No. 129695

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- ANGEL CLASS, Respondent-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-20-0903. There on appeal from the Circuit Court of Cook County, Illinois, No. 02 CR 13513. Honorable Angela Munari Petrone, Judge Presiding.

BRIEF AND ARGUMENT FOR RESPONDENT-APPELLEE

JAMES E. CHADD
State Appellate Defender

DOUGLAS R. HOFF
Deputy Defender

MICHAEL H. ORENSTEIN
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR RESPONDENT-APPELLEE

ORAL ARGUMENT REQUESTED

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CYNTHIA A. GRANT
SUPREME COURT CLERK

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ISSUES PRESENTED FOR REVIEW

In this case, after finding a strong actual-innocence claim, after reversing the trial judge's dismissal order, and after remanding for third-stage post-conviction proceedings, the Appellate Court found that:

- the trial judge improperly disregarded one exculpatory affiant, calling it incredible,
- the trial judge improperly disregarded a second exculpatory affidavit, calling it "hearsay" and "not newly discovered," and
- the trial judge failed to consider Angel Class's affidavits as a whole, instead combing them for flaws and insufficiencies.

Given these findings:

- should this Court affirm the Appellate Court under *People v. Heider*, 231 Ill. 2d 1, 25 (2008) (ordering reassignment "to remove any suggestion of unfairness"), or
- should this Court alternatively affirm under *United States v. Robin*, 553 2d 8, 10 (2nd Cir. 1977) (considering potential remand bias, the appearance of justice, and efficiency), or
- should this Court, again alternatively, affirm under *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002) (for actual bias)?

STATUTES AND RULES INVOLVED

Illinois Supreme Court Rule 615(b) provides:

Powers of the Reviewing Court. On appeal the reviewing court may:

(1) reverse, affirm, or modify the judgment or order from which the appeal is taken;

(2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;

(3) reduce the degree of the offense of which the appellant was convicted;

(4) reduce the punishment imposed by the trial court; or

(5) order a new trial.

STATEMENT OF FACTS

Procedural summary.

The State charged Angel Class with first-degree murder and aggravated discharge of a firearm. The case involved the car-to-car shooting of Tony Koniewicz. (C. 68-81; R. 490). In a bench trial, a single State witness implicated Class. (R. 47-50). Class denied involvement, testifying that, on the evening in question, he was with his family at home. (R. 175, 186-87). Convicted on both counts, he was sentenced to the minimum term, 45 years, plus five years on the discharge count. (R. 286).

On direct appeal, the Appellate Court affirmed. *People v. Class*, No. 1-04-2930 (2006) (unpublished order under Supreme Court Rule 23) (C. 142-62). Class's first post-conviction petition was summarily dismissed, a decision affirmed on appeal. *People v. Class*, No. 1-06-3721 (unpublished order under Supreme Court Rule 23). (C. 277-85).

In a second petition, Class raised, *inter alia*, actual innocence; after appointing counsel, the judge granted the State's motion to dismiss. (C. 295-96, 316-22, 560-72). The Appellate Court reversed, ordering an evidentiary hearing before a new judge. *People v. Class*, 2023 IL App (1st) 200903, ¶¶ 2, 83 (opinion of April 28, 2023). After the State sought leave to appeal – challenging only the order reassigning to a new judge – this Court remanded, retained jurisdiction, and ordered an explanation of the reassignment order. *People v. Class*, No. 129695, order of Sep. 21, 2023). Which it soon received. *People v. Class*, 2023 IL App (1st) 200903, ¶¶ 85-98 (Opinion of Oct. 13, 2023). The case now returns to this Court.

Trial proceedings.

Defense evidence.

Class testified in his own defense. (R. 173-92). He told the judge that he had nothing to do with the shooting of Koniewicz on October 22, 2001. (R. 175). He explained that he did not know Koniewicz. (R. 190-91). He also testified that on the night of the shooting, he was at his mother's house, where he lived with his girlfriend and their two children, three and four years old. (Sup3, R. 7; R. 186).

Class acknowledged his gang membership and two 1997 drug convictions. (R. 31, 33). Class grew up with Elijah Salazar and Heather Ambrose and knew that they were both members of the same gang, the Satan Disciples. (R. 21-22). Ambrose had an Insane Satan Disciples devil tattoo with two smoking guns. (R. 22). Ambrose formerly dated Salazar's brother and, previously, members of a rival gang called the C-Notes, but, during the fall of 2001, she was dating Salazar. (R. 26). Salazar controlled the gang's Texas interests and moved guns between Texas and Chicago. (R. 30, 34).

Class testified that up until 2001, there were no problems between his gang and the C-Notes. (Sup3, R. 11-12, 184). Class had also been shot in August of 2001, but by a member of the Milwaukee Kings gang, not by the C-Notes, and the C-Notes had shot none of his friends; he felt no animosity towards them. (Sup3, R. 26; TR 184).

Class testified, however, that, in 2001, Salazar returned to Chicago from Texas. (Sup3, R. 27-28). Salazar then began driving into C-Notes territory and "messing with them." (Sup3, R. 10-11). In response, the C-Notes shot a Satan Disciple, Roberto Karsnetto. (Sup3, R. 10-12).

Class testified that he was angry with Salazar because the C-Notes "shot Roberto due to the fact that [Salazar] was messing with the C-Notes." (Sup3, R. 10). The day before Koniewicz was shot, Class told Salazar that "ever since" Ambrose "had come around with him, a lot of [Class's] friends were getting hurt," and he told Salazar to stop bringing to the neighborhood. (Sup. R. 13-14; TR 173). Ambrose saw Class and Salazar talking, and he believed that she knew they were discussing her. (R. 173).

Class testified that hours before Karsnetto was shot, he, Salazar and Ambrose attended the weekly gang meeting. (R. 174-75, 185). Class again warned Salazar not to bring Ambrose around and made him take her home. (R. 174). Ambrose, upset, said something "wrong" to Class. (R. 175). Class approached to Ambrose's car window and told her not to come around anymore. (R. 174). As this point, Class put his hand next to her cheek and shoved it. (R. 174). Salazar, angry, left with Ambrose. (R. 174).

State evidence.

Gerard Racasi testified that on the day in question, he was a passenger in Koniewicz's red Corsica. (R. 20-22). Both he and Koniewicz belonged to the C-Notes gang. (R. 24). At Ohio and Leavitt, after stopping to smoke cannabis, he heard several shots. (R. 26). Ducking down, he could not see the shooter. (R. 25-27). Koniewicz tried to turn around, but he could not drive, so Racasi drove him to a hospital. (R. 27-31, 38). Aside from agreeing to "evening hours," Racasi did not give a time of the shooting. (R. 31).

At about 10:00 p.m. that night, Officer Luis Arroyo was dispatched to Saint Mary's. (R. 88-90). He spoke with Racasi and examined Koniewicz's car, noting its shattered driver-seat window and driver's-side-door bullet holes.

(R. 90-91). Later, at Ohio and Leavitt, he saw shattered glass. (R. 90-91). Forensic evidence traced bullets at the scene, in Koniewicz's car, and from the autopsy to the same gun. (R. 94-97, 101-03, 104-05, 136-39).

Detective Robert Rodriguez testified that about six weeks later, he interviewed an anonymous witness to the shooting. (R. 109-10). He also interviewed Ambrose, who first denied knowing anything about the shooting, then later admitted she knew more. (R. 110). After Rodriguez searched for Salazar and found him in Texas, Salazar gave a handwritten statement to a prosecutor, and, later, testified before a grand jury; however, he did not testify at Class's trial. (R. 112-14).

Ambrose testified that she knew Salazar and Class from the area. (R. 34, 41). She knew that Salazar and Class were both Satan Disciples. (R. 39-41). She denied gang membership; however, she did acknowledge having a devil tattoo with two smoking guns on her arm. (R. 43, 69-70).

Ambrose testified that on October 22, 2001, she was at her grandparents' house in Chicago. Asked what she was doing, she said, "I was sick. I was home in bed." (R. 44). Sometime after 7:00 p.m., Salazar and Class arrived. (R. 44-45). They asked her to drive them around. (R. 45). She agreed. (R. 44-45). Salazar then got in her back seat; Class, in the front passenger seat. (R. 45).

At first, Ambrose testified, she "just drove around the neighborhood." Class then directed her to drive toward a house. (R. 46). They stopped at Grand Avenue and Oakley Boulevard. (R. 46). Class directed her into hostile C-Note territory and then, specifically, onto Ohio Street. (R. 46-47). Once there, Class pointed out a red car, said that it was his cousin's, and told Ambrose to approach it. (R. 47). Ambrose brought her passenger window next

to the red car's driver's window. (R. 48). Class rolled down his window, reached into his sweatshirt pocket, and leaned out of the window. (R. 48-49). When the red car's driver began to roll down his window, Class pulled out a gun, fired, and shouted gang slogans. (R. 50).

Ambrose testified that afterward, Class told her to look straight ahead. (R. 50). She did, and drove off. (R. 50-51). In her rearview mirror, she saw the red car do a disjointed U-turn and drive the opposite way. (R. 51). She then dropped Class and Salazar at Class's home, on Grand near the Brickyard Mall. (R. 55). Again, she did not give a time.

Ambrose testified that early the next morning, she, Ambrose, Salazar, and a mutual friend went to a car wash to clean out the car. (R. 54-56, 67-69). After they were done, Class told Ambrose to go home and not to speak with the police. (R. 56-57). She did not. (R. 53).

Ambrose testified that three days later, Class asked when she was returning to Kentucky. (R. 57). Ambrose promised to go when she had gas money. (R. 57). Class gave her $80 and threatened to kill her and blow up her grandparents' house if she told the police or anyone about the shooting. (R. 58-59). Ambrose went to Kentucky the following day. (R. 60).

Ambrose acknowledged that the previous year she had been convicted in federal court of aiding and abetting aggravated criminal sexual abuse. (R. 36, 71). Additionally, Ambrose admitted that she had smoked marijuana before the shooting, that she had dated Salazar's brother, and that she could not remember who, if anyone, was in her car at any point during shooting. (R. 40, 72-77).

Officer Miguel Delatorre testified that on April 27, 2002, he arrested Class in connection with Koniewicz's death. (R. 124-29).

Conviction, sentence, appeal, and first post-conviction petition.

The trial judge, the Honorable Evelyn B. Clay, convicted Class on all counts. (C. 129). Class was sentenced to a total of 50 years in prison. (C. 129).

On direct appeal, Class argued that the trial court: (1) improperly granted the State's speedy-trial extension request; (2) improperly excluded exculpatory hearsay from Salazar, and (3) improperly found Class guilty beyond a reasonable doubt. The Appellate Court affirmed. *People v. Class*, No. 1-04-2930 (March 3, 2006) (Rule 23 Order) (C. 142-62).

On August 18, 2006, in an initial *pro se* post-conviction petition, Class alleged, among other things, that trial counsel had failed to investigate, interview, and present alibi witnesses. (C. 166, 170-71). It was summarily dismissed, a decision affirmed on appeal. *People v. Class*, No. 1-06-3721 (Rule 23 order, December 12, 2008) (C. 280-82).

Post-conviction petition proceedings under review.

On May 16, 2016, Class moved to file a successive post-conviction petition. (C. 286). He alleged, among other things, actual innocence. (C. 295-96). He attached several affidavits. Among the affiants, Christopher Stanley attested that he was an shooting eyewitness and that Salazar was the shooter. (C. 315-16). William Sanchez attested that he was also a shooting eyewitness and that Class had nothing to do with the shooting. (C. 322). And Robert Pasco attested that Salazar had boasted of committing the shooting. (C. 319-20).

The post-conviction judge – the Honorable Angela Petrone, who was not the trial judge – advanced the petition[1] and appointed counsel. (R. 323). The judge dismissed the petition. She found that the Sanchez affidavit, did not rule out Class as the shooter. (C. 570). She found that the Pasco affidavit lacked successive-filing cause and revealed no prejudice. (C. 571). And she found that the Stanley affidavit was not newly discovered and failed to show actual innocence. (C. 572).

Class initially ordered an evidentiary hearing, reassigned to a new judge on remand. 2023 IL App (1st) 200903, ¶¶ 2, 83 (opinion of April 28, 2023). It did not explain its latter order. *Id.*, ¶ 83. The State then sought leave to appeal, challenging only the reassignment order; after Class then filed an answer, this Court, retaining jurisdiction, ordered the Appellate Court to explain its reassignment order. *People v. Class*, No. 129695, order of Sep. 21, 2023).

