony related to the suppression hearing rather than his trial (St. Br. 35-36; C. 131) (after he told counsel about the abuse, counsel "filed a motion to suppress and later withdrew [his] testimony"). *See Robinson*, 2020 IL 123849, ¶ 61 (factual disputes must be resolved at an evidentiary hearing).

Nor does it really matter. According to Blalock's affidavit, counsel told him not to testify about police abuse (at some point), and advised that "all of his research" showed it would be "impossible" to prove that abuse without corroborating evidence (C. 131). Taken as true and liberally construed in his favor, that advice explains why Blalock did not volunteer police abuse testimony at trial (*see* Def. Br. 51, n. 7). *See Sanders*, 2016 IL 118123, ¶ 31.

Also, that Blalock raised a police abuse claim in his 1999 suppression motion

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[6] *Robinson*'s definition of "positively rebutted by the record" is not somehow limited to innocence issues, as the State insinuates (St. Br. 36). Neither this Court nor the appellate courts have recognized that limitation, nor is there any justifiable basis for it. *See*, *e.g.*, *People v. Martinez*, 2021 IL App (1st) 190490, ¶¶ 60, 78-79 (applying *Robinson* to a coerced witness claim); *People v. Coats*, 2021 IL App (1st) 181731, ¶ 36 (same, ineffectiveness for failing to call a witness); *People v. Triplett*, 2021 IL App (1st) 180546-U, ¶ 43 (same).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

demonstrated that the record *corroborated* his post-conviction allegations (TC. 86-87). Considering that fact alongside the affidavit's explanation for why Blalock did not testify about police abuse at trial, the record does not "positively rebut" his claims for that reason, as well. *Robinson*, 2020 IL 123849, ¶ 60.

One of the State's cited cases provides a helpful comparison (St. Br. 34). In *People v. Deloney*, 341 Ill. Def. 3d 621, 628-29 (1st Dist. 2003), the defendant's post-conviction petition alleged that "Detectives O'Brien, McKay, and McWeeney" physically abused him.[7] At trial, however, the defendant had denied knowing "the names of the detectives that were hitting him." He also specified that officers "O'Brien," "McWeeney," and "Ptak" did not hit him, and said that no one who testified at trial "or on [his] motions" had ever "laid a hand on" him. *Id*. Because "the only officers named by defendant in his petition" had been "those whom he specifically exculpated at trial," the court found that the record "directly contradicted" his claim. *Id*.

Here, by contrast, the prosecutor asked no specific questions about Blalock being physically abused by any particular officer. So unlike *Deloney*, Blalock did not "specifically and explicitly state[ ] that none of th[e] . . . named officers had beaten him." *See People v. Almodovar*, 2013 IL App (1st) 101476, ¶ 71 (distinguishing *Deloney*). Rather, as detailed above, Blalock's answer to one question about being "threatened to say anything in the statement" had several possible meanings that were each compatible with his abuse allegations.

This case is therefore also nothing like decisions recognizing that a trial

[7] "McKay" was likely a mistaken reference to a prosecutor. *Id*. at 628, n. 2.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

court gave certain admonishments, despite defendants' contrary claims (St. Br. 33-34) (citing *Knapp*, *Boykins*, *Rogers*, *Brooks*, *Arbuckle*). *See also Escamilla v. Jungwirth*, 426 F. 3d 868, 870 (7th Cir. 2005) (petitioner's testimony that he drove the car used in a murder rebutted his later alibi claim); *People v. Mabrey*, 2016 IL App (1st) 141359, ¶ 22 (pretrial assertion that defendant was "in the vicinity" of the scene rebutted later claim that he was "nowhere near the scene").

Thus, contrary to the State's contention, the record here does not "positively rebut" Blalock's police abuse claims against O'Brien and Halloran. To the extent that Blalock's postconviction pleadings might otherwise conflict with the record or raise some factual question, those matters can only be resolved at an evidentiary hearing. *Robinson*, 2020 IL 123849, ¶¶ 57, 60-83 (a "conflict" with the record is not the same as being "positively rebutted"; new affidavits were not positively rebutted by defendant's contrary "lengthy, detailed" confession to murder); *Martinez*, 2021 IL App (1st) 190490, ¶¶ 78-79 (claim that an officer coerced witness statements was not rebutted by the witnesses' trial testimony that the officer did not pressure them); *Almodovar*, 2013 IL App (1st) 101476, ¶ 72 (similarly holding); *see also People v. Reed*, 2020 IL 124940, ¶ 38 (guilty plea does not "positively rebut" a post-conviction actual innocence claim).

Indeed, this Court has long recognized that a defendant's "inconsistent testimony as to the confession should not and cannot preclude the accused from raising [a] due process issue" alleging police coercion. *People v. Norfleet*, 29 Ill. 2d 287, 291 (1963) (quotation omitted); *see People v. Wrice*, 2012 IL 111860, ¶¶ 52-54 (defendants who deny making a statement to police at trial may still allege that the police coerced their statement). It would be similarly unfair to preclude

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

consideration of a post-conviction coerced confession claim based on trial testimony that was impelled by the improper admission of that coerced statement (Def. Br. 51) (citing *Harrison v. United States*, 392 U.S. 219, 222-23 (1968)).[8]

In sum, this Court should reject the State's argument that Blalock's police abuse claims were positively rebutted by the record, and find that his petition made a *prima facie* showing of "prejudice," which the State does not otherwise dispute.

CONCLUSION

For these reasons, Harold Blalock, petitioner-appellant, requests that this Court reverse the decision of the appellate court and find that Blalock's successive post-conviction petition made a *prima facie* showing of cause and prejudice, grant leave to file, and remand for second-stage post-conviction proceedings.

Respectfully submitted,

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[8] The State's argument that such impelled trial testimony cannot be used against a defendant on retrial (*Oregon v. Elstad*, 470 U.S. 298, 316-17 (1985)) only reinforces this point (St. Br. 37).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

CERTIFICATE OF COMPLIANCE

I certify that this reply brief conforms to the requirements of Rules 341(a) and (b). The length of this reply brief, excluding 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, and the certificate of service, is 5998 words.

/s/Christopher L. Gehrke
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SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

APPENDIX

People v. Robinson 2022 IL App (1st) 200483-U

People v. Triplett 2021 IL App (1st) 180546-U

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

2022 IL App (1st) 200483-U

FIFTH DIVISION
Order filed: January 21, 2022

No. 1-20-0483

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. LOUIS ROBINSON, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 96 CR 18502 Honorable Domenica A. Stephenson, Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held*: We reverse the circuit court's summary dismissal of the defendant's postconviction petition, finding that he stated an arguable claim of actual innocence.

¶ 2 The defendant, Louis Robinson, appeals from an order of the circuit court of Cook County summarily dismissing his petition for relief filed pursuant to the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-2 *et seq.* (West 2018)). On appeal, he contends that the circuit court erred in dismissing his petition because he stated arguable claims of actual innocence and ineffective

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

assistance of trial counsel. For the reasons that follow, we reverse and remand for second-stage proceedings under the Act.

¶ 3 The defendant was charged by indictment with, *inter alia*, two counts of first-degree murder and two counts of aggravated discharge of a firearm stemming from the June 20, 1996 drive-by shooting that killed Kelly Velez.

¶ 4 Following a 1997 bench trial, the defendant was found guilty of first-degree murder and aggravated discharge of a firearm. The evidence presented at trial established that the defendant, while driving a maroon-colored car, fired his gun at a group of people who were congregating in the parking lot of a gas station near the intersection of Kedzie and Barry. Velez, who was at the gas station meeting her boyfriend Oscar Betancourt, was shot and killed.

¶ 5 At trial, the State presented the testimony of three occurrence witnesses: Hilda Carerra, Oscar Betancourt, and Francisco Rocha. The State also presented the testimony of two Chicago Police Officers: Asvaldo Valdez and Caesar Echevarria.