The Appellate Court then issued a modified opinion. *People v. Class*, 2023 IL App (1st) 200903 (Opinion of October 13, 2023). It included, almost without change, its original analysis ordering an evidentiary hearing. *Class*, ¶¶ 5-47, 52-83. It then added a new section, addressing this Court's order. *Class*, ¶¶ 85-98. Both its remand analysis and its reassignment analysis are summarized at length on pages 11-15 below. This Court then granted review.

[1] The common-law record has scrambled its order; pages one through four are at C. 505-08; pages five through 10 are at C. 513-23; pages 11 through 16 are at C. 512-17; and the last page is at C. 509.

ARGUMENT

This Court should affirm the remand order reassigning this case to a different judge.

This Court should affirm the Appellate Court's new-judge order because under any test – under either the current, broad interests-of-justice test, or the Appellate Court's proposed intermediate, three-factor test, or even the State's proposed narrow, actual-bias standard – it correctly ordered a new judge to hear Class's actual-innocence evidentiary hearing. *People v. Class*, 2023 IL App (1st) 200903.

The Appellate Court worried that Class, serving 50 cumulative years for murder and aggravated discharge, could be wrongly convicted. As it noted, only a single witness, Heather Ambrose, implicated Class. As it also noted, Ambrose was, herself, an obvious suspect (because, presumably, she had driven the getaway car), and she was gang member Elias Salazar's girlfriend. As it also noted, Class's petition offered three affidavits, two of whom implicated Salazar. And, as it noted, after the shooting, both Ambrose and Salazar – but not Class – left Chicago.

The Appellate Court also worried that the judge below could fail to put aside her bias. As it found, she prejudged Class's actual-innocence claim, combing its supporting affidavits, from the start, for flaws and insufficiencies. As it also found, she improperly disregarded one exculpatory statement as hearsay. As it further found, she prematurely discounted a second exculpatory statement as incredible. And, as it found, she further disregarded this second statement, calling it not newly discovered, which it was. Her

actions, as a whole, showed that she was combing Class's exculpatory affidavits for weakness, revealing prejudgment.

Given the judge's action pattern, this Court should affirm the Appellate Court's reassignment order. Class will first outline the Appellate Court's decision (Section A below). He will then argue that this Court should retain its interests-of-justice test or adopt the Appellate Court's intermediate test (Section B). He will then argue that, under either test, the Appellate Court correctly ordered reassignment (Section C). Then, alternatively, he will argue that, even under the State's proposed bias test, the judge showed bias and actual prejudice (Section D). Finally, he will urge this Court to reject the State's attack on the Appellate Court's supposedly *sua sponte* order (Section E).

A. Why the Appellate Court assigned a new judge on remand.

In its decision, *Class* first reviewed the trial evidence. *People v. Class*, 2023 IL App (1st) 200903, ¶ 65. As it noted, neither confession evidence nor physical evidence implicated Class. *Id.*, ¶¶ 65-66. As it also noted, only one witness, Ambrose, tied Class to the murder. *Id.* It also noted that officers suspected Class only after talking to Ambrose and Salazar – whom Class, at trial, had identified as Ambrose's boyfriend. *Id.*, ¶¶ 21. It further noted Ambrose's motive to lie: she and Class had clashed the day before. *Id.* And it noted that Class never left Chicago, unlike Ambrose and Salazar. *Id.* ¶¶ 14-15.

Second, *Class* reviewed the petition's five affidavits. 2023 IL App (1st) 200903, ¶¶ 67-73. Although two were inapposite, it found, the remaining three were newly discovered, material, and, exculpatory. *Id.*, ¶¶ 68-70.

"When read together and weighed against the unusually scant trial evidence, these affidavits raise serious questions about Mr. Class's guilt that undermine this court's confidence in his conviction." *Id.*

One affiant, Christopher Stanley, attested that he was with the shooter, who was not Class but rather Salazar. *Class*, 2023 IL App (1st) 200903, ¶¶ 71, 78. Another, William Sanchez, who saw the incident, attested that Class had nothing to do with the shooting. *Id.*, ¶ 71. (He also described the shooter as "almost white," *id.*, ¶ 71, but police reports described Class as medium complected, see Sec. C. 23, 69, 75.) And a third, Robert Pasco, attested that Elias Salazar had admitted to committing the shooting. *Id.,* ¶ 72.

These affidavits, *Class* acknowledged, raised credibility questions. Stanley, for example, gave a post-affidavit statement which was still exculpatory but contradicted the affidavit. *Class*, 2023 IL App (1st) 200903, ¶ 71. Sanchez did not explicitly deny that Class was the shooter or explain why he came forward, and his time-frame description might or might not contradict trial testimony. *Id.*, ¶¶ 79-81. On the other hand, it noted the Stanley and Pasco affidavits corroborated each other in several ways. *Id.*, ¶ 73. *Class* left credibility resolution, however, for the evidentiary hearing. *Id.*, ¶ 82.

Third, *Class* criticized the judge's reasoning. 2023 IL App (1st) 200903, ¶ 74. "Rather than analyze all this evidence in the holistic manner that the law requires," it found, she "assessed these affidavits in isolation, combing each one for evidentiary infirmities and potential credibility issues and minimizing any probative value it might contain." *Id.*

Class gave several examples. The judge, it found, improperly discounted Pasco's affidavit (describing Salazar's confession) as hearsay. *Class*, 2023 IL

App (1st) 200903, ¶ 74. She "completely disregarded" Stanley's affidavit (an eyewitness account implicating Salazar and exculpating Class) as incredible, an improper second-stage consideration. *Id.*, ¶ 75. She also rejected Stanley's affidavit as not being newly discovered, but the record showed otherwise. *Id.*, ¶¶ 76-77. Finally, she disregarded Sanchez's affidavit (attesting that Class was not the shooter), reasoning that Stanley had not described the shooter as appearing different from Class; however, Sanchez did attest that Class had nothing to do with the shooting. *Id.*, ¶ 78.

Concluding, *Class* found that Class's newly discovered evidence, viewed as a whole, put the trial evidence in a different light, undermining confidence in the verdict. *Class*, 2023 IL App (1st) 200903, ¶ 82. It therefore remanded for further proceedings. *Id.*

Class then ordered reassignment on two alternative grounds. 2023 IL App (1st) 200903, ¶¶ 84-98. Its secondary, but shorter, ground was bias and actual prejudice, which it called "one valid reason for reassignment." *Id.*, ¶¶ 86-87, 96, *citing Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 263 (2004); *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002). Class's judge, it found, had disregarded one affidavit based on credibility, failed to address another based on "hearsay," and, as a whole, had combed his affidavits for weaknesses, minimizing their probative value. *Id.* In sum, she had "turned a blind eye to much of the evidence," had "refused to admit probative, admissible evidence," and seemed "flatly unwilling to consider the evidence offered by [the] petitioner." *Class*, ¶ 96, *quoting People v. Serrano*, 2016 IL App (1st) 133493, 1, 45.

Class also offered a primary reassignment ground, one involving a longer, more intensive legal analysis. It found that this Court had, in

previous cases, recognized reassignment grounds beyond bias and actual prejudice. *Class*, 2023 IL App (1st) 200903, ¶ 88, *citing People v. Heider*, 231 Ill. 2d 1, 25 (2008); *People v. Dameron*, 196 Ill. 2d 156, 179 (2001); and *People v. Jolly*, 2014 IL 117142, ¶ 46. It then recognized a three-factor federal reassignment test:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving [the] appearance of fairness.

Class, 2023 IL App (1st) 200903, ¶ 89, *citing United States v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006); *and Manley v. Rowley*, 847 F.3d 705, 712 (2017); *see also United States v. Robin*, 553 2d 8, 10 (2nd Cir. 1977) (first promulgating this test).

Under the *Robin* test, *Class* ordered reassignment. 2023 IL App (1st) 200903, ¶¶ 89-95. Under the first, substantial-difficulty factor, it found that the judge's multiple actions "compounded each other in a way that undermines our confidence that this judge would be able to put out of her mind the findings that she made and that we found to be improper." *Id.*, ¶ 91. Class's petition, it found, created "serious concerns that the wrong person may be in prison." *Id.* Because the judge had failed to view Class's exculpatory evidence cumulatively, because she had searched Class's affidavits for flaws and insufficiencies, and because she had improperly

discounted and ignored exculpatory evidence, *Class* "lack[ed] confidence that she would be able to view his petition as anything other than deficient." *Id.*, ¶¶ 91-92.

Under the second, appearance-of-justice factor, *Class* found, the petitioner, who had consistently maintained his innocence, would, at an evidentiary hearing, face "the very judge who failed to fully consider, in our view, the substantial showing that he made of that innocence." 2023 IL App (1st) 200903, ¶ 93. This hearing "is his last chance to gain a new trial and a return to this trial judge for that decision would create serious doubt as to whether that chance was genuine." *Id.*

And under the third, efficiency factor, *Class* saw nothing counseling against reassignment. 2023 IL App (1st) 200903, ¶ 94. It noted that third-stage hearings are relatively discrete. It also noted that the judge below, not having been the trial judge, lacked special familiarity with Class's case. *Id.*. After distinguishing *In re Marriage of O'Brien*, 2011 IL 109039, *id.,* ¶ 95, and addressing the State's *sua sponte* argument, *id.* at 97, it remanded for a third-stage evidentiary hearing before a different judge. *Id.*, ¶¶ 98-100.

B. Why this Court should retain its broad *Heider* test or adopt *Class*'s proposed intermediate *Robin test.*

As the Appellate Court noted, this Court has, when ordering reassignment, has applied a broad, suggestion-of-unfairness test. *Class*, 2023 IL App (1st) 200903, ¶ 78, *citing People v. Heider*, 231 Ill. 2d 1, 25 (2008); *People v. Dameron*, 196 Ill. 2d 156, 179 (2001). In *Heider*, the judge, at sentencing, found a defendant's intellectual disability aggravating. 231 Ill. 2d at 22. This Court, however, found no evidence linking this disability to future

dangerousness. *Id.* at 22-24. After ordering resentencing, and without finding bias, it ordered reassignment "to remove any suggestion of unfairness." 231 Ill. 2d at 25 (2008); *see also Dameron*, 196 Ill. 2d at 179 (2001) (applying similar test, where judge made independent sentencing investigation). In neither case did this Court invoke its supervisory authority.

The Appellate Court, however, proposed an intermediate, three-factor test, as discussed on 14-15 above. *Class*, 2023 IL App (1st) 200903, ¶ 89, *citing Manley v. Rowley*, 847 F.3d 705, 712 (2017). This test assesses: 1) potential remand bias, 2) the appearance of justice, and 3) efficiency. *Class*, ¶ 89, *citing Rowley*, 847 F.3d at 712; *see also Robin,* 553 F.2d at 10, which is the federal case in this area. Substitution of judge, 6 Crim. Proc. § 22.4(e) (4th ed.). Several sister jurisdictions also use the *Robin* test. *See State v. Epic Tech, LLC,* 373 So. 3d 809, 815-16 (Ala. 2022)*; People v. Evans*, 156 Mich. App. 68, 72 (1986)*; Com. v. Henriquez,* 440 Mass. 1015, 1016 (2003)*; State v. Rambold*, 2014 MT 116, ¶¶ 21-22; *Roe v. Roe*, 139 Nev. Adv. Op. 21 (2023).

1. The *Heider* and *Robin* tests protect due process and the rule of law.

This Court should retain the *Heider* test, or adopt the *Robin* test, to retain the flexibility needed to safeguard due process. *Peters v. Kiff*, for example, found due process "denied by circumstances that create the likelihood or the appearance of bias," even with "no showing of actual bias." 407 U.S. 493, 502 (1972). In *Taylor v. Hayes*, the judge found the defendant in contempt. 418 U.S. 496, 500 (1974). On appeal, he argued that the judge denied him notice and the opportunity to be heard. *Taylor*, 418 U.S. at 500. 500 (1974). The Supreme Court agreed. *Id*. In its remand order, it directed judicial reassignment, asking "not only whether there was actual bias," but

also whether "such a likelihood of bias or an appearance of bias * * *." *Id.* at 501-03. A likelihood-or-appearance test, it added might "sometimes bar" judges with "no actual bias and who would do their very best," but "due process of law requires no less." *Id.* at 501.