¶ 6 Carerra testified that, on the night of June 20, 1996, she and Velez went to the gas station at 3100 N. Kedzie to meet Betancourt. After parking behind Betancourt in the gas station parking lot, Velez exited the car to talk to him; Carerra stayed in the car. Approximately 15 minutes later, Carerra heard gunshots and ducked down. When the shooting ended, she exited the car and saw that Velez had been shot. She testified that she heard the shots coming from the direction of Kedzie, which was in front of the gas station, but she did not see the shooter.

¶ 7 Betancourt testified that, at approximately 11 p.m. on the night in question, he drove to a gas station on Kedzie to meet Velez. He was accompanied by three friends, all of whom were members of the Maniac Latin Disciples street gang. When Velez arrived at the gas station, she parked her

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

car behind his and then exited the car to talk with him. Betancourt described the gas station and surrounding area as being well-lit. As he stood outside talking to Velez, he heard "pops," which he thought were fireworks. He turned toward Kedzie, where the sound originated, and saw a "dark black male," whom he identified as the defendant, in a maroon car "with his hand out the window shooting a gun." Betancourt turned toward Velez and noticed that she had fallen to the ground. He then looked back toward Kedzie and saw that the maroon car had stayed in place for a moment before slowly driving away. When Betancourt turned away from Kedzie, he discovered that Velez had been shot and called for help.

¶ 8 Betancourt also testified that, on June 25, 1996, he went to the Area 5 police station where a detective showed him a photo array containing six photographs depicting black males. Betancourt identified the defendant as the shooter from the photo array. Betancourt remained at the police station for the next several hours. Shortly after midnight, he viewed a lineup, and he again identified the defendant as the shooter. On cross examination, Betancourt testified that he did not know the defendant, nor had he ever seen him prior to that evening. He also denied being a member of the Maniac Latin Disciples and denied telling the police otherwise.

¶ 9 Francisco Rocha, who was inside an apartment near Kedzie and Barry when the shooting occurred, also testified. According to Rocha, at around 11:15 p.m., he heard several gunshots coming from outside his apartment. He looked out a window and saw a maroon car driving slowly on Kedzie. He saw the driver of the car "bringing his left arm in the car" as he drove away. Rocha described the driver of the car as either a "Hispanic" or "light-complected black man" who was wearing a dark colored tank top and a small medallion on a gold chain necklace. He heard a man cry out that someone had been shot and saw a young woman lying on the ground. On

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

crossexamination, Rocha testified that it was dark out and that he never saw the face of the person in the car. He also did not remember if there were other people in the car. Rocha acknowledged that he viewed a lineup about a week after the shooting and that he was unable to identify anyone from the lineup as the shooter.

¶ 10 Officer Caesar Echeverria testified that he created the photo array shown to Betancourt. Officer Echevarria stated that he was familiar with the Maniac Latin Disciples, its hierarchy, factions, and internal conflicts at the time. According to Officer Echeverria, at the time of the shooting, the Talman-Wabansia faction of the Manic Latin Disciples was in conflict with the Kedzie-Barry faction of the gang. Officer Echeverria explained that he looked at photographs of known members of the Talman-Wabansia faction because some of its members were black, as the shooter had been described. After viewing the photos, Officer Echevarria suspected that the defendant was involved in Velez's murder for the following reasons: (1) Talman-Wabansia was in open warfare with Kedzie-Barry; (2) Velez had been in Kedzie-Barry territory when she was shot; (3) sometime earlier on the same evening as Velez's murder, a man named Rogelio Barnes had been shot in Talman-Wabansia territory; and (4) the defendant, who was Barnes's cousin, was an "enforcer" in the Talman-Wabansia faction. Based on his suspicions, Officer Echevarria included the defendant's photograph in the array.

¶ 11 Officer Asvaldo Valdez testified that he arrested the defendant on June 26, 1996, after Betancourt identified him in a photo array. Officer Valdez stated that the defendant was wearing a medallion and gold jewelry when he was arrested.

¶ 12 The parties stipulated to the testimony of Assistant State's Attorney Robert Heilingoetter, who was working in the felony review unit on June 26, 1996. If called, Heilingoetter would testify that,

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

at approximately 3 a.m., he was with Chicago Police Detective Reynaldo Guevara at the Grand and Central police station. He advised the defendant of his *Miranda* rights, and the defendant agreed to give a statement. The defendant told Heilingoetter that, at approximately 10:40 p.m. on June 20, 1996, he was with his cousin, Rogelio Barnes, at 1800 North Washtenaw Avenue when Barnes was shot. After the shooting, the defendant went to put air in his car tire and then went to his grandmother's house, where he encountered Barnes's father and an individual named Beaver. The defendant, Barnes's father, and Beaver then went to St. Elizabeth's Hospital to visit Barnes. Afterwards, the defendant went to get his tire fixed before going to his girlfriend's house, where he spent the night.

¶ 13 Officer Kristine Carabello testified that, on June 20, 1996, she was assigned to investigate a shooting that occurred at 1800 North Washtenaw. As part of her investigation, she canvassed local hospitals searching for the victim. Officer Carabello first went to St. Mary's Hospital where she was approached by a black male, whom she later identified as the defendant, who told her: "My cousin is not here." Officer Carabello observed that the defendant was wearing a gold chain with a medallion in the shape of a machine gun. After confirming that the victim was not at St. Mary's Hospital, Officer Carabello went to St. Elizabeth's Hospital. There, she learned that the victim was being treated and that his name was Rogelio Barnes. While at the hospital conducting her interview with Barnes, Officer Carabello heard over the radio that there had been a shooting in the 3000 block of Kedzie. Officer Carabello testified that she did not see the defendant while she was at St. Elizabeth's. Officer Carabello also testified that, on June 25, 1996, she saw the defendant at Area 5 and that he was wearing the same gold medallion and chain he had been wearing when she saw him at St. Mary's Hospital. The State then rested.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 14 The defense presented the stipulated testimony of Detective Joseph Mohan. The parties stipulated that, if called to testify, Detective Mohan would have testified that he interviewed Betancourt in the early morning hours on June 21, 1996, and that Betancourt admitted to being a member of the Maniac Latin Disciples.

¶ 15 At the close of evidence, the circuit court found the defendant guilty of first-degree murder and aggravated discharge of a firearm. In announcing its decision, the court state that Betancourt's testimony was the "linchpin" and that it found his testimony credible. The court described the other witnesses as "creat[ing] the fabric around which Mr. Betancourt's testimony could sit." Following a sentencing hearing, the court sentenced the defendant to concurrent prison terms of 60 years for first-degree murder and 15 years for aggravated discharge of a firearm. The defendant filed a direct appeal, and this court affirmed the defendant's conviction. See *People v. Robinson*, 316 Ill. App. 3d 1292 (2000) (unpublished order under Supreme Court Rule 23).

¶ 16 On October 22, 2019, the defendant filed a *pro se* postconviction petition pursuant to the Act. In his petition, the defendant argued, *inter alia*, that his trial counsel was ineffective for failing to investigate whether detectives coerced Betancourt to falsely identify him during the lineup. According to the defendant, when it was his turn to stand up for the lineup, he heard conversations on the other side of the one-way glass window. He first heard a detective, whom he believed was Detective Guevara, ask, "is that him," to which someone else responded, "that's not him." He then heard unidentified "detectives" say the following: "[I]f you don't say that's him, we're going to give you the murder because we think they was trying to kill you. So far as we're concern[ed], you're the reason why your girlfriend is dead." The defendant told the person on the other side of the glass, "please, don't do that." Shortly thereafter, an officer came into the lineup room and told

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

the defendant he was formally under arrest. The defendant alleged that he told his trial counsel what transpired during the lineup and encouraged him to investigate the matter, but his trial counsel declined to do so because he did not believe the defendant's story.