This Court should also retain the *Heider* test, or adopt the *Robin* test, to retain flexibility needed to protect the rule of law. "[T]he administration of justice requires a tribunal that is impartial in appearance, as well as in fact." *In re Lane*, 127 Ill. 2d 90, 106 (1989). For both "the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself." *Williams v. Pennsylvania*, 579 U.S. 1, 16 (2016).

Today, protecting the rule of law is no small matter. "[P]ublic trust in the [United States Supreme] Court has declined to an all-time low in recent years." Lauren Keane, *Williams v. Pennsylvania: The Intolerable Image of Judicial Bias*, 49 LOY. U. CHI. L.J. 181, 221 (2017). The same is true of courts nationwide. *See* Graham S. Steele, *Major Questions' Quiet Crisis*, 31 GEO. MASON L. REV. 265, 337 (2023); *see also AJS at the Century Mark*, 96 JUDICATURE 254 (2013).

In sum, the appearance of bias can corrode judicial legitimacy. Reviewing courts, therefore, need flexibility to defend this legitimacy. *Robin's* test explicitly grants this flexibility. 553 F.2d at 10. Logically, although implicitly, so does the broader *Heider* suggestion-of-unfairness test. 231 Ill. 2d at 25.

2. The *Heider* and *Robin* tests protect intercourt comity.

This Court should also retain the *Heider* test, or adopt the *Robin* test, to retain the flexibility needed to protect intercourt comity. Specifically, reviewing courts need flexibility to address "potential" judicial bias (St. br. 23), without having to impugn judges' reputations.

Judges generally avoid challenging each others' impartiality. Dmitry Bam, *Recusal Failure*, 18 N.Y.U.J. Legis. & Pub. Pol'y 631, 655-56 (2015). And for good reason. Bias "is a most grave accusation." *State v. Custodio*, 126 Conn. App. 539, 561-62, *aff'd*, 307 Conn. 548 (2012). Such an allegation "strikes at the very heart of the judiciary as a neutral and fair arbiter of disputes for our citizenry." *Id.* Such a charge "throw[s] into question" the "judge's personal integrity and ability to serve," "a strain" that "cannot easily be erased." *Custodio*, 126 Conn. App. at 561.

Therefore, reviewing courts need flexibility to act without accusation. Just as with *Custodio*'s trial-level litigants, reviewing courts "should be free to challenge, in appropriate legal proceedings, a court's perceived partiality without the court misconstruing such a challenge as an assault on the integrity of the court." 126 Conn. App. at 561. *Id.* Such assaults from reviewing courts would assault a judge's integrity far more, given their implicit moral authority and its online decisions, viewable by all. That is why a *Robin* reassignment order "does not imply any personal criticism" and "assure[s] that no personal criticism of the original judge is involved." 553 F.2d at 10-11.

Nastasi v. United Mine Workers of Am. Union Hospital shows how one panel struck this balance. 209 Ill. App. 3d 830 (5th Dist. 1991). The *Nastasi* plaintiff alleged "multitudinous" judicial "improprieties" against his

testifying expert. *Id.* at 843. *Nastasi* found that plaintiff's prejudice claims perhaps "somewhat overstated." *Id.* But, having ordered a new trial, it saw no purpose in "detailing the particular improprieties the trial judge is alleged to have committed." *Id.* Rather, *Nastasi* held, "it sufficient simply to order that the cause be tried before a different judge on remand." *Id.* This Court should retain the flexibility the *Nastasi* court enjoyed.

3. The *Heider* and *Robin* tests help resolve unique dilemmas and protect legitimate defendant interests.

This Court should also retain the broad *Heider* test, or adopt the narrower *Robin* test, to keep the flexibility needed to address unique, hard-to-predict challenges. For example, reviewing courts need flexibility to address trial judges who are unable or unwilling to follow a mandate. Vital to the administration of justice is reviewing court's inherent power to enforce orders. *Sanders v. Shephard*, 163 Ill.2d 534, 540 (1994). In such rare cases, reassignment can avoid "an exercise in futility" in which a reviewing court "is merely marching up the hill only to march right down again." *Robin*, 553 F.2d 8, 11 (2d Cir. 1977).

Usually, of course, when a judge violates a mandate, a single remand reminder suffices. But not always. In *People v. Sanchez Segura*, a judge denied Pretrial Fairness Act release. 2024 IL App (3d) 240082-U, ¶ 4. The Appellate Court ordered a new hearing. *Id.* On remand, the trial court again denied release, this time also criticizing the Act – and the reviewing court. *Id.,* ¶ 7. The Appellate Court again ordered a new hearing, this time with judicial reassignment. *Id.* ¶ 11. *See also People v. Gurga*, 176 Ill. App. 3d 82,

84 (1st Dist. 1988) (ordering reassignment where trial judge failed to follow mandate). Reviewing courts should not be denied this power.

Reviewing courts, as another example, need flexibility to address judges who act arbitrarily. *See People v. Bolyard*, 61 Ill.2d 583, 587, 589 (1975) (ordering reassignment, where trial judge arbitrarily denied probation); *People v. Zemke* 159 Ill. App. 3d 624, 627 (2nd Dist. 1987) (ordering reassignment, where trial judge refused to consider sentencing range's lower end); *cf. People v. White*, 2017 IL App (1st) 142358, ¶ 43 (declining reassignment, having "see[n] no indication that the court will not follow the law on remand"). Arbitrary actions create at least "potential" bias on remand. (St. br. 23, *citing People v. Dameron*, 196 Ill. 2d 156 (2001)). The State's actual-bias-only test would deny reviewing courts the flexibility necessary to address this potential.

Reviewing courts, as a final example, need flexibility in varied, hard-to-predict situations. *See*, *e.g.*, *People v. Jolly*, 2014 IL 117142 ¶¶ 27, 31 (ordering reassignment, without finding bias, given State *Krankel*-hearing participation); *Santobello v. New York,* 404 U.S. 257, 262 (1971) (ordering conditional reassignment, without finding bias, given State's plea-bargain breach); *Heider*, 231 Ill. 2d at 24-25 (ordering reassignment, without finding bias, given judge's unsupported finding linking intellectually disability to dangerousness).

As these examples show, reassignment needs can be difficult to anticipate. So reviewing courts need flexibility. The *Heider* suggestion-of-unfairness test meets this need. So does the three-pronged *Robin* test – but with more guidance. This Court should not take upon itself, using its supervisory authority, the job of addressing every possible need for a new

judge. That is a job the for Appellate Court. Either *Heider* or *Robin* give reviewing courts the necessary flexibility.

And reviewing courts, as a final example, need flexibility to assure defendants that their judge is fair. As the State notes, a defendant's subjective confidence is not, under any test, a condition precedent for a fair trial. (St. br. 26). But neither is it irrelevant: the defendant is the one facing trial. What *Marshall v. Jerrico, Inc.* said of the appellate arena should also govern trial proceedings: the accused should "present his case with assurance" that no judge is "predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). Stated otherwise, every litigant "should be able to feel that his cause has been tried by a judge who is wholly free, disinterested, impartial and independent." *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467, 471 (Ky. 2010).

C. Nothing in Supreme Court Rule 615(b) precludes reassignment under either the *Heider* or *Robin* tests.

1. Nothing in Rule 615(b)'s plain text precludes the *Heider* or *Robin* tests.

The State acknowledges that, at least in limited circumstances – specifically, bias or actual prejudice – reviewing courts can order reassignment. Yet the State's argument does not rest solely on Supreme Court Rule 615(b). Rather, it argues that, in limited circumstances, Supreme Court Rule 366 can govern criminal appeals. (St. br. 13-15). As it notes, this Court has, in a past criminal case, invoked Rule 366(a). (St. br. 14, *citing People v. Enoch*, 122 Ill. 2d 176, 188-89 (1988)). As it also notes, however, this

Court has, more recently, limited Rule 366(a) to civil appeals; Rule 615, to criminal appeals. *People v. Webster*, 2023 IL 128428, ¶ 27.

Rule 615(b)'s plain language authorizes appellate reassignment orders under either the *Heider* or *Robin* tests. Rule 615(b) empowers reviewing courts to "set aside, affirm, or modify any or all" of the "proceedings subsequent to or dependent upon" the appealed "judgment or order." Judicial assignment is part of the proceedings. On remand, it is a part of the proceedings "subsequent to" the appealed judgment. And reassignment "modifies" the original assignment. Rule 615(b), therefore, authorizes appellate reassignment orders. And nothing in its text limits this authority to findings of bias or actual prejudice.

Rule interpretation resembles statutory interpretation. *People v. Marker*, 233 Ill. 2d 158, 164-65 (2009). The goal is always to implement the drafter's intent. *Id.* Intent is best assessed by assessing codified terms' plain, ordinary meaning. *Id.* Absent a specific statutory definition, it is also proper to consult a dictionary. *People v. Chapman*, 2012 IL 111896, ¶ 24.

In this context, Rule 615(b)(2) has three key terms:

> On appeal the reviewing court may ... set aside, affirm, or [1] *modify* any or all of [2] *the proceedings* [which are] [3] *subsequent to* or dependent upon the judgment or order from which the appeal is taken. (Emphasis and numbers added.)

The first term, "modify," is broad, meaning "to change." "Modify," Merriam-Webster.com Dictionary, merriam-webster.com/dictionary/modify (viewed 11 Jul. 2024). Such a change can be minor ("had to *modify* his plan"). *Id.* Or it can be major ("the wing of a bird is an arm *modified* for flying"). *Id.* The second term, "subsequent to" the judgment or order is also broad, meaning "following in time, order, or place." *Id.*

And the third term, "the proceedings," is also broad, if more technical. In the litigation context, the "proceedings" include "all acts and events between the time of commencement and the entry of judgment." Black's Law Dictionary, 12th ed. (2024). They specifically include "act[s] done by the authority or direction of the court." *Id*; *see also McCarthy v. Geary*, 229 Ill. App. 414, 417 (1st Dist. 1923) 'Proceedings are "intrinsic acts in the process of litigation").

This plain language authorizes appellate judicial-reassignment orders but not the State's proposed limits. Judicial assignment is part of the "proceedings" – an "act," done at a judge's "direction." On appeal, this act is "modif[ied]" by a reassignment order. And the appellate-reassignment order is, necessarily, an act "subsequent" to the act done at a trial court's direction. Rule 615(b), therefore, authorizes reviewing-court reassignment. *See People v. DiCorpo*, 2020 IL App (1st) 172082, ¶ 55 (applying "suggestion of unfairness" reassignment standard, given, among other things, its authority to "modify any or all" subsequent proceedings). Nothing in Rule 615(b) limits reassignment orders to judicial bias.

Should any ambiguity remain, however, legislative history supports the *Heider* and *Robin* tests. Both tests seek to serve the interests of justice. *Heider*, for example, sought to "to remove any suggestion of unfairness." 231 Ill. 2d at 25. And *Robin* sought to satisfy a federal statute. 553 F.2d at 9, *citing* 28 U.S.C. 2106. This statute's expressed intent, in turn, authorized such action as "may be just under the circumstances." 28 U.S.C. 2106. So does Rule 615. This Court adopted Rule 615(b), verbatim, from former statutory criminal-procedure section 121-9. *See People v. Hammond*, 18 Ill. App. 3d 693, 696 (4th Dist. 1974), *citing* Ill.Rev.Stat., ch. 38, 121-9 (describing process).

And former section 121-9's Committee Comments reflect intent to "do justice to the defendant and the People." *Id.*

2. Nothing in Rule 615(b) implicitly precludes the *Heider* or *Robin* tests.

The State argues that this Court's Rule 366(a) case law restricts Rule 615(b) reassignments to bias-and-prejudice findings. It reasons that: 1) Rule 366(a) is broader and more specific than Rule 615(b); 2) Rule 366(a) case law limits civil reassignments to bias-and-prejudice grounds; 3) therefore, Rule 615(b) must impose similar limits. (St. br. 13-15). Its argument fails for three reasons. First, this Court's Rule 615(b) case law authorizes reassignment grounds beyond bias and prejudice. Second, Rule 366(a) case law does not govern Rule 615(b). And third, nothing in Rule 366(a) case law limits reassignment orders to bias-and-prejudice grounds.