¶ 17 The defendant explained in his petition that he was unaware of Detective Guevara's history of misconduct until he read an article from May 5, 2017, "confirming that [Detective] Guevara often used the tactics [he] used on [Bentancourt]." The defendant then met a fellow inmate, Anthony Jones, who told him that he was also a victim of Detective Guevara's misconduct and shared with the defendant "a litany of articles and other documents" regarding Detective Guevara tactics. After obtaining this information, the defendant contacted his trial counsel and told him about what he had learned. His counsel, who had since retired, apologized for not pursuing his claim when he still represented him. Counsel advised him to contact assistant public defender Harold J. Winston for assistance. The defendant contacted Winston who instructed him to file a *pro se* postconviction petition.

¶ 18 The defendant attached the following documents in support of his petition: his own signed and notarized affidavit; three pages of a Chicago Police Department Supplementary Report, dated June 21, 1996; and a copy of the letter he received from Assistant Public Defender Winston advising him to file a postconviction petition. In his affidavit, the defendant stated he attempted to obtain an affidavit from his trial counsel, but his counsel refused. He also averred that the facts alleged in his petition were "true and correct." The police report attached to the defendant's petition contained the initial statements Rocha and Betancourt provided to police. The report reflects that Rocha described the driver of the maroon car as "a M/Wh with a dark complexion or a light skinned

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

M/B," whereas Betancourt described the shooter "as a dark complected male black Hispanic in his early twenties."

¶ 19 The circuit court dismissed the defendant's postconviction petition on January 17, 2020, finding that his claims were frivolous or patently without merit. Regarding the defendant's claim that his counsel was ineffective for failing to investigate the allegations of coercion during the lineup, the court found that the defendant failed to support his claim with affidavits from the other men present during the lineup or explain the absence of said affidavits, as required by the Act. As to the defendant's more general claim that his trial counsel should have investigated Detective Guevara or other detectives for possible misconduct, the court found that, at the time he related this information to his counsel, his allegations were entirely uncorroborated, and therefore his counsel was not arguably deficient for failing to investigate them. The court also noted that it was factually and legally irrelevant whether the defendant's trial counsel subsequently apologized to the defendant for failing to investigate those matters because the reasonableness of counsel's conduct is measured from his perspective at trial, not in hindsight.

¶ 20 The court next addressed the allegations that the defendant was denied a right to a fair trial because of police misconduct. After first acknowledging the issue was not "explicitly" plead by the defendant, the court denied the claim on the grounds that the allegations were "lacking independent or objective corroboration." The court noted that the defendant did not attach the articles he allegedly read detailing Detective Guevara's abuse or an affidavit from Jones, the inmate who alleged that he was a victim of Detective Guevara's misconduct. The court also noted that the defendant failed to cite to any specific incidents that Detective Guevara is alleged to have committed in other cases; failed to show that those other instances were similar to the misconduct

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

alleged in his case; submitted no evidence that the detectives named in the petition had been present at the lineup or had interviewed Betancourt; or that he or other witnesses, including Betancourt, had ever accused the detectives, during or since trial, of coercing Betancourt into identifying the defendant as the perpitrator. This appeal followed.

¶ 21 On appeal, the defendant raises two arguments in support of his contention that the circuit court erred in summarily dismissing his petition. First, he argues that his petition stated an arguable claim of actual innocence based on newly discovered evidence of Detective Guevara's pattern and practice of coercing witnesses in identification procedures. His second argument is that his petition stated an arguable claim that his trial counsel was ineffective for failing to investigate whether Betancourt's identification was coerced. We first address whether the defendant stated an arguable claim of actual innocence.

¶ 22 The Act provides a procedural mechanism through which a defendant may assert a substantial denial of his constitutional rights in the proceedings which resulted in his conviction. 725 ILCS 5/122-1 (West 2012). At the first stage of a postconviction proceeding, the circuit court independently reviews the defendant's petition, taking the allegations as true, and determines if it is frivolous or patently without merit. *People v. Hodges*, 234 Ill. 2d 1, 10 (2009). Our supreme court has held that a petition may be summarily dismissed as frivolous or patently without merit if it has "no arguable basis either in law or in fact." *Id.* at 16. A petition lacks such an arguable basis when it is based on fanciful factual allegations or an indisputably meritless legal theory. *Id.* A legal theory that is completely contradicted by the record is indisputably meritless. *Id.* Our review of a first-stage summary dismissal is *de novo. People v. Henderson*, 2011 IL App (1st) 090923, ¶ 19. ¶

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

23 The defendant's first contention on appeal is that he stated an arguable claim of actual innocence based on newly discovered evidence of Detective Guevara's pattern of misconduct.

¶ 24 An actual innocence claim is cognizable under the Act because the conviction of an innocent person violates the due process clause of the Illinois Constitution. *People v. Washington*, 171 Ill. 2d 475, 489 (1996); see also *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009) ("The due process clause of the Illinois Constitution affords postconviction defendants the right to assert a freestanding claim of actual innocence based on newly discovered evidence."). To establish a claim of actual innocence at the first stage of postconviction proceedings, the defendant was required to show that the supporting evidence was arguably: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *People v. Robinson*, 2020 IL 123849, ¶¶ 47-48.

¶ 25 The defendant acknowledges his allegation that Betancourt was coerced into falsely identifying him was known to him and his trial counsel prior to trial; therefore, it is not newly discovered. However, he maintains that he could not raise the issue earlier because he did not have evidence to support his claim until recently when he read a May 5, 2017 article regarding Detective Guevara's prior misconduct and then met a fellow inmate who had additional articles and documents relating to Detective Guevara's misconduct. According to the defendant, this evidence should be considered newly discovered because evidence of Detective Guevara's pattern and practice of misconduct was not reasonably available to him at the time of his 1997 trial. He also contends that the evidence is material, noncumulative, and of such a conclusive character that it would probably change the result on retrial given that Bentancourt's identification was the "linchpin" to securing his conviction.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 26 At the outset, we note the State does not dispute that Detective Guevara has an extensive history of misconduct, including influencing witnesses to obtain false identifications, nor could it. See, e.g., *People v. Gomez*, 2021 IL App (1st) 192020, ¶ 58 ("This court has recognized that [Detective] Guevara has a history of influencing witnesses."). Indeed, this court recently described Detective Guevara as "a malignant blight on the Chicago Police Department and the judicial system." *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 64. Rather, the State maintains that the defendant's petition should be summarily dismissed because the newly discovered evidence of Detective Guevara's misconduct is not arguably material or so conclusive as to likely change the result on retrial. We disagree.

¶ 27 To begin, we find that the defendant's evidence is newly discovered. New evidence means it was discovered after trial and could not have been discovered earlier through the exercise of due diligence. See *People v. Burrows*, 172 Ill. 2d 169, 180 (1996). According to the defendant's postconviction petition, he related his story of overhearing Detective Guevara coercing Betancourt's identification to his trial counsel, but his counsel did not believe him and chose not to investigate the matter. This left the defendant without any means of corroborating his allegations. However, that changed when he discovered a 2017 news article detailing Detective Guevara's history of misconduct and met Jones, who provided him with additional articles and documents relating to Detective Guevara. We find that the evidence described in the defendant's postconviction petition constitutes newly discovered evidence because there is no reasonable argument that he could have come into possession of that evidence prior to his trial in 1997. See *People v. Reyes*, 369 Ill. App. 3d 1, 20 (2006) (finding that allegations against Detective Guevara could not have been discovered through due diligence prior to the defendant's 2000 trial.).