The State's argument fails, first, because this Court's Rule 615(b) case law authorizes reassignment grounds beyond bias and prejudice. *See Class*, 2023 IL App (1st) 200903, ¶ 88, *citing Heider*, 231 Ill. 2d at 25 (ordering reassignment to remove "any suggestion of unfairness"); *People v. Dameron*, 196 Ill. 2d 156, 179 (2001) (same); and *People v. Jolly*, 2014 IL 117142, ¶ 46 (ordering reassignment, given State's improper *Krankel* input). *See also People v. Bolyard* 61 Ill. 2d 583, 587, 589 (1975) (ordering reassignment, without bias-or-prejudice finding, based on arbitrary trial-court order). This Court, therefore, should not so limit judicial reassignment here.

Anticipating this argument, the State urges this Court to disregard *Heider*, *Dameron*, *and Jolly*. It argues that their reassignment decisions (and, presumably, *Boylard*'s) were actually supervisory orders, and so nonprecedential. (St. br. 22-23). But nothing in *Heider, Dameron*, or *Jolly* invokes or even mentions supervisory authority. Therefore, the State's

argument should fail, as a similar argument failed in *People v. Dolis*, 2020 IL App (1st) 180267.

In *Dolis*, the defendant filed a pleading which was, in part, a successive post-conviction petition. *Dolis*, 2020 IL App (1st) 180267, ¶ 6. The trial court conducted a preliminary screening test. *Id.*, ¶ 16. At this screening, however, the State improperly offered input. *Id.* ¶¶ 17-21.

Dolis addressed how to remedy this error. *Dolis*, 2020 IL App (1st) 180267¶ 22. The defendant sought a remand for a new screening. *Id.*, ¶ 22. The State argued against a remand, citing *People v. Bailey*, 2017 IL 121450, ¶¶ 41-42. The defendant, among other things, urged the Appellate Court to disregard *Bailey*. *Id.*, ¶ 36. *Bailey*, he noted, had used the phrase "we have chosen." *Id. This* "language of discretion," he argued, signaled use of supervisory authority. *Id.*

Dolis disagreed. "In each of the cases cited by defendant, the [S]upreme [C]ourt used language of discretion but also specifically stated it was acting pursuant to its supervisory authority." 2020 IL App (1st) 180267, ¶ 37. Had this Court invoked its supervisory authority, *Dolis* found, it would have said so. *Id.*

Had this Court invoked its supervisory authority in *Heider* and its other reassignment cases, it too would have said so. It said no such thing. This Court should reject the State's efforts to eviscerate *Heider*.

For somewhat similar reasons, the State urges this Court to disregard the *Robin* test. It argues that this test stems from *federal* reviewing-court supervisory authority, which Illinois' Appellate Court does not share. (St. br. 24). This is a bit of a red herring: *this* Court has its own supervisory authority,

and it can adopt *Robin* if it wants to. But even on its own terms, the State's argument fails.

The State's argument fails because federal supervisory authority is unlike this Court's cognate authority. This Court's supervisory authority, though used with restraint, "is unlimited in extent" and "is bounded only by the exigencies which call for its exercise." *Eighner v. Tiernan*, 2021 IL 126101, ¶ 29. In contrast, as a general matter, federal supervisory authority, though not well defined, can only be exercised "within limits." *United States v. Wright*, 913 F.3d 364, 371 (3d Cir. 2019).

More specifically, in the reassignment context, federal courts, when using "supervisory authority," are only doing what the Appellate Court does daily: exercising codified power. *See Arrowpoint Capital Corp. v. Arrowpoint Asset Mgmt., LLC*, 793 F.3d 313, 329 (3d Cir. 2015) (addressing reassignment authority under "[o]ur supervisory powers under § [28 U.S.C.] 2106"; *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) ("We have the authority to order reassignment of a criminal case to another district judge as part of our supervisory authority over the district courts in this Circuit. See 28 U.S.C.A. § 2106.") Section 2106 power (authorizing reviewing courts to "affirm, modify, vacate, set aside or reverse" trial-court actions) parallels Rule 615(b) power (authorizing reviewing courts to "reverse, affirm, or modify" same). Exercising codified power, specifically Rule 615(b) power, is all *Class* did here. Comparing Section 2016 power to this Court's supervisory authority is apples and oranges.

The State's argument fails, second, because Rule 366(a) case law does not govern Rule 615(b). The State argues that civil-appeals Rule 366(a) is broader and more specific than criminal-appeals Rule 615(b). Therefore, it argues,

Rule 615(b) authority cannot be broader than Rule 366(a) authority. (St. br. 13-14). Its argument reads Rule 615(b) far too narrowly.

In some ways, Rule 366(a) is both broader and more specific than Rule 615(b). For example, in civil cases, the Appellate Court can amend pleadings. Rule 366(a)(1). In criminal appeals, the Appellate Court cannot. *See People v. Smith*, 2013 IL App (3d) 110738, ¶ 15, *rev'd on other grounds*, 2015 IL 116572, ¶ 34 (noting lack of power to amend indictment).

But in other ways, Rule 366(a) is just more specific than Rule 615(b), not broader. For example, Rule 366(a)(4) specifically allows inferences of fact. Under Rule 366(a)(4), a civil reviewing court can find a fact which the record compels, even if the trial court found differently. *Mendiola v. Schomig*, 224 F.3d 589, 597 (7th Cir. 2000) *citing* Rule 366(a)(4) and *In re Marriage of Bennett*, 225 Ill. App. 3d 828, 829-32 (4th Dist 1992). But, even without this specific Rule 615(b) authority, so can criminal reviewing courts. *See People v. Dismuke*, 2017 IL App (2d) 141203, ¶ 48 (noting that courts can reverse convictions where record so compels). As another example, in civil cases, Rule 366(a)(5) specifically authorizes inferences of fact and law. Not so Rule 615(b). Yet in criminal cases, reviewing courts do this too. *See*, *e.g.*, *People v. Cross*, 2019 IL App (1st) 162108, ¶ 159 (finding Rule 431(b) error).

In sum, Rule 366(a)'s broader language sometimes means broader power, but not always. Rule 615(b) is a different rule with a different body of case law. It is not Rule 366(a)'s younger sibling.

Therefore, in construing Rule 615(b), this Court should consider its own past criminal Rule 615(b) cases, not the State's civil Rule 366 cases. For example, in *Webster*, when this Court considered Rule 615(b)'s limits, it examined an earlier Rule 615(b) case. 2023 IL 128428, ¶¶ 21, 32, *citing People*

v. Perruquet, 68 Ill. 2d 149, 153-54 (1977)). As another example, in *People v. Clark,* when this Court considered how Rule 615(b) governed lesser-included offense relief, it also examined an earlier Rule 615(b) case. 2016 IL 118845, ¶¶ 47-48, *citing People v. Kennebrew*, 2013 IL 113998, ¶¶ 25, 47.

In its past Rule 615(b) decisions, this Court has ordered judicial reassignment – without making any finding of bias or prejudice. *See Class*, 2023 IL App (1st) 200903, ¶ 88, *citing Heider*, 231 Ill. 2d 1, 25 (2008) (ordering reassignment to remove "any suggestion of unfairness"); *People v. Dameron*, 196 Ill. 2d 156, 179 (2001) (same); and *People v. Jolly*, 2014 IL 117142, ¶ 46 (ordering reassignment, given State's improper *Krankel* input). *See also People v. Bolyard*, 61 Ill. 2d 583, 587, 589 (1975) (ordering reassignment based on arbitrary order, without bias-or-prejudice finding). It should, therefore, not so limit judicial reassignment here.

And the State's argument fails, third, because nothing in Rule 366(a) case law limits reassignment orders to bias-and-prejudice grounds. Arguing otherwise, the State cites *Eychaner*, 202 Ill.2d at 280, and *Raintree Homes v. Vill. of Long Grove*, 209 Ill. 2d 262, 262-63 (2004). (St. br. 14). But neither case mandates such limits.

Nothing in *Eychaner* limits reassignment relief to bias-and-prejudice grounds. (St. br. 14, 16-17). In that case, the plaintiffs sought a reassignment remand order. *Eychaner,* 279 Ill. 2d at 279. As grounds for this order, it argued only that the judge was actually biased. *Id. Eychaner* rejected this argument, finding that the judge was unbiased. *Id.* at 280. *Eychaner*, therefore, never faced, never addressed, and so never barred reassignment orders on grounds other than bias.

Nothing in *Raintree Homes* so limits reassignment relief either. (St. br. 14). As the Appellate Court noted, in *Raintree Homes*, this Court reversed its reassignment order, finding, among other things, that the reassignment order was entered "without discussing any bias on the part of the trial judge." *Class*, 2023 IL App (1st) 200903, ¶ 87, *citing Raintree Homes*, 209 Ill. 2d at 263. Presumably referencing this language, the State argues that *Raintree Homes* limited reassignment orders to bias-and-prejudice grounds. (St. br. 40).

When viewed in context, however, this quoted language did not limit reassignment orders to bias findings; rather, it only described one permissible ground. In *Raintree Homes,* the Appellate Court ordered reassignment, without offering grounds. 335 Ill. App. 3d 317, 320-21 (2d Dist. 2002). In this Court, the Appellee offered no grounds either; rather, it argued that the Appellate Court needed no grounds. *Raintree Homes,* Brief[2] of Appellee, 2003 WL 23935791, at *35-37. The appellant, responding, argued that reassignment required grounds; for example, "a legally sufficient reason such as demonstrated prejudice." *Raintree Homes*, Reply Brief, 2003 WL 23935792, at *24 (March 12, 2003). Given *Raintree*'s question presented – asking whether any grounds are necessary, rather than deciding what grounds are sufficient – *Raintree Homes* cannot be read to create an inflexible bias-only rule.

[2]This Court can, in evaluating a case's issues presented, examine the briefs in that case. *See People v. Mosley*, 2015 IL 115872, ¶ 16 n.6 (taking judicial notice of brief in *People v. Klepper*, 234 Ill. 2d 337 (2009); *People v. Glasper*, 234 Ill. 2d 173, 190 (2009) (taking judicial notice of briefs, and issues, raised in *People v. Zehr*, 103 Ill. 2d 472 (1984)). Class has filed a judicial-notice motion similar to those filed in *Mosley* and *Glasper*.

And *Raintree Homes* does not exist in a vacuum. In adopting *Robin*'s rule, *Class* weighed *Raintree's* above-quoted language against this Court's criminal-appeals orders. 2023 IL App (1st) 200903, ¶ 88, *citing Heider*, 231 Ill. 2d at 25; *Dameron*, 196 Ill. 2d at 179; and *Jolly*, 2014 IL 117142, ¶ 46. *Class* found sufficient authority in the latter. *Id.* As argued above, so should this Court.

3. Nothing in Rule 615(b) explicitly or implicitly supports the State's proposed independent-error doctrine.

The State proposes what might be called an "independent-error doctrine." Every appellate order, it argues, requires two conditions. First, it argues, "the appellate court must find an error in the appealed-from judgment or order," or in related proceedings. Second it argues, "the relief provided must remedy that error." (St. br. 12).

This argument has two problems. First, this Court has never read Rule 615(b) so narrowly. In *People v. Joseph Young*, this Court observed that Rule 615(b) did not specifically authorize remands. 124 Ill. 2d 147, 152 (1988). It found, however, remand power for several reasons; among them: "a reviewing court has certain inherent authority." *Id.* Remand reassignment also falls within a reviewing court's inherent authority. *See Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 167068 (3d Cir. 1993) (finding judicial-reassignment grounds in both federal statutes and "this court's inherent authority").

Second, this Court has never created any such rule. Arguing otherwise, the State cites *Webster*, 2023 IL 128428, ¶¶ 25-33; *People v. Nelson Young*, 2018 IL 122598, ¶¶ 28-29; and *Joseph Young*, 124 Ill. 2d at 152. But neither *Young* case supports the State's proposal. And *Webster* undermines its

proposal, authorizing both dispositional relief (like reversing and remanding) and supplemental relief (like that issued here).

This Court should reject the State's proposal under *Webster*. As it notes, *Webster* held that a reviewing court, having found *no* error – or, stated otherwise, having found only inequity – can issue no relief. 2023 IL 128428, ¶¶ 21, 28-32. (St. br. 20). But *Webster* also distinguished two earlier cases. In both cases, the reviewing court, having found *one* error, issued both "dispositional" relief (correcting the error) and what might be called "supplemental" relief (to avoid future error). 2023 IL 128428, ¶ 24-25. In other words, both cases provided "relief" beyond that which "remed[ied] that error." (St. br. 12).

For example, *Webster* distinguished *People v. Alejos*, 97 Ill. 2d 502 (1983). The *Alejos* defendant was convicted of armed violence and voluntary manslaughter. *Webster*, 2023 IL 128428, ¶ 25, *citing Alejos*, 97 Ill. 2d at 505, 510-12. The armed-violence count, however, needed a predicate offense. *Alejos*, 97 Ill. 2d at 505. The State used, as the predicate offense, the voluntary-manslaughter count. *Webster*, 2023 IL 128428, ¶ 25; *Alejos*, 97 Ill. 2d at 505. *Alejos* found, however, that using voluntary manslaughter as a predicate was error. *Id.*

Having found a single error, *Alejos* issued multiple forms of relief. First, in what *Webster* called its "dispositional remand," *Alejos* reversed the armed-violence conviction. *Webster*, 2023 IL 128428, ¶ 25, *citing Alejos*, 97 Ill. 2d at 511. Then, it further ordered resentencing on the remaining manslaughter count. *Id. Alejos* granted this supplemental relief not by finding "independent error" – it found no further error – but rather "to guard against the

possibility" that the improper conviction "might have affected sentencing as to the proper one." *Id.*

As another example, *Webster* distinguished *People v. Figures*, 216 Ill. App. 3d 398 (1st Dist. 1991). The *Figures* defendant was convicted of two charges: armed violence and attempted murder. *Webster*, 2023 IL 128428, ¶ 25, *citing Figures*, 216 Ill. App. 3d at 399. *Figures* first vacated the former count, finding insufficient evidence. *Webster*, ¶ 25, *citing Figures* at 402. But despite finding only a single error, it also remanded for resentencing on the attempted murder count, as it could not determine if further error occurred in that sentencing. *Webster*, ¶ 25, *citing Figures* at 404.

In sum, *Webster* recognized that reviewing courts, upon finding a single error, are not limited to "dispositional" relief. Upon finding an error, they can also grant further relief, to guard against possible further error.

Which is what the Appellate Court did here. Judicial partiality is an error. *Class* ordered reassignment to guard against possible future error, lacking confidence that the judge could hold the balance clear and true. 2023 IL App (1st) 200903, ¶¶ 91-92. Under *Webster, Alejos*, and *Figures*, the Appellate Court properly exercised its authority.

Nothing in *Nelson Young* or *Joseph Young* undermine *Webster*, *Alejos*, or *Figures*. In *Nelson Young*, the Appellate Court did what this Court has expressly forbidden: it considered, on appeal, post-conviction claims not raised below. 2018 IL 122598, ¶ 28, *citing People v. Jones*, 213 Ill.2d 498, 507 (2004). That case did not involve dispositional and supplemental relief. Neither did *Joseph Young*, where the Appellate Court remanded without any error finding, apparently only for purely humanitarian reasons. 124 Ill. 2d at 152.

4. Nothing in trial-level substitution law precludes the *Heider* or *Robin* tests.

The State argues that *In re Marriage of O'Brien* limits reviewing-court reassignment authority. 2011 IL 109039. (St. br. 15, 20-22). Not so. In *O'Brien*, the husband filed a substitution petition, alleging actual bias and prejudice. *Id.*, ¶ 6. It was denied. *Id.*, ¶¶ 7-13. On appeal, he proposed a trial-level substitution-petition appearance-of-impropriety test. *Id.*, ¶ 35. As the State notes, this Court rejected his proposal. *Id.*, ¶¶ 36-48. (St. br. 20). From that rejection, the State argues that an appearance test (and, presumably, *Robin*'s other prongs as well) should not be an appellate-level reassignment ground either. (St. br. 15, 20-22).

But *O'Brien* was a statutory-interpretation case, where legislative intent controlled. In contrast, in this rule-interpretation case, this Court need not defer to the legislature. Construing its own rules, this Court should distinguish *O'Brien*, for three reasons. First, unlike trial judges, who evaluate trial-level substitution petitions, reviewing-court justices bring a different perspective. Second, unlike trial judges, appellate justices have a different role. And third, unlike trial litigants, appellate litigants cannot force judge shopping.

Unlike in *O'Brien*, this Court need not defer to legislative intent. *O'Brien* addressed trial-level substitution petitions, which were, and are, "governed solely by statute." 2011 IL 109039, ¶ 26, *citing* 725 ILCS 5/114-5 (2006); 735 ILCS 5/2-1001(a) In contrast, as the State acknowledges, reassignment is governed by this Court's own rules. (St. br. 12-15). So unlike the *O'Brien* court, bound by legislative intent, this Court remains free to exercise its own

judgment. And in exercising its judgment, this Court should distinguish reviewing-court reassignment, for three reasons.

First, reviewing-court justices bring a different perspective. As *Class* noted, "for-cause substitution necessarily involves a certain degree of speculation as to what kinds of rulings the trial judge will make going forward." *Class*, 2023 IL App (1st) 200903, ¶ 95. "Absent some express animosity or hostility, any [trial] court would be disinclined to conclude that the trial judge could not fairly make those rulings." *Id.* "[I]n contrast," *Class* found, "the appellate court has a full record to make a far more nuanced decision...". *Id.*

The State, arguing otherwise, contends that reassignments are also speculative. (St. br. 21). Perhaps, but less so. Reviewing courts get a full record. They get full briefing. And sometimes they can, when necessary, take more time. *See State v. Jones*, 2024-Ohio-1083, ¶ 18 (Donnell, J., concurring_ ("every conscientious trial-court judge appreciates the fact that appellate courts have more time to contemplate the record and correct any legal or factual errors").

Second, reviewing-court justices have a different role. Reviewing courts, more than trial judges, can, and sometimes must, consider public interests going beyond those of litigants. *See Midwest Commercial Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 18 (noting that forfeiture can be excused, where "public interest favors considering the issue now"); *In re Marriage of Avery*, 251 Ill. App. 3d 648, 654 (5th Dist. 1993) (addressing nonessential issue, given its "substantial public interest"); *Mueller v. Bd. of Fire & Police Com'rs of Vill. of Lake Zurich*, 267 Ill. App. 3d 726, 732 (2d Dist. 1994) (disregarding *stare decisis* where prejudicial to public interest). As argued on pages 16-21 above,

the *Robin* test protects interests beyond those of litigants: the rule of law, for example, and intercourt comity. That is why the *Robin* test is "salutary and in the public interest," both "for the judge's sake and the appearance of justice." *Robin*, 553 F.2nd at 10 (2nd Cir. 1977).

And third, reviewing-court justices have more discretion; therefore, appellate litigants cannot force judge shopping. Trial judges, upon finding substitution "cause," *must* order substitution. *See* 735 ILCS 5/2-1001(a)(3)(I); 725 ILCS 5/114–5 (2006)**.** Therefore, at the trial level, if the appearance of bias constituted "cause," such an appearance "would be enough to force a judge's removal." *O'Brien*, 2011 IL 109039 ¶ 43.

In contrast, under Rule 615, appellate justices "*may* ... modify any or all of the [subsequent] proceedings." (Emphasis supplied.) The word "may" confers discretion. *Lichter v. Carroll*, 2023 IL 128468, ¶ 22. So does *Heider*'s language. 231 Ill. 2d at 25 (finding that case "should" be reassigned). And so does *Robin*'s test. 553 F.2d at 11 (holding that even where judge ignores mandate, reassignment "may be advisable").

Given these differences, the State's efforts to invoke *O'Brien* lack merit. *O'Brien*, for example, did not "reject," in the appellate context, appearance-of-impropriety analysis. (St. br. 20). *O'Brien* was a trial-level, statutory-interpretation case. It never addressed Rule 615(b).

Further, *O'Brien* does not, in the appellate context, make the Code of Judicial Conduct "the" exclusive "mechanism" for addressing perceived partiality. (St. br. 21). Rather, *O'Brien* forbade trial-level appearance-of-bias, petitions because such petitions could force judge shopping. 2011 IL 109039, ¶¶ 43-44. As noted above, appellate litigants cannot force reassignment.

In sum, "principled bas[es]" for distinguishing trial substitution abound. (St. br. 22). *O'Brien's* statutes govern only trial courts. Reviewing courts bring a different perspective. They have a different role. And they can refuse judge shopping. Nothing in *O'Brien* holds otherwise.

5. Summary.

Nothing in Rule 615's plain language precludes the *Heider* and *Robin* tests. Neither does the State's case law. Nothing in *Heider* (or its allied cases) invoke supervisory authority. There is no independent-error test, nor should there be. And *O'Brien* has nothing to teach here. This Court should not restrict reviewing courts to a bias-and-actual-prejudice test.

D. Under either the *Heider* or *Robin* tests, this Court should affirm reassignment.

Applying the *Robin* factors, *Class* correctly ordered reassignment. It correctly doubted that the judge could reassess her views. It correctly found that reassignment would serve the appearance of justice. And it correctly found no judicial-economy problem. The State, arguing otherwise, imagines only "mere" legal error and an isolated doctrinal mistake. Under the *Robin* test (and, logically, under the broader *Heider* test) this Court should affirm *Class*.

The State accused Class of the car-to-car shooting of gang rival Tony Koniewicz. *Class*, 2023 IL App (1st) 200903, ¶ 5. Only one witness, however, implicated Class: Heather Ambrose. *Id.* But nothing corroborated her: neither confession evidence, nor physical evidence, nor other circumstantial evidence.

Id., ¶ 1. Class testified that he was innocent – and he has always maintained his innocence. *Id.*, ¶¶ 1, 23-24, 65-66.

In his petition below, Class offered new affidavits implicating Salazar. (C. 292-83, 298). Robert Pasco, for example, attested that Salazar had bragged about shooting Koniewicz. *Class*, 2023 IL App (1st) 200903, ¶¶ 34, 72. Christopher Stanley attested that, while in Ambrose's car, and while with Ambrose and Salazar, he saw Salazar fire shots at the car in question. *Id.*, ¶ 35, 71. And William Sanchez attested that Class was not the shooter, whom he described as "light skinned, 'almost white.'" *Id.*, ¶ 31, 71. (Although *Class* did not note it, police reports described the petitioner as medium complected; *see* Sec. C. 23, 69, 75.)

Based on the foregoing, *Class* found a substantial actual-innocence showing. *Class*, 2023 IL App (1st) 200903, ¶ 83. Based on this finding, it reversed the circuit court's order dismissing the petition at the second stage. *Id.* It ordered an evidentiary hearing. *Id.*

Class also ordered reassignment, and correctly so. 2023 IL App (1st) 200903, ¶¶ 85-98. It found that "the multiple errors committed her compounded each other" so as to "undermine our confidence" that the judge could "put out of her mind" her improper findings. *Id.* ¶ 91. A review of these findings shows why.

Applying *Robin*'s first prong – that the judge would face substantial difficulty rethinking her findings – *Class* noted its petitioner's strong actual-innocence claim, one challenging a one-witness identification. 2023 IL App (1st) 200903, ¶¶ 89-91, *citing Manley*, 847 F.3d at 713. It also noted that the sole identification witness was herself an obvious suspect – and gang member

Elias Salazar's girlfriend. *Id.*, ¶ 91. And it noted that, after the shooting, both Salazar and Ambrose, but not Class, left Chicago. *Id.*, ¶¶ 5, 90-91.

Against this background, *Class* correctly doubted that the judge could view Class's actual-innocence claim as anything but deficient. *Id.* First, as it noted, the judge discounted Pasco's affidavit as hearsay. *Class*, 2023 IL App (1st) 200903, ¶ 34. Pasco described hearing Salazar confess to the shooting – or, more precisely, brag about it. ¶ 34. As the experienced judge likely knew, however, this Court has long allowed post-conviction hearsay. *Class*, ¶ 74, *citing* Illinois Rule of Evidence 1101(b)(3) (eff. Jan 1, 2011). By barring exculpatory hearsay, the judge undermined Class's petition.

Second, as *Class* noted, the judge improperly disregarded Stanley's affidavit, in two ways. For example, she discounted his affidavit as incredible. Stanley described seeing Salazar shoot Koniewicz. *Class*, 2023 IL App (1st) 200903, ¶ 35. The judge called his account unbelievable. *Id.*,¶ 75. But again, as the experienced judge likely knew, this Court has long reserved credibility for the evidentiary hearing. *Id., citing People v. Domagala*, 2013 IL 113688, ¶¶ 34-35; *see also People v. Caballero*, 126 Ill. 2d 248, 259 (1989). As another example, she disregarded his affidavit as not newly discovered: "the record," she asserted, showed that Stanley was "known to Mr. Class at trial." *Class*, 2023 IL App (1st) 200903, ¶ 76. Yet this same record "contain[ed] several references to Mr. Class's trial counsel trying, but ultimately failing, to produce Mr. Stanley at trial." *Id,* ¶ 77. As *Class* explained, trial counsel's efforts made Stanley's affidavit in fact newly discovered. *Id.* By considering credibility and by ignoring the trial record, the judge undermined Class's petition all the more.