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 28 We next consider whether the evidence is material, which means the evidence is relevant and probative of the defendant's innocence. *People v. Smith*, 177 Ill. 2d 53, 82-83 (1997). Here, we conclude that the evidence is material. As previously mentioned, Detective Guevara's history of misconduct includes allegations that he improperly influenced identifying witnesses. See *Martinez*, 2021 IL App (1st) 190490, ¶ 67 (detailing allegations that Detective Guevara told a witness that the offenders were in the lineup prior to her viewing the lineup and that the witness "believed she would be arrested if she did not identify someone.") At the defendant's trial, the only evidence linking him to Velez's murder was Betancourt's identification of him as the perpetrator. Indeed, the circuit court described Betancourt's testimony as the "linchpin" to securing the defendant's conviction. Certainly, evidence that Betancourt's identification was coerced by a detective with a history of coercing witnesses to obtain convictions would be arguably relevant and probative of the defendant's innocence.

¶ 29 The third element when considering evidence of actual innocence is whether the evidence is noncumulative, meaning that the evidence adds to what the trier of fact heard. *People v. Molstad*, 101 Ill. 2d 128, 135 (1984). Here, there can be no question that the trier of fact did not hear any evidence similar to what the defendant described in his postconviction petition. The defendant's theory at trial was that he had been misidentified, not that the police had coerced Betancourt to identify him. Consequently, the evidence is noncumulative.

¶ 30 We turn to the final element of an actual innocence claim whether it is arguable that the proposed new evidence, when considered along with the trial evidence, would probably lead to a different result on retrial. *People v. Coleman*, 2013 IL 113307, ¶ 96. At this stage, the defendant's evidence "need not be entirely dispositive" but he must "present evidence that places the trial

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

evidence in a different light and undermines the court's confidence in the judgment of guilt." *People v. Robinson*, 2020 IL 123849, ¶ 56. Here, we find that the defendant's evidence is arguably so conclusive that it could lead to a different result on retrial. As mentioned, the only evidence connecting the defendant to Velez's murder was Betancourt's identification. Moreover, Rocha's description of the shooter (a Hispanic of light-complected black male), which is the only other description of the shooter presented at trial, did not match the defendant, a dark-complected black male. According to the defendant's postconviction petition, he overheard Betancourt initially refuse to identify him as the perpetrator, followed by detectives, one of whom he identified as Detective Guevara, threatening to charge Betancourt with Velez's murder if he did not identify him (the defendant) as the perpetrator. Taking this allegation as true, as we must at this stage of the proceedings, and given Detective Guevara's documented history of engaging in precisely these types of tactics to obtain convictions, it is more than arguable that this evidence could place the evidence at trial in a different light. Accordingly, we conclude that the defendant has met the required threshold for surviving summary dismissal on his claim of actual innocence.

¶ 31 The State nevertheless contends that the defendant failed to show Detective Guevara was present during his lineup. However, at the first stage of postconviction proceedings, we must accept all allegations in the defendant's petition as true unless rebutted by the record. See *People v. Sanders*, 2016 IL 118123, ¶ 42. Here, there is nothing in the record to rebut the allegation that Detective Guevara was present during the lineup. Moreover, the record contains several references to Detective Guevara, including that he was the arresting detective and that he was "with" ASA Heilingoetter at the Grand and Central police station when the defendant gave Heilingoetter his statement. Notably, the lineup in question occurred shortly after the defendant was arrested.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

Accordingly, we must accept as true the defendant's allegation that Detective Guevara was present during the lineup.

¶ 32 For these reasons, we reverse the judgment of the circuit court of Cook County and remand this case with instructions to docket the petition for second-stage proceedings pursuant to the Act. Based on our holding, we need not consider whether the defendant's petition contained an arguable claim of ineffective assistance of trial counsel.

¶ 33 Reversed and remanded with directions.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

2021 IL App (1st) 180546-U

No. 1-18-0546

Order filed March 25, 2021

Fourth Division

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 03 CR 274
	)	
JULIUS TRIPLETT,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justices Reyes and Martin concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in dismissing defendant's postconviction petition without an evidentiary hearing where, accepting as true defendant's allegations and supporting affidavits, his petition made a substantial showing of ineffective assistance of trial counsel and actual innocence.

¶ 2 At a bench trial in 2004, defendant Julius Triplett was convicted of first degree murder for the shooting death of Michael Pierre Haywood. The State's case rested on the custodial statements and grand jury testimony of Germain Johnson and Keith Wilson implicating Triplett as the shooter.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

When they recanted their out-of-court statements at trial, the State introduced them as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2004)). No other evidence connected Triplett to the shooting.

¶ 3 After we affirmed his conviction on direct appeal, Triplett filed a *pro se* petition for post-conviction relief. As later amended by appointed counsel, the petition alleged that Triplett's trial counsel was ineffective for failing to interview and call Triplett's sister, Maisha Hall, as an alibi witness and asserted a claim of actual innocence based on newly discovered evidence. In support of his claims, Triplett submitted affidavits from Hall and a fellow inmate named Robert Robinson. Hall attested that Triplett was home with her when the shooting allegedly occurred, and Robinson attested that at the same time he was with Johnson at a different location. On the State's motion, the trial court dismissed the petition without an evidentiary hearing.

¶ 4 On appeal, Triplett contends that his petition and supporting affidavits made a substantial showing of ineffective assistance of counsel and actual innocence. He asks us to reverse the trial court's order dismissing his petition and remand for an evidentiary hearing on his claims. For the following reasons, we agree that Triplett is entitled to an evidentiary hearing on his claims and thus reverse the trial court's judgment.

¶ 5 I. BACKGROUND

¶ 6 On the morning of November 5, 2002, Haywood's body was discovered in a vacant lot at the corner of West Lexington Street and South Washtenaw Avenue in Chicago. The State's theory was that, on the prior evening, Haywood was standing in front of an apartment building two lots

[1] In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

west of the vacant lot when Triplett, who had driven to the area with Johnson and Wilson, got out of his car, walked toward Haywood, and shot him to death as he tried to climb over a fence into the vacant lot.

¶ 7 Alicia Andrews and Victoria Washington, along with several other family members, lived in the two-flat apartment building at 2708 West Lexington Street, two lots west of the vacant lot. An adjoining, abandoned building sat between their building and the vacant lot. The front yard of the abandoned building was separated from the vacant lot by a metal fence. At trial, Andrews and Washington testified that they heard multiple gunshots outside their apartment on November 4, 2002, between 8:30 and 9 p.m. After the shooting ended, Andrews, Washington, and other family members went outside. Washington testified that they did so immediately; Andrews said that they waited 30 minutes. Andrews testified that she walked up to the fence separating the front yard of the abandoned building from the vacant lot and looked into but did not enter the vacant lot. Washington testified that she and other family members looked through the vacant lot, including the area near the fence. Both women testified that they saw nothing unusual, although Andrews testified that it was dark at the time and both testified that not all the streetlights in the area were working. Both testified that it was common to hear gunshots in their neighborhood.

¶ 8 Around 11:30 p.m., Haywood's friend, Jerome Cooper, informed Haywood's mother, Edna Gandia, that there had been a shooting and asked her if Haywood made it home. Gandia testified that she and Cooper searched for Haywood for two hours but did not find him. Gandia said they drove by the vacant lot at Lexington and Washtenaw several times but did not get out of the car. She too testified that there was not much lighting in the area at the time.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 9 Around 9:00 the next morning, when Washington and her brother left for school, they saw Haywood's body in the vacant lot and called the police. Detective Terrence O'Connor, who arrived a short time later, testified that Haywood's body was about 10 feet north of the sidewalk and one or two feet from the fence in the vacant lot, which he described as strewn with debris. Detective O'Connor testified that some grass in the vacant lot was knee-length but that none of the overgrown grass was in the area immediately next to where Haywood's body was found. The detective stated that if a person were standing in front of the abandoned building and looking directly at the location where the body was found, the overgrown grass would not obstruct their view. But he also opined that a person could miss the body if they were just passing by.