And third, the judge's other actions further undermined confidence that she could take an open mind. For example, she disregarded the Sanchez affidavit because it did not distinguish the shooter's appearance from Class's. *Class*, 2023 IL App (1st) 200903, ¶ 78. "However," *Class* noted, Sanchez "did clearly state that he observed the shooting and knew Class had nothing to do with the shooting." *Id.* Further, she improperly applied the cause-and-prejudice standard to Class's actual-innocence claim. *Id.*, ¶¶ 41, 61, 92. More generally, she examined each affidavit in an isolated way, seeking flaws and insufficiencies. *Id.,* ¶ 92. As a whole, this pattern further undermined Class's petition.

In sum, the judge improperly disregarded Pasco's affidavit as hearsay, improperly discredited Stanley's affidavit as incredible and not newly discovered, selectively read the Sanchez affidavit, and failed to consider the affidavits as a whole under the proper actual-innocence standard. Any one of these actions, in isolation, might merit an innocent gloss. In isolation, an unbiased judge, perhaps a new one, might forget post-conviction hearsay rules. Or prematurely address credibility. Or misread the record. But together, as a pattern, they reenforced the same result: to undermine a strong actual-innocence claim. *Class*, 2023 IL App (1st) 200903, ¶ 91. Given this pattern, *Class* correctly doubted that the judge could rethink her views. 2023 IL App (1st) 200903, ¶¶ 89-91*, citing Awadallah*, 436 F.3d 125, 135; and *Manley,* 847 F.3d at 712**.**

Applying *Robin*'s second prong, *Class* correctly found that reassignment would serve the appearance of justice. *Class*, 2023 IL App (1st) 200903, ¶ 93. As it noted, this is Class's last chance for freedom. *Id.* As it found, a reasonable observer could easily perceive bias, given how the many ways the

judge had avoided exculpatory evidence: by examining each affidavit for flaws and insufficiencies; by isolating each affidavit; and, especially, by prematurely addressing credibility. *Id.*, ¶¶ 92-93. "The appearance of fairness is almost invariably undercut by a premature assessment of the strength of one party's case." *Adoption of Tia*, 73 Mass. App. 115, 123 (2008).

Finally, the Appellate Court correctly found, under the third *Robin* factor, that judicial economy did not outweigh the first two factors. 2023 IL App (1st) 200903, ¶ 94. As *Class* noted, evidentiary hearings are fairly discrete. *Id.* Further, as it noted, the judge below, not having been the trial judge, never saw or heard the original trial. *Id.* The State does not argue otherwise.

The State, does, however, make other arguments. In a specific argument, it contends that *Class* ordered reassignment because the judge had failed to apply a recently clarified legal standard. (St. br. 17-18). In more general argument, it contends that the judge had only "misidentified" a "legal standard," had "merely misunderstood the applicable law," and committed only "mere legal error." (St. br. 17-18, 23, 25).

The State's more specific argument attacks a straw target, specifically a nonexistent Appellate Court reassignment "basis." (St. br. 17). As it correctly notes, the judge, in dismissing Class's petition, misapplied a recently-clarified actual-innocence test. (St. br. 17-18, *citing People v. Robinson*, 2020 IL 23849). As it also notes, *Class* found this error. (St. br. 17). But nothing in *Class*'s reassignment basis mentioned the *Robinson* error. Rather, it emphasized that Class's actual-innocence claim was strong, that the judge discounted evidence she found incredible, and her refusal to consider some evidence, as a whole. *Class*, ¶¶ 92, 96. And when its reassignment analysis addressed improper

standards, it discussed only misuse of the cause-and-prejudice standard, not the judge's *Robinson* error. *Id.*, ¶ 92.

The State's more general arguments isolate each of the judge's actions, actions this Court should view as a whole. *Class* never ordered reassignment merely because it and the judge "disagree[d]." (St. br. 19). Or just because she "opined on the strength of the evidence" (or, more accurately, on affidavit credibility). (St. br. 18). Or only because she "ruled adversely to petitioner." (St. br. 18). Or "merely because" she "made an error." (St. br. 18-19).

To so isolate *Class's* findings evokes Alice in Wonderland. "Although error alone is almost never a sufficient basis for reassignment," *Class* noted, "the multiple errors committed here compounded each other in a way that undermines our confidence that this judge would be able to put out of her mind the findings that she made and that we found to be improper." 2023 IL App (1st) 200903, ¶ 91. This Court will, of course, review *Class*'s analysis *de novo. Yarbrough v. Nw. Mem'l Hosp.*, 2017 IL 121367, ¶ 21. But it should review what *Class* wrote, not the State's atomized rewrite. It should find, as *Class* did that the judge's pattern of action satisfied the *Robin* factors.

This pattern distinguishes *United States v. Barksdale*, 98 F.4th 86, 90 (3d Cir. 2024). (St. br. 25-26). In *Barksdale*, a parole-revocation case, the judge did not let the defendant testify. 98 F.4th at 88. Based on this single error, *Barksdale* reversed. *Id.* at 88-90. But it denied a reassignment request, finding that neither this single error nor the judge's understandable frustration satisfied the *Robin* test. 98 F.4th at 90. Nothing in *Barksdale* resembles the improper-behavior pattern described above.

The judge's pattern also distinguishes *Sagan v. United States*, 342 F.3d 493. (St. br. 25-26). In *Sagan*, the rescuee-plaintiff alleged delayed-treatment-

induced hypothermia. *Id.* at 496. In support, he offered an expert's affidavit. *Id.* at 499-500. Granting summary judgment, the trial judge called this affidavit speculative. *Id.* at 500. Disagreeing, the Sixth Circuit reversed. 342 F.3d at 498-500. But it denied reassignment, declining to reassign "every time a district court judge misconstrued some evidence." *Id.* Again, nothing in *Sagan* resembles the judge's improper pattern here.

This case is much more like *United States v. City of New York,* which did order reassignment. 717 F.3d 72, 99 (2d Cir. 2013). As here, that case's judge both misapplied the law and prematurely assessed credibility.

In *City of New York*, the plaintiff and intervenors filed a summary-judgment motion. 717 F.3d 72, 78 (2013). The defendants filed a rebuttal, with affidavits. *Id.* at 88. The judge granted the motion, finding the affidavits "either incredible or inapposite." *Id.* at 99.

Finding otherwise, *City of New York* reversed. 717 F.3d at 99-100. It then issued a limited reassignment order ("limited" in that the new judge would only handle liability issues). *Id.* It gave two reasons. First, the judge misapplied the law: at issue was the defendant's burden of production, but the judge required its ultimate burden of proof. *Id.* at 99. Second, and more importantly, the judge prematurely assessed credibility. *Id.* at 99-100. "[A] reasonable observer would have substantial doubts" as to whether the judge, "having branded the City's affidavits 'incredible,' could thereafter be impartial in assessing their] truth." *Id.*, ¶ 100.

Here, as well, the judge misapplied the law, improperly disregarding exculpatory evidence as hearsay. *Class*, 2023 IL App (1st) 200903, ¶ 92. Here, as well, the judge improperly refused to consider other exculpatory evidence. *Id.* In particular, the judge here prematurely assessed credibility. *Id.* As in

City of New York, she created doubt as to whether she could thereafter be impartial. This Court should affirm *Class's* reassignment order.

In summary, *Class* correctly weighed the *Robin* factors, correctly doubted that the judge could be impartial, and it correctly found that others would doubt it too. This Court should distinguish the State's cases, apply *City of New York*, and – either under *Robin*, or, logically, under the broader *Heider* test – affirm the reassignment order below.

E. Alternatively, this Court should affirm reassignment under the State's proposed actual-bias-and-prejudice test.

Even under the State's proposed test, *Class* correctly ordered reassignment. As *Class* found, the judge improperly disregarded one exculpatory statement as hearsay, an irrelevant post-conviction consideration. As it also found, she improperly discounted a second exculpatory statement as incredible. And, as it found, she further disregarded this second statement as not newly discovered, yet the record showed otherwise. Further, her actions, as a whole, show that, from the beginning, she prejudged the case, combing Class's exculpatory affidavits for weaknesses. That is why the record reflects bias. The State again isolates what must be considered as a whole, attacks a straw target, and misreads its own cited authority. Especially because *Class* rightly worried that the wrong man may be in prison, this Court should affirm the trial court's reassignment order.

1. Applicable law.

The State acknowledges that reassignment can be proper, at least for bias or actual prejudice. (St. br. 12-15, *citing People v. Young*, 124 Ill. 2d 147, 152

(1988), and *Eychaner*, 202 Ill. 2d at 279). Bias or prejudice includes, among other things, prejudging a claim. *See Murphy v. Kinnally Flaherty Krentz Loran Hodge & Masur, P.C.*, 2023 IL App (2d) 230019, ¶¶ 73 (equating bias with prejudgment); *People v. Reyes*, 369 Ill. App. 3d 1, 25-26 (1st Dist. 2006) (same).

A judge's rulings and legal errors can betray prejudgment. *People v. Serrano*, 2016 IL App (1st) 133493 (ordering reassignment, where trial judge ignored and misread exculpatory affidavits, made contradictory findings, and ignored defendant-favorable law); *see also People v. Murphy*, 2023 IL App (2d) 230019, ¶¶ 72-74 (reassigning because judge barred admissible evidence, allowed inadmissible evidence, and made unsupported findings); *People v. Scullark*, 2024 IL App (1st) 220676-U, ¶ 95 (reassigning because judge "prematurely decid[ed] *every* question of fact and credibility" (emphasis in original); *People v. Masters*, 2021 IL App (4th) 210178-U. In *Masters*, the defendant, a young adult, argued that, based on his mental condition, he should have been sentenced under *Miller v. Alabama*, 567 U.S. 460 (2012). The judge dismissed the petition, finding that the defendant deserved his sentence and that his petition had no basis in law. *Id.*, ¶¶ 10, 18, 22. *Masters*, however, found a clear basis in this Court's case law. *Id.*, ¶¶ 22. "Given the circumstances," it concluded," a remand "before a different judge is necessary." *Id.*

2. Even under the State's proposed test, *Class* correctly ordered reassignment.

The record shows actual bias and prejudice for the reasons Class, on pages 37-42 above, argues it supports doubts about the judge's impartiality

and the appearance thereof. As noted above, *Class* found a strong actual-innocence claim, a finding the State does not dispute. 2023 IL App (1st) 200903, ¶ 91. As also noted above, the judge improperly discounted one affidavit as hearsay; she improperly disregarded another as both incredible and as not newly discovered, and, as a whole, she combed all of Class's affidavits for weaknesses while minimizing their probative value. *Id.,* ¶¶ 46, 74-75, 96.

In finding actual bias and prejudice *Class* followed *People v. Serrano*. *Class*, 2023 IL App (1st) 200903, ¶¶ 57, 96, 96, *citing Serrano*, 2016 IL App (1st) 133493. *Class*'s background facts parallel *Serrano*'s. As here, in *Serrano*, a single witness anchored the State's murder case. 2016 IL App (1st) 133493, ¶¶ 9-10. As here, newly discovered evidence challenged that witness (specifically, in *Serrano*, a new recantation and new evidence against Detective Reynaldo Guevara). *Id.*, ¶¶ 11-12, 41-42. As here, the judge rejected the defendant's claims. *Id.*, ¶ 20. As here, *Serrano* reversed, finding that substantial evidence supported the defendant's *prima facie* innocence burden. *Id.*, ¶¶ 40-41.

Class's reassignment facts also parallel *Serrano*'s. As here, the *Serrano* judge improperly disregarded exculpatory evidence (here, by discounting Pasco's affidavit as hearsay; in *Serrano*, by ignoring affidavits documenting Guevara's misconduct). 2023 IL App (1st) 200903, ¶ 34; *Serrano*, 2016 IL App (1st) 133493 ¶¶ 32-34, 42. As here, the *Serrano* judge misread the record, to its defendant's detriment (here, by wrongly finding the Stanley affidavit not newly discovered; in *Serrano*, by finding the recanting witness's trial testimony tangential). *Class*, ¶¶ 76-77; *Serrano*, ¶ 29. And, as here, the *Serrano* judge isolated the defendant's affidavits individually, ignoring their

impact as a whole (specifically, affidavits describing Guevara coercion). *Class*, ¶¶ 92-96; *Serrano*, ¶¶ 32-33.