¶ 10 Dr. Joseph Cogan, the medical examiner, identified eight through-and-through gunshot wounds to Haywood's body and concluded that Haywood died of multiple gunshot wounds. Dr. Cogan testified that three shots entered the front of Haywood's torso and traveled from the right side to the left, striking his heart, lungs, and other internal organs. The shot that struck Haywood's heart entered at an upward angle, while the other two shots to his torso entered either horizontally or at a slightly downward angle. Two shots entered Haywood's right and left thighs and exited his right and left buttocks, respectively, traveling upward. Two more shots went through Haywood's upper right leg. Although the autopsy indicated that these shots followed a downward trajectory, Dr. Cogan opined that the shots could have entered Haywood's body at an upward angle if his right leg was raised toward his torso while trying to climb a fence. The final shot that Dr. Cogan identified traveled through Haywood's right elbow. Dr. Cogan opined that Haywood was unlikely to have survived more than 30 minutes after the gunshot wound to his chest and that his body had not been moved after he died.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 11 Two weeks after the shooting, Johnson and Wilson were questioned at the police station by a detective and a prosecutor. Both men made (and signed) statements that were memorialized in writing by Assistant State's Attorney (ASA) Jennifer Walker. Johnson stated that he got into a car with Wilson and Triplett on November 4, 2002, around 8 or 8:30 p.m., and began to drive around. Johnson drove to the home of a girl he knew, where the men stopped for a short period of time before continuing to drive around. Triplett then told Johnson to drive to "Pookie Slim's block" on Lexington Street between Washtenaw and California Avenues. When they arrived, Triplett told Johnson to pull over. Triplett got out of the car, telling Johnson and Wilson that he was going to talk to "Big Baby." Triplett walked over to Big Baby, while Pookie Slim came to the car and talked to Wilson. About five minutes later, Triplett returned to the car and the men drove away.

¶ 12 At Triplett's direction, Johnson dropped Triplett off near his home, drove around for a short period, and returned to pick Triplett up. The men stopped briefly at the home of the girl they had visited earlier and then continued to drive around. Triplett instructed Johnson to drive back to Pookie Slim's location. At Triplett's direction, Johnson pulled over at Lexington and Washtenaw. Triplett got out of the car, saying he needed to talk to Big Baby. As he did so, Triplett put the hood of his sweatshirt over his head. Johnson saw Haywood knocking on someone's door. Then, all of a sudden, Johnson heard a loud gunshot. Johnson and Wilson ducked down in the car, and Johnson heard several more gunshots. After the gunshots stopped, Triplett got back in the car, and Johnson drove away. As they drove, Johnson saw the handle of a gun sticking out of the front pocket of Triplett's hoodie. Eventually, Johnson and Wilson got out of the car, and Triplett drove away. Two weeks later, Johnson spoke with Triplett on the phone. Triplett told Johnson that Wilson was "bogus for tricking on" him, and Johnson told Triplett that he was "bogus for shooting" Haywood.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 13 Wilson likewise stated that he, Johnson, and Triplett were riding in Triplett's car around 8 or 8:30 p.m. on November 4, 2002. Johnson drove to Pookie Slim's location on Lexington, where Wilson saw several people, including Pookie Slim, Big Baby, and Haywood. Triplett rolled down his window and called out to Haywood, saying he wanted to talk to him. When Haywood ignored Triplett, Triplett walked over to Big Baby and talked to him instead. Pookie Slim then came to the car and talked to Wilson. Triplett was frowning when he returned to the car about five minutes later. Johnson drove away and, at Triplett's direction, let Triplett out by his home. When Triplett returned to the car, Johnson drove away again.

¶ 14 Triplett then told Johnson to drive back to Pookie Slim's location. Once there, Triplett put his hood on and got out of the car, saying he was going to talk to Big Baby. When Haywood, who was standing on a porch at that location, saw Triplett, he jumped to the porch next door, trying to get away. He then began climbing the fence near the vacant lot. When Haywood was at the top of the fence, Wilson saw Triplett pull a gun from the front pocket of his hoodie and fire it. Wilson then saw Haywood fall. Wilson ducked down in the car and heard several more gunshots. After the gunshots ceased, Triplett got back in the car, and Johnson drove off. Wilson and Johnson got out of the car a short time later, and Triplett drove away. Several days later, Wilson saw Triplett carrying the same gun he had used to shoot Haywood. Triplett told Wilson he had "f***ed up" and "shouldn't have done dude like that."

¶ 15 Shortly after making their statements, Johnson and Wilson testified before a grand jury. In their testimony, Johnson and Wilson described a version of events substantially similar to what they had recounted in their statements. One notable exception was that Wilson testified he saw Haywood get shot and fall while on the second porch rather than when climbing the fence.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

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¶ 16 At trial, Johnson and Wilson recanted their prior statements and grand jury testimony.[2] Johnson testified that Wilson and Triplett approached him in a car on November 4, 2002, between 5 and 6 p.m. He got into the car and began to drive. After stopping at the home of a girl he knew, Johnson drove to the 2700 block of West Lexington, where he saw Big Baby and Pookie Slim. Triplett got out to talk to Big Baby while Johnson and Wilson remained in the car. After five minutes, Triplett returned to the car, and Johnson drove away. Johnson then drove to Triplett's house, where Triplett got out. After Johnson circled the block, Triplett got back in the car with some food. They then continued to drive around.

¶ 17 Johnson testified that, between 8:30 and 9 p.m., they returned to the 2700 block of West Lexington to buy marijuana. When they arrived, Johnson saw Big Baby and Haywood. Haywood was on a porch, going into a house. Big Baby called out to them, and Triplett got out of the car to see what he wanted. Johnson testified that Triplett was wearing a jacket but did not have anything on his head. Johnson testified that, after Triplett got back in the car, he heard multiple gunshots. He then drove away. Johnson denied seeing Triplett with a gun after Triplett got back in the car. Two weeks later, Johnson spoke with Triplett by phone, but Johnson denied that Triplett said anything about Wilson.

¶ 18 Johnson acknowledged speaking with ASA Walker and a detective at the police station on November 18, 2002. He acknowledged that ASA Walker wrote out his statement and read it to him, and that he then signed it. After reviewing the written statement, however, Johnson claimed to recognize only parts of it. He denied telling ASA Walker that Triplett was wearing a hood on

[2] At the time of trial, Johnson was incarcerated on weapon- and drug-related convictions and facing a pending drug-conspiracy charge.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

his head when he got out of the car at Lexington and Washtenaw; that Triplett was outside the car when the shots were fired; and that he saw the handle of a gun sticking out of the front pocket of Triplett's hoodie as they drove away. Johnson also denied telling ASA Walker that, in a phone call after the shooting, Triplett told him that Wilson was "bogus for tricking on" him, and that he told Triplett that he was "bogus for shooting" Haywood.

¶ 19 Johnson also acknowledged testifying before the grand jury. He claimed, however, that he could not recall whether he agreed to tell the truth during his grand jury testimony because he had been drinking before arriving at the police station the prior evening. (He did not deny telling ASA Walker that he was not under the influence of drugs or alcohol, but he claimed that he thought he was "supposed" to say that.) Johnson said he could not recall testifying that Triplett put his hood up when he got out of the car; that Triplett got back in the car after the gunshots stopped; and that he saw a gun in the front pocket of Triplett's hoodie after Triplett got back in the car. Johnson also said he could not recall testifying about his phone call with Triplett two weeks after the shooting.