Given these parallels, this Court should find bias and actual prejudice under *Serrano*. As here (see pages 11-13 above), the *Serrano* petitioner "offered up an abundance of evidence to support his claim of actual innocence." *Serrano*, 2016 IL App (1st) 133493, ¶ 45. As here, the *Serrano* judge "turned a blind eye to much of the evidence, and also refused to admit probative, admissible evidence." *Id.* As here, the judge "gave the impression that it was flatly unwilling to consider the evidence offered by petitioner." *Id.* As here, therefore, its "[p]etitioner would be prejudiced were we not to assign the case to a new judge on remand." *Id.*

The State never calls *Serrano* wrongly decided. Neither does it seek to distinguish *Serrano*. This Court should affirm *Class*'s finding that, under *Serrano*, the judge here prejudiced Class.

3. The State's arguments are nonresponsive, misread case law, and fail to address the judge's actions as a whole.

The State's arguments mostly parallel its *Robin*-factors arguments – its *Robinson*-error argument, its effort to atomize what this Court should consider as a whole, and its efforts to minimize the judge's actions as mere mistakes of law. (St. br. 17-19). Class has rebutted these arguments on pages 38-43 above.

Class must, however, argue that the State twice misreads *Eychaner*, 202 Ill. 2d at 279-81. First, it argues that, under *Eychaner*, bias cannot be shown by "opinions formed by the judge." (St. br. 18). But as the State acknowledges only later (St. br. 19), *Eychaner* actually said that such opinions do not show

bias "*unless* they display a deep-seated favoritism or antagonism that would make fair judgment impossible." (emphasis added).

Second, the State overreads *Eychaner*'s opinion-of-the-judge discussion. *Eychaner*'s holding – that, absent favoritism or antagonism, a judge's opinions do not show bias – only governs opinions formed *properly*. As the State notes, *Eychaner* followed *Liteky v. United States*, 510 U.S. 540, 551 (1994). In declining to find bias, *Liteky* held that even strong negative opinions toward a defendant do not show bias. *Id. Liteky* reasoned that its judge's "knowledge and the opinion it produced" were, in the course of the proceedings, "properly and necessarily acquired." *Id.* Here, however, the judge's opinions, and especially her credibility finding, were improperly and unnecessarily acquired. *Class*, ¶¶ 75, 92, 96. *See Domagala*, 2013 IL 113688, ¶¶ 34-35; *Coleman*, 183 Ill. 2d 366, 381 (1998) (leaving credibility for third stage).

4. Summary.

Under the State's proposed actual-bias standard, *Class* correctly ordered reassignment. The judge improperly disregarded exculpatory evidence, improperly discounted other exculpatory evidence, and failed to assess Class's evidence as a whole. The State's arguments, in turn, fail to consider *Class's* analysis as a whole. Especially because *Class* properly saw a potential wrongful conviction, this Court should affirm the reassignment order.

F. This Court should reject the State's *sua sponte* arguments.

The State argues that the appellate court's reassignment order was *sua sponte* and so improper. (St. br. 15-16, *citing People v. Givens*, 237 Ill. 2d 311, 323 (2010)). But *Class* did not violate *Givens*, as the reversal was not *sua*

sponte. Further, the revised appellate opinion was not *sua sponte* at all, as it addressed the State's leave-to-appeal arguments. Finally, even if the State is right, this Court should still address the merits to clarify the law in this area.

Nothing in *Class* – neither in its original or revised decisions, implicated *Givens*. Under *Givens*, a "reviewing court should not normally search the record for unargued and unbriefed reasons to *reverse* a trial court judgment." 237 Ill. 2d at 323 (emphasis in original). This is because the parties are "responsible for advancing the facts and arguments entitling them to relief." 237 Ill. 2d at 324, *quoting Greenlaw v. United States*, 544 U.S. 237, 244 (2008).

But *Class*'s original decision never reversed for unargued reasons. It reversed because, as Class argued, he had made a substantial actual-innocence showing. *Class*, 2023 IL App (1st) 200903 (Opinion of April 28, 2023). It was this showing that entitled Class to dispositional relief. *Id.*, ¶ 83. Only when addressing further relief did the Appellate Court act *sua sponte*. The *Givens* appellate panel, in contrast, found, *sua sponte*, unargued, unbriefed reasons to reverse. 237 Ill. 2nd at 323. Nothing in *Class* implicates *Givens*.

Alternatively, even were the Appellate Court's original decision *sua sponte*, its revised decision was not. *Sua sponte* issues, this Court has explained, involve "speculat[ing] as to the arguments that the parties might have presented had these issues been properly raised." *Givens*, 237 Ill. 2d at 324. But this case comes to this Court from a revised opinion below. This revised opinion addressed the State's petition-for-leave-to-appeal arguments. *Class*, 2023 IL App (1st) 200903, ¶¶ 95, 97. The Appellate Court, therefore, had the State's petition (and presumably, Class's answer). It needed not

speculate. *Givens*, 237 Ill. 2d at 324. And if the State thought its leave-to-appeal arguments inadequate, it could have moved to file a supplemental brief.

Finally, this Court should address the merits despite any *sua sponte* worries. *See People v. Hunt*, 234 Ill. 2d 49, 56 (2009) (addressing issue's merits, despite *sua sponte* decision below, to clarify case law). As in *Hunt*, the issues here are fully briefed. *Id.* As the State notes, in criminal cases, this Court "has never addressed the source and scope of the appellate court's [reassignment] authority. (St. br. 12). This Court presumably took review to clarify this question. It should resolve this matter on the merits. And, for the reasons argued above, it should affirm *Class's* reassignment order.

CONCLUSION

For the foregoing reasons, Angel Class, respondent-appellee, respectfully requests that this Court affirm the Appellate Court's reassignment order.

Respectfully submitted,

DOUGLAS R. HOFF
Deputy Defender

MICHAEL H. ORENSTEIN
Assistant Appellate Defender
Office of the State Appellate Defender
First Judicial District
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
1stdistrict.eserve@osad.state.il.us

COUNSEL FOR RESPONDENT-APPELLEE

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342, is 50 pages.

/s/Michael H. Orenstein
MICHAEL H. ORENSTEIN
Assistant Appellate Defender

APPENDIX TO THE BRIEF

People v. Masters

People v. Sanchez-Segura

People v. Scullark

2021 IL App (4th) 210178-U

NO. 4-21-0178

FILED
December 8, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. GAVIN MASTERS, Defendant-Appellant.	))))))))	Appeal from Circuit Court of Adams County No. 15CF362 Honorable Robert K. Adrian, Judge Presiding.

JUSTICE HOLDER WHITE delivered the judgment of the court.
Presiding Justice Knecht and Justice Cavanagh concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court reversed and remanded for further postconviction proceedings where the trial court failed to determine whether defendant's amended postconviction petition and supporting documents made a substantial showing of a constitutional violation.

¶ 2 In January 2021, defendant, Gavin Masters, filed an amended postconviction petition alleging defendant's aggregate 115-year prison sentence was unconstitutional as applied to him and a record needed to be developed sufficiently to address his claim that *Miller v. Alabama*, 567 U.S. 460 (2012) applied to his particular circumstances. In February 2021, the State filed a motion to dismiss. In March 2021, the trial court granted the State's motion to dismiss.

¶ 3 Defendant appeals, arguing the trial court erred by dismissing his postconviction petition at the second stage of proceedings where the petition, supported by a report from a

doctor, made a substantial showing of a deprivation of defendant's rights under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const., 1970, art. I, § 11). For the following reasons, we reverse and remand.

¶ 4 I. BACKGROUND

¶ 5 In *People v. Masters*, 2020 IL App (4th) 190714-U, this court reversed the trial court's judgment dismissing defendant's postconviction petition at the first stage of proceedings. In defendant's prior appeal we summarized the relevant background as follows:

> "In November 2015, a jury found defendant guilty of first degree murder and attempted first degree murder. The jury further found the State proved the allegation that defendant personally discharged a firearm that proximately caused the death of another. The trial court sentenced defendant to consecutive sentences of 70 years' imprisonment on the first degree murder conviction and 45 years' imprisonment on the attempted first degree murder conviction.
>
> In June 2019, defendant filed a postconviction petition. Defendant alleged his aggregate sentence of 115 years' imprisonment violated the eighth amendment because it was a mandatory *de facto* life sentence. In the petition, defendant acknowledged he was 18 years old at the time of the offense and a facial challenge to his aggregate sentence under the eighth amendment failed. However, defendant alleged a record needed to

> be developed sufficiently to address his claim that [*Miller*] applied to his particular circumstances. The petition alleged defendant was less mature and had an underdeveloped sense of responsibility, was more vulnerable to negative influences and pressures, and his character was less fixed making his actions less likely to be indicative of irretrievable depravity.
>
> In September 2019, the trial court dismissed the postconviction petition. The court found defendant's sentencing claim frivolous and without merit because defendant 'was 18 years of age at the time the offenses were committed [and] a *de facto* life sentence does not violate the state o[r] federal [c]onstitution.'
>
> Defendant filed a motion to reconsider the dismissal of his postconviction petition. The trial court denied the motion to reconsider. In part, the court pointed out the statutory minimum sentence was a *de facto* life sentence and reiterated that a *de facto* life sentence for an 18-year-old did not violate the state or federal constitution." *Id.* ¶¶ 5-8.

¶ 6 As noted, this court reversed the first-stage dismissal of defendant's postconviction petition and remanded for further proceedings. In January 2021, defendant filed an amended postconviction petition. In relevant part, the amended petition alleged the mandatory minimum sentence of 76 years' imprisonment and defendant's sentence of 115 years' imprisonment were unconstitutional as applied to defendant's particular circumstances in violation of the eighth amendment (U.S. Const., amend. VIII) and the proportionate penalties

clause of the Illinois Constitution (Ill. Const., art. I, § 11). Defendant attached a report from Dr. James Garbarino in support of his claim that *Miller* applied to his particular circumstances. Defendant requested an evidentiary hearing where he would call Dr. Garbarino as an expert witness to sufficiently develop the record on his as-applied constitutional challenge to his sentence.

¶ 7 Dr. Garbarino's report stated it offered his "developmental analysis in light of the Supreme Court decision in the case of *Miller v. Alabama*. The *Miller* ruling requires the courts to consider the adolescent defendant's liabilities when it comes to making good decisions and managing emotions as a function of the special developmental characteristics of being immature." The report stated that, generally, the protections from *Miller* should be extended to individuals in their mid-20s when brain maturation is complete. According to Dr. Garbarino, defendant's childhood and early adolescence indicated he had a significant experience of psychological maltreatment. Defendant felt alone in his family and "felt emotionally disconnected from his parents." The recurrent theme of disconnection extended into his social and romantic life. Defendant began playing violent video games at the age of 9 and he reported becoming "immersed in imagery from the dark side of human experience, in terms of both violence and sex. He was introduced to the Dark Web by a peer, and came to view acts of horrific violence—beheadings, gruesome accidents, sexual assaults, suicides, etc." Dr. Garbarino opined exposure to such content would be devastating for a youth. The report stated defendant was "drowning in this violent imagery for years." According to Dr. Garbarino, "this soul numbing experience contributed to [defendant's] lack of inhibitions about shooting two people on July 4, 2015."

¶ 8 The report indicated defendant witnessed domestic violence as a child, including assaults by his stepfather against his mother. According to the report, defendant "appreciate[d] that his actions reflected his immaturity of thought ('executive function') and emotional management ('affective regulation')." Dr. Garbarino opined defendant's issues with thinking and feeling reflected his adolescence coupled with the effects of his family environment and traumatic experiences, rather than a personality disorder. According to Dr. Garbarino, defendant had begun to make rehabilitative progress once he entered his early 20s and that process would continue as he matured. The report stated: "As an 18-year-old boy, [defendant] demonstrated immaturity of thought and emotional control, impetuous and impulsive action, and failure to appreciate the full consequences of his criminal behavior. And, perhaps most importantly, the possibility of rehabilitation was present at the time of his crime and sentencing."

¶ 9 In February 2021, the State filed a motion to dismiss defendant's postconviction petition, arguing defendant was solely responsible for the shooting. Defendant filed a reply, arguing he demonstrated a substantial showing of a constitutional violation. Specifically, defendant alleged he was less mature and had an underdeveloped sense of responsibility, leading to recklessness, impulsive behavior, and risk taking. Defendant further alleged he was vulnerable to negative influences and his character was less fixed. Defendant argued his allegations were supported by Dr. Garbarino's report.

¶ 10 In March 2021, the trial court dismissed defendant's postconviction petition. The court stated nothing about defendant's sentence shocked the moral sense of the community and it found defendant's age was a mitigating factor at sentencing. The court noted it sentenced defendant to 115 years' imprisonment. The court stated it believed defendant deserved the 115-year sentence because of his actions "and because the [c]ourt doesn't believe that there is

any law out there that would change what the Illinois Supreme Court has said in quoting the *Miller* court that 18 is the bright line." Accordingly, the court dismissed the postconviction petition "as far as the claim goes for the unconstitutionality of the *de facto* life sentence as applied to this [d]efendant."

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 On appeal, defendant argues the trial court erred by dismissing his postconviction petition at the second stage where the petition, supported by a report from a doctor, made a substantial showing of a deprivation of defendant's rights under the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11).

¶ 14 The Post-Conviction Hearing Act (Postconviction Act) (725 ILCS 5/122-1 to 122-7 (West 2020)) provides a collateral means for a defendant to challenge a conviction or sentence for a violation of a federal or state constitutional right. *People v. Jones*, 211 Ill. 2d 140, 143, 809 N.E.2d 1233, 1236 (2004). At the first stage of postconviction proceedings, the trial court must determine, taking the allegations as true, whether the defendant's petition is frivolous or patently without merit. 725 ILCS 5/122-2.1(a)(2) (West 2020). At the second stage of postconviction proceedings, "the State may move to dismiss a petition or an amended petition pending before the court." *People v. Pendleton*, 223 Ill. 2d 458, 472, 861 N.E.2d 999, 1008 (2006). The defendant bears the burden of making a substantial showing of a constitutional violation. *Id.* at 473. "At the second stage of proceedings, all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true, and, in the event the circuit court dismisses the petition at that stage, we generally review the circuit court's decision using a

de novo standard." *Id.* Once a petition advances to a third-stage evidentiary hearing, where the trial court makes findings of fact and credibility determinations, we will reverse a trial court's decision only if it is manifestly erroneous. *Id.*

¶ 15 Defendant challenges his sentence, arguing that, as applied to his specific circumstances, his 115-year aggregate sentence violated the eighth amendment of the United States Constitution (U.S. Const., amend. VIII) and the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). Defendant argues the trial court erred by dismissing his postconviction petition at the second stage because the court should have advanced the petition to the third stage so defendant could develop a factual record for his as-applied constitutional challenge. In the appeal following the trial court's first-stage dismissal, this court discussed the relevant law as follows:

> "In a progression of cases involving juvenile sentencing, the United States Supreme Court has held the eighth amendment to the United States Constitution prohibits the death sentence for juveniles convicted of murder (*Roper v. Simmons*, 543 U.S. 551, 578-79 (2005)), mandatory life sentences without the possibility of parole for juveniles convicted of nonhomicide offenses (*Graham v. Florida*, 560 U.S. 48, 82 (2010)), and mandatory life sentences without the possibility of parole for juveniles convicted of murder (*Miller*, 567 U.S. at 489). The Supreme Court determined 'that children are constitutionally different from adults for purposes of sentencing.' *Id.* at 471. The Supreme Court identified three principal differences between juveniles and adults. First, a child's

underdeveloped sense of responsibility and lack of maturity led to 'recklessness, impulsivity, and heedless risk-taking.' *Id.* Second, juveniles are more vulnerable to outside pressure and negative influences. *Id.* Third, a child's character is less fixed and less likely to demonstrate an inability to be rehabilitated. *Id.*

The Illinois Supreme Court has taken this line of cases further. In *People v. Holman*, 2017 IL 120655, ¶ 40, 91 N.E.3d 849, the supreme court held *Miller* applied to discretionary life sentences without parole for juvenile defendants. And in *People v. Buffer*, 2019 IL 122327, ¶ 40, 137 N.E.3d 763, the supreme court held *Miller* also applied to *de facto* life sentences of more than 40 years. Finally, the supreme court has raised the possibility that the rationale in *Miller* might apply on a case-by-case basis to young adult offenders who were over the age of 18 at the time of the offense. *People v. Harris*, 2018 IL 121932, ¶¶ 37, 53, 120 N.E.3d 900.

As noted above, defendant raises an as-applied challenge to his sentence. The distinction between a facial and as-applied constitutional challenge is crucial. 'A party raising a facial challenge must establish that the statute is unconstitutional under any possible set of facts, while an as-applied challenge requires a showing that the statute is unconstitutional as it applies to the specific facts and circumstances of the challenging party.' *Id.* ¶ 38.

In *Harris*, the Illinois Supreme Court heard a similar argument from an 18-year-old defendant who challenged his 76-year mandatory minimum sentence under the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 35. The defendant argued the sentencing scheme that resulted in a mandatory aggregate sentence of 76 years' imprisonment was unconstitutional as applied to his circumstances. *Id.* ¶ 36. The defendant argued it shocked the moral sense of the community to impose a mandatory *de facto* life sentence given the facts of his case, including his youth and other mitigating factors. *Id.* In support of his argument, the defendant relied on *Miller* to argue the emerging science showed brain development continued into the early twenties and the reasoning from *Miller* should be extended to his case because he was just 18 years old at the time of the offense. *Id.* ¶ 37.

The supreme court determined defendant's as-applied challenge was premature because the record was not sufficiently developed in terms of the defendant's specific facts and circumstances. *Id.* ¶¶ 39, 46. The supreme court noted *Miller* did not directly apply to the defendant who, at the age of 18, was no longer a juvenile. *Id.* ¶ 45. Accordingly, the court concluded, '[t]he record must be developed sufficiently to address [the] defendant's claim that *Miller* applies to his particular

circumstances.' *Id.* The court further concluded remand was unnecessary where the defendant could raise his claim in a collateral challenge. *Id.* ¶ 48. We note that the supreme court, in *Harris*, determined the defendant could raise an as-applied challenge under the proportionate penalties clause of the Illinois Constitution but it rejected the defendant's facial challenge under the eighth amendment. *Id.* ¶ 53. The court noted an as-applied challenge under the eighth amendment 'would fail for the same reason as his challenge under the Illinois Constitution failed, because no evidentiary hearing was held and no findings of fact were entered on how *Miller* applies to him as a young adult.' *Id.*

In *Harris*, the court relied upon its earlier analysis of these issues in *People v. Thompson*, 2015 IL 118151, 43 N.E.3d 984. In *Thompson*, a 19-year-old defendant attempted to raise an as-applied constitutional challenge to his mandatory life sentence for the first time on appeal from the dismissal of a petition for relief under section 2-1401 of the Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)). *Thompson*, 2015 IL 118151, ¶ 1. He argued the eighth amendment considerations addressed in *Miller* should apply with ' "equal force" to individuals between the ages of 18 and 21.' *Id.* ¶ 21. The defendant relied on the evolving science regarding juvenile maturity and brain development in support of this position. *Id.* ¶ 38. The court held the defendant's

as-applied challenge under *Miller* was forfeited because it was not the type of challenge recognized as being exempt from the typical rules of forfeiture. *Id.* ¶ 39. However, in *dicta*, the court noted the defendant's as-applied challenge was actually a facial challenge because he relied exclusively on the evolving science of brain development, and the record contained 'nothing about how that science applie[d] to the circumstances of [the] defendant's case, the key showing for an as-applied constitutional challenge.' *Id.* ¶ 38.

Following *Harris* and *Thompson*, Illinois courts have confronted as-applied challenges invoking the *Miller* rationale in postconviction proceedings. In *People v. House*, 2019 IL App (1st) 110580-B, ¶¶ 17, 23, 142 N.E.3d 756, the appellate court considered the second-stage dismissal of a 19-year-old defendant's postconviction petition, in which he asserted his mandatory life sentence violated the proportionate penalties clause. [*Id.* ¶ 23.] After discussing the evolving science regarding brain development and considering our supreme court's decision in *Harris*, the *House* court concluded the line demarcating 18 years of age as adulthood for legal purposes was 'somewhat arbitrary.' *Id.* ¶¶ 55-56. It held the defendant's mandatory life sentence violated the proportionate penalties clause and shocked the moral sense of the community because of the 'defendant's age, his family background, his actions as a lookout as opposed to being the actual shooter, and [his] lack

of any prior violent convictions[.]' *Id.* ¶ 64. The court noted the defendant's age and his relative culpability created questions regarding the 'propriety of a mandatory natural life sentence for a 19-year-old defendant convicted under a theory of accountability.' *Id.* ¶ 46.

Courts have distinguished *House* in cases where the defendant played a more active role in the crime or received a discretionary rather than a mandatory sentence. See, *e.g.*, *People v. Ramsey*, 2019 IL App (3d) 160759, ¶¶ 22-23, 143 N.E.3d 865 (rejecting an 18-year-old defendant's proportionality claim and noting he was the sole actor who committed the offenses); *People v. Handy*, 2019 IL App (1st) 170213, ¶¶ 1, 41 (finding an 18-year-old defendant was not entitled to a new sentencing hearing because he was an active participant in the crimes and received a discretionary sentence)." *Masters*, 2020 IL App (4th) 190714-U, ¶¶ 14-21.

¶ 16 The Illinois Supreme Court allowed the State's appeal in *House* and recently issued its decision in that case. *People v. House*, 2021 IL 125124. The procedural posture in *House* began with the second-stage dismissal of the defendant's postconviction petition. *Id.* ¶ 15. The supreme court reviewed the case's procedural history on review as follows:

"This case comes to us for review following our court's issuance of a supervisory order directing the appellate court to vacate its judgment in *House*, 2015 IL App (1st) 110580. We

> specifically directed the appellate court to consider the effect of this court's opinion in *Harris*, 2018 IL 121932, on the issue of whether petitioner's sentence violated the proportionate penalties clause of the Illinois Constitution (Ill. Const. 1970, art. I, § 11). *House*, No. 122134 (Ill. Nov. 28, 2018) (supervisory order)." *House*, 2021 IL 125124, ¶ 21.

On remand, the parties filed an agreed motion for summary disposition asking the appellate court to remand the case for further postconviction proceedings. *Id.* ¶ 22. The appellate court denied the agreed motion and again vacated the defendant's sentence based on its conclusion that his sentence violated the proportionate penalties clause of the Illinois Constitution. *Id.* ¶ 23. The appellate court concluded *Harris*, 2018 IL 121932, had no effect on its decision because the defendant raised his proportionate penalties clause argument in a postconviction petition and was not the principal offender. *House*, 2021 IL 125124, ¶ 23.

¶ 17 The Illinois Supreme Court determined "the appellate court improperly found that petitioner's sentence violated the proportionate penalties clause of the Illinois Constitution without a developed evidentiary record on the as-applied constitutional challenge." *Id.* ¶ 29. The appellate court incorrectly determined that *Harris* and *Thompson* were limited to situations where the defendant raised an as-applied challenge on direct review or when the defendant was guilty as a principal rather than as an accomplice. *Id.* ¶ 30. The supreme court stated:

> "[O]ur analysis in *Harris* focused on development of the record in the trial court, not whether the challenge is raised in a collateral proceeding or on appeal, or whether the petitioner was a principal rather than an accomplice in the crime. We conclude that the

> appellate court erroneously held that petitioner's sentence of natural life violated the proportionate penalties clause of the Illinois Constitution as applied to him without a developed evidentiary record or factual findings on the as-applied constitutional challenge." *Id.* ¶ 31.

Accordingly, the supreme court stated, "Because we have determined that the record in this case requires further development, we remand the cause to the circuit court for second-stage postconviction proceedings." *Id.* ¶ 32.

¶ 18 As we previously noted in defendant's appeal following the first-stage dismissal of his postconviction petition, defendant has raised an as-applied constitutional challenge to his sentence. On appeal, we concluded defendant met the low bar of stating a gist of a constitutional challenge and remanded for further proceedings. The trial court proceeded to second-stage postconviction proceedings, and defendant