¶ 20 Wilson testified that he was at home at 9 p.m. on November 4, 2002. He testified that, earlier that evening, he had been riding around in a car with Johnson and Triplett. At some point, they drove to the area of Lexington and Washtenaw, where Wilson saw Big Baby, Pookie Slim, and Haywood, as well as other people he did not know. Wilson testified that no one got out of the car. Instead, while seated in the car, Wilson spoke with Pookie Slim and Triplett spoke with Big Baby. After a minute or two, they drove away. They then went to Johnson's girlfriend's house and talked to her for a while. After that, Wilson testified, he was dropped off at home. He denied going back to Lexington and Washtenaw a second time that evening.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 21 Wilson acknowledged that he spoke with ASA Walker and a detective at the police station in the early hours of November 19, 2002. He admitted that he read and signed the written statement that ASA Walker prepared during their conversation, but he denied making many of the statements that ASA Walker attributed to him. He denied stating that Triplett called out to Haywood and that Haywood ignored him; that Triplett got out of the car, talked to Big Baby, and returned to the car frowning; and that Triplett then told Johnson to drive to Triplett's home. He denied stating that he, Johnson, and Triplett returned to Lexington and Washtenaw a second time and that Triplett put his hood over his head and got out of the car. He denied stating that Haywood jumped from one porch to the other and tried to climb the fence into the vacant lot to get away from Triplett; that Triplett pulled a gun from the pocket of his hoodie and fired at Haywood as he was at the top of the fence; and that Haywood then fell. He denied stating that he ducked down in the car and heard several more gunshots and that Triplett then returned to the car after the shooting stopped. He also denied stating that he saw Triplett carrying the same gun a few days later and that Triplett told him he had "f***ed up" and "shouldn't have done dude like that."

¶ 22 Wilson also acknowledged testifying before the grand jury. However, when the prosecutor read large portions of the grand jury transcript to him verbatim, Wilson denied giving the answers attributed to him. In addition to denying the portions of his grand jury testimony that were similar to his earlier statement, Wilson denied testifying that he saw Haywood get shot by Triplett and fall down on the second porch as he was trying to get away from Triplett.

¶ 23 The State called ASA Walker to perfect its impeachment of Johnson and Wilson. And the parties stipulated to the admission of the grand jury transcripts for impeachment purposes. In

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

addition, Johnson's and Wilson's prior inconsistent statements to ASA Walker and the grand jury were admitted as substantive evidence under section 115-10.1.

¶ 24 The trial court found Triplett guilty of first degree murder and sentenced him to 40 years in prison. We affirmed Triplett's conviction on direct appeal, rejecting his challenges to the sufficiency of the evidence and the admission of Johnson's and Wilson's out-of-court statements as substantive evidence. See *People v. Triplett*, No. 1-04-1387, 927 N.E.2d 892 (2006) (Table) (unpublished order under Illinois Supreme Court Rule 23).

¶ 25 In 2007, Triplett filed a *pro se* petition for postconviction relief. He alleged that his trial counsel was ineffective for failing to investigate and call his sister, Hall, and her friend, Jennifer Darnell, as alibi witnesses. As support for this claim, Triplett submitted an affidavit from Hall attesting that she was at home on November 4, 2002, working as a hair stylist. Hall stated that, around 8:00 that evening, while she was with a client, Triplett came home, spoke to her briefly, and went to his room, where he remained until Hall finished her work a little after 10 p.m. In his own affidavit, Triplett stated that Darnell had signed and sent him an affidavit (which he had not yet received) asserting that she was at Hall's home on November 4, 2002, and remembered that Triplett was also present from 8 to 11 p.m. Triplett alleged that he informed trial counsel that Hall and Darnell could testify to his whereabouts at the time the shooting was alleged to have occurred but that counsel never contacted the witnesses or investigated his potential alibi. In a supporting memorandum, Triplett alleged that trial counsel told him that a factfinder would not believe alibi testimony from his sister and her friend.

¶ 26 Triplett also alleged that trial counsel was ineffective for failing to investigate and call Wilson's cousin, Jameka Allen, to testify that Wilson was at home with her on November 4, 2002,

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

between 8 p.m. and midnight. In a supporting affidavit, Triplett attested that Allen had mailed him an affidavit to support this claim but he had not yet received it.

¶ 27 Finally, Triplett submitted an affidavit from Robinson, a fellow inmate with whom he had become acquainted and discussed the details of his case. In the affidavit, Robinson attested that, between 7:30 and 11 p.m. on November 4, 2002, he was playing dice with Johnson and about 20 other people at Trumbull Avenue and Iowa Street. Robinson stated that he remembered that evening because he won $200 in the dice game and learned of Haywood's death the next day.

¶ 28 The trial court appointed counsel to represent Triplett. After numerous continuances spanning almost nine years, appointed counsel filed an amended petition, reasserting Triplett's claims that his trial counsel was ineffective for failing to investigate and call Hall as an alibi witness and that Robinson's affidavit constituted newly discovered evidence of actual innocence.[3] Appointed counsel supported the amended petition with updated affidavits from Triplett, Hall, and Robinson. Triplett attested that, on November 4, 2002, he came home around 8 p.m., said hello to his sister, and then rested in his room until sometime after 10 p.m. He stated that he told his trial counsel to contact Hall about testifying as an alibi witness but counsel never did so.

¶ 29 Hall attested that she was styling hair at her home on November 4, 2002. She stated that, around 8 p.m., Triplett walked in the kitchen door, stopped to chat, and then went to his room, where he stayed until Hall finished her hairstyling work around 10 p.m. Hall stated that she was not interviewed about the matter until 2015, when an investigator working for Triplett's appointed postconviction attorney contacted her.

[3] The amended petition omitted Triplett's claims that trial counsel was ineffective for failing to investigate and call Darnell and Allen.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 30 Robinson attested that, on November 4, 2002, he was playing dice with Johnson on Iowa and Trumbull from either 6 or 7 p.m. until 10 p.m. In this affidavit, Robinson stated that he remembered that evening because his girlfriend had called him at 10:00 that evening to let him know she was going into labor.

¶ 31 The State moved to dismiss Triplett's petition without an evidentiary hearing. On October 30, 2017, after hearing oral argument, the trial court granted the State's motion and dismissed Triplett's petition, concluding that the affidavits of Hall and Robinson did not support claims of ineffective assistance of counsel or actual innocence. On March 30, 2018, we allowed Triplett to file a late notice of appeal.

¶ 32 II. ANALYSIS

¶ 33 The Post-Conviction Hearing Act (725 ILCS 5/122-1 *et seq.* (West 2018)) "provides a method by which persons under criminal sentence in this state can assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Tate*, 2012 IL 112214, ¶ 8. A petition filed under the Act is adjudicated in three stages. *Id.* ¶ 9. At the first stage, the circuit court independently examines a petition without input from the State. *People v. Johnson*, 2018 IL 122227, ¶ 14. If the court finds the petition is frivolous or patently without merit, the petition is summarily dismissed. *People v. Allen*, 2015 IL 113135, ¶ 21. If the petition is not summarily dismissed after first-stage review, the court dockets the petition for second-stage consideration. *Id*.

¶ 34 At the second stage, the court may appoint counsel to represent an indigent defendant and appointed counsel may file an amended petition. *People v. Lesley*, 2018 IL 122100, ¶ 32. The State may then move to dismiss the petition or answer it. *People v. Cotto*, 2016 IL 119006, ¶ 27. If the

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

State files a motion to dismiss, the trial court must then determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Bailey*, 2017 IL 121450, ¶ 18. If the court finds that the petition makes the requisite showing, it must advance the petition to third-stage review, where the court conducts an evidentiary hearing. *Id.* If the court finds the petition does not make a substantial showing of a constitutional violation, it will be dismissed at the second stage. *Id.*

¶ 35 During second-stage review, the court examines only "the legal sufficiency of the petition," without "engag[ing] in any fact-finding or credibility determinations." (Internal quotation marks omitted.) *People v. Domagala*, 2013 IL 113688, ¶ 35. In other words, the court asks "whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act." *People v. Sanders*, 2016 IL 118123, ¶ 31. Despite this liberal pleading standard, the trial court need not accept as true "facts [that] are positively rebutted by the trial record." *People v. Brown*, 2020 IL App (1st) 170980, ¶ 41. But if the petition's well-pleaded allegations, if proven true, would entitle the petitioner to relief, the petition must advance to a third-stage evidentiary hearing, where the veracity of the petition's allegations can be tested. *Domagala*, 2013 IL 113688, ¶ 35. We review the second-stage dismissal of a postconviction petition *de novo*. *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 36 A. Ineffective Assistance of Counsel

¶ 37 Triplett's first contention is that the trial court erred in dismissing his petition without an evidentiary hearing because his amended petition and its supporting affidavits made a substantial showing that his trial counsel was ineffective for failing to investigate and call Hall as an alibi witness. At the outset, the State argues that Triplett forfeited this claim by failing to raise it on

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

direct appeal. But the failure to raise a claim on direct appeal results in a postconviction forfeiture only where the claim "could have been raised" on direct appeal. *Tate*, 2012 IL 112214, ¶ 8. An ineffective assistance claim, moreover, must be raised on direct appeal only if it is "apparent on the record." *People v. Veach*, 2017 IL 120649, ¶ 46. Triplett's claim that trial counsel was ineffective for failing to investigate and present Hall as an alibi witness is not apparent from the trial record and could not have been raised on direct appeal. The claim is thus properly presented on postconviction review, so we turn to the merits.

¶ 38 Ineffective assistance of counsel claims are judged under a familiar two-part standard. To prevail on such a claim, a defendant must show that his counsel's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *People v. Cherry*, 2016 IL 118728, ¶ 24. To demonstrate deficient performance, the defendant "must show that counsel's performance fell below an objective standard of reasonableness." *Dupree*, 2018 IL 122307, ¶ 44. When reviewing counsel's performance, we "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and that counsel's "challenged action[s] might be considered sound trial strategy." (Internal quotation marks omitted.) *Strickland*, 466 U.S. at 689. To establish prejudice, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Dupree*, 2018 IL 122307, ¶ 44. When an ineffective assistance claim is considered at the second stage of postconviction review, the petition need only make a substantial showing of deficiency and prejudice to survive dismissal and proceed to an evidentiary hearing. See *Domagala*, 2013 IL 113688, ¶¶ 42, 47.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

¶ 39 We conclude that the allegations in Triplett's petition and supporting affidavits, taken as true, make a substantial showing that Triplett's trial counsel was ineffective for failing to investigate and call Hall as an alibi witness. As for deficient performance, Hall's affidavit attests that Triplett was home with her from 8 to 10 p.m. on November 4, 2002 around the time that Haywood was shot. Triplett alleges that he asked trial counsel to contact Hall to testify as an alibi witness but that counsel failed to do so. Hall similarly attests that she was not interviewed about the case until well after Triplett's trial concluded, when an investigator working for Triplett's postconviction attorney contacted her.

¶ 40 The State asserts that trial counsel's decision not to call Hall as an alibi witness was based on the reasonable strategic consideration that alibi testimony from a defendant's relative is unlikely to carry much weight and that presenting unreliable alibi testimony may do more harm than good. In fact, Triplett himself recounted in his petition that trial counsel explained to him that a factfinder was unlikely to believe alibi testimony from his sister. But that type of strategic decision "may be made only after there has been a thorough investigation of [the] law and facts relevant to plausible options." (Internal quotation marks omitted.) *People v. Upshaw*, 2017 IL App (1st) 151405, ¶ 39. Here, nothing in the record rebuts Hall's allegation, which we must accept as true at this stage of the proceedings, that trial counsel never contacted her about her potential testimony.

¶ 41 "An attorney who fails to conduct [a] reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy." *People v. Makiel*, 358 Ill. App. 3d 102, 107 (2005). Instead, the "failure to interview witnesses may indicate actual incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating." (Internal quotation marks and citations omitted.)

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

Upshaw, 2017 IL App (1st) 151405, ¶ 39. Taking the allegations in Triplett's petition and Hall's affidavit as true, as we again note we must do at this stage of the proceedings, we find that Triplett has made a substantial showing that trial counsel was deficient in failing to interview Hall before deciding not to call her as an alibi witness at trial.[4]

¶ 42 Triplett has also made a substantial showing of prejudice to warrant an evidentiary hearing. While the evidence at trial was sufficient to sustain his conviction, it was far from overwhelming. The State's case rested entirely on the out-of-court statements and grand jury testimony of Johnson and Wilson, which those men later recanted at trial. The State presented no other evidence linking Triplett to Haywood's death. And some circumstantial evidence tended (at least somewhat) to undermine the version of events that Johnson and Wilson recounted in their out-of-court statements and grand jury testimony. For instance, while Johnson and Wilson claimed that Triplett shot Haywood near the vacant lot around 8:30 or 9 p.m., Haywood's body was not discovered in that location until the next morning, even though several neighbors searched the area shortly after hearing gunshots around 8:30 or 9 p.m. the prior evening. In addition, Wilson gave conflicting pretrial accounts of the location where Triplett shot Haywood. In his statement to ASA Walker, Wilson claimed to have seen Triplett pull a gun from his pocket and fire at Haywood as Haywood was climbing the fence near the vacant lot. Before the grand jury, however, Wilson testified that Haywood was on a porch when he was shot. In both accounts, Wilson suggested that Haywood was trying to escape from Triplett when he was shot, even though Dr. Cogan testified that many of the bullets that struck Haywood entered the front of his body. Due to the closeness of the

[4] Whether Triplett's and Hall's allegations *are* true, of course, is a question to be decided by the trial court following an evidentiary hearing. All we decide here is that Triplett has stated a legally sufficient claim for postconviction relief and that he is thus entitled to an evidentiary hearing to test the veracity of the allegations in his petition and supporting affidavits.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

evidence, there is a reasonable probability that alibi testimony from Hall, if credible, would have changed the result at trial.

¶ 43 The State argues that trial counsel's failure to present alibi testimony from Hall did not prejudice Triplett because Hall's proposed testimony "fails to disturb" Johnson's and Wilson's inculpatory accounts. But Hall's claim that Triplett was at home with her around the time of the shooting is directly at odds with what Johnson and Wilson told ASA Walker and the grand jury. And because Hall's claim is not positively rebutted by the record, we must accept it as true at this stage of the proceedings. As our supreme court recently explained, "the existence of a conflict with the trial evidence is not the same as finding that the new evidence is positively rebutted." *People v. Robinson*, 2020 IL 123849, ¶ 60. Instead, "[f]or new evidence to be positively rebutted, it must be clear from the trial record that no fact finder could ever accept the truth of that evidence, such as where it is affirmatively and incontestably demonstrated to be false or impossible." *Id.* Nothing in the trial record affirmatively and incontestably demonstrates the falsity or impossibility of Hall's assertion that Triplett was at home with her around the time that Johnson and Wilson claimed the shooting occurred.

¶ 44 Finally, the State argues that the factfinder would have rejected any alibi testimony from Hall because of her relationship with Triplett. But that is precisely the kind of "[c]redibility determination[ ]" that "may be made only at a third-stage evidentiary hearing." *Sanders*, 2016 IL 118123, ¶ 42. The only question at this stage of the proceedings is whether, taking Hall's affidavit as true, there is a reasonable probability that the result of Triplett's trial would have been different. As we have explained above, in light of the closeness of the evidence at trial, we find that there is

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

a reasonable probability that alibi testimony from Hall, if found credible, would have changed the result of the trial. We therefore must remand for an evidentiary hearing on this claim.

¶ 45 B. Actual Innocence

¶ 46 Triplett also argues that his petition and Robinson's supporting affidavits made a substantial showing of actual innocence, entitling him to an evidentiary hearing on that claim as well. We agree.

¶ 47 The Illinois Constitution recognizes postconviction claims of actual innocence based on newly discovered evidence. *People v. Coleman*, 2013 IL 113307, ¶ 84. To warrant relief on such a claim, a defendant "must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *Id.* ¶ 96. New evidence is that which "was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* Such evidence is material if it "is relevant and probative of the [defendant's] innocence." *Id.* New evidence is noncumulative if it "adds to what the [factfinder] heard" at trial. *Id.* And new evidence is sufficiently conclusive to warrant postconviction relief when the new evidence, viewed in light of the evidence at trial, "would probably lead to a different result." *Id.* As a procedural matter, an actual innocence claim is treated like any other postconviction claim. *Id.* ¶ 84. A defendant is thus entitled to an evidentiary hearing if, accepting as true his well-pleaded allegations and supporting affidavits, his petition makes a substantial showing of actual innocence. *Sanders*, 2016 IL 118123, ¶ 37.

¶ 48 The State does not appear to contest that Robinson's affidavits constitute newly discovered and noncumulative evidence. Triplett alleges that he met Robinson in 2007, when they were housed together following Triplett's conviction. After discussing the details of his case, Triplett

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

alleges, Robinson told him that Johnson could not have witnessed him shooting Haywood on the evening of November 4, 2002, as Johnson's (and Wilson's) out-of-court statements and grand jury testimony claimed, because Johnson was playing dice with Robinson that evening. Accepting these allegations as true, Robinson's account of Johnson's whereabouts on the night of Haywood's death is evidence that "was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Coleman*, 2013 IL 113307, ¶ 96. Moreover, because no evidence was presented at trial contradicting Johnson's and Wilson's out-of-court statements about Johnson's whereabouts on the night of the shooting, Robinson's newly discovered account adds to what the factfinder heard at trial. *Id.*

¶ 49 Although closer questions, we think the allegations in Robinson's affidavits, if true, also constitute material evidence that would be sufficiently conclusive to warrant postconviction relief. As noted, new evidence is material if it "is relevant and probative of the [defendant's] innocence." *Id.* Although the State does not directly address the materiality prong, it suggests that Robinson's affidavits cannot be deemed material because Robinson's account merely impeaches or contradicts Johnson's and Wilson's out-of-court statements and grand jury testimony and does not itself offer an eyewitness account of the shooting or claim to place Triplett at a different location. It is true that evidence merely impeaching or contradicting a prosecution witness is generally an insufficient basis for ordering a new trial. *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009); *People v. Barnslater*, 373 Ill. App. 3d 512, 523 (2007). But the allegations in Robinson's affidavits, if credible, would not simply impeach or contradict Johnson's and Wilson's out-of-court statements and grand jury testimony. They would instead undermine the entirety of the State's case against Triplett. As our supreme court recently clarified, "evidence which is 'materially relevant' to a defendant's claim

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

of actual innocence is simply evidence which tends to significantly advance that claim." *Robinson*, 2020 IL 123849, ¶ 55 (quoting *People v. Savory*, 197 Ill. 2d 203, 213 (2001)). Because the State's case rested exclusively on Johnson's and Wilson's out-of-court statements that they were with Triplett on the evening of November 4, 2002 and witnessed (or heard) him shoot Haywood, we think that testimony from Robinson that Johnson was somewhere else that evening (directly rebutting Johnson's account and implicitly rebutting Wilson's) would, if credible, "tend[ ] to significantly advance" Triplett's claim of innocence. *Id.*

¶ 50 As with Hall's affidavit, the fact that the contentions in Robinson's affidavits contradict Johnson's and Wilson's out-of-court statements and grand jury testimony, which were admitted as substantive evidence at trial, does not mean that Robinson's contentions are positively rebutted by the trial record and need not be accepted as true at this stage of the proceedings. See *Robinson*, 2020 IL 123849, ¶ 60 ("the existence of a conflict with the trial evidence is not the same as finding that the new evidence is positively rebutted"). Because nothing in the record "affirmatively and incontestably demonstrate[s]" that the assertions in Robinson's affidavits are "false or impossible," we cannot say that "no fact finder could ever accept the truth of" those claims. *Id.* We must thus accept Robinson's assertions as true when assessing whether Triplett is entitled to an evidentiary hearing on his actual innocence claim.

¶ 51 For the same reason, we also find that the allegations in Robinson's affidavits, if accepted as true and considered in light of the trial evidence, "would probably lead to a different result." *Coleman*, 2013 IL 113307, ¶ 96. As explained above in connection with Triplett's ineffective assistance claim, the evidence of Triplett's guilt was not overwhelming. The State's case hinged on out-of-court statements and grand jury testimony that Johnson and Wilson ultimately recanted

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

at trial. The State offered no other evidence connecting Triplett to Haywood's death, and some of the circumstantial evidence at trial like when Haywood's body was discovered and the direction that the bullets entered his body tended to undermine the State's theory of the case. And while Johnson's and Wilson's out-of-court statements generally corroborated each other, Wilson gave conflicting accounts of where Haywood was located when he was shot.

¶ 52 The State contends that Robinson's assertion that Johnson was playing dice with him at the time the shooting allegedly occurred is not sufficiently "dispositive" to support a claim of actual innocence. But newly discovered evidence need not "total[ly] vindicat[e] or exonerat[e]" a defendant to warrant postconviction relief. *Robinson*, 2020 IL 123849, ¶ 55. As our supreme court has explained, "the new evidence supporting an actual innocence claim need not be entirely dispositive to be likely to alter the result on retrial." *Id.* ¶ 56. "Rather, the conclusive-character element [of the actual innocence test] 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.* Robinson's assertion that Johnson was playing dice with him on the evening Haywood was killed, if credited, would contradict Johnson's and Wilson's accounts of Triplett's actions that evening, which together formed the entirety of the State's case against Triplett. The new evidence would thus place the trial evidence in a significantly different light and undermine confidence in the verdict.

¶ 53 Finally, the State argues that the allegations in Robinson's affidavits are incredible and internally inconsistent. The State notes, for instance, that in his first affidavit, Robinson asserted that he was able to recall the dice game he and Triplett allegedly attended on November 4, 2002, because he won $200 that evening, whereas in his second affidavit, Robinson claimed to recall the

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

126682

event because he learned that evening that his girlfriend had gone into labor. But as we have repeatedly stressed above, it is not appropriate to make credibility determinations at the second stage of postconviction review. Instead, for now, we must accept the well-pleaded allegations of Triplett's petition and supporting affidavits as true and assess only "the legal sufficiency of the petition." *Domagala*, 2013 IL 113688, ¶ 35. Because Robinson's assertions, accepted as true, make a substantial showing of Triplett's actual innocence, Triplett is entitled to an evidentiary hearing on this claim.

¶ 54 III. CONCLUSION

¶ 55 For the foregoing reasons, we reverse the judgment of the circuit court and remand for an evidentiary hearing on Triplett's ineffective assistance of counsel and actual innocence claims.

¶ 56 Reversed and remanded with directions.

SUBMITTED - 16861471 - Marquita Harrison - 2/25/2022 3:23 PM

No. 126682

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Respondent-Appellee, -vs- HAROLD BLALOCK, Petitioner-Appellant.	)))))))))))	Appeal from the Appellate Court of Illinois, No. 1-17-0295. There on appeal from the Circuit Court of Cook County, Illinois , No. 99 CR 4956. Honorable Vincent M. Gaughan, Judge Presiding.

NOTICE AND PROOF OF SERVICE

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On February 25, 2022, the Reply Brief was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system in the above-entitled cause. Upon acceptance of the filing from this Court, persons named above with identified email addresses will be served using the court's electronic filing system and one copy is being mailed to the petitioner-appellant in an envelope deposited in a U.S. mail box in Chicago, Illinois, with proper postage prepaid. Additionally, upon its acceptance by the court's electronic filing system, the undersigned will send 13 copies of the Reply Brief to the Clerk of the above Court.

<u>/s/Marquita S. Harrison</u>
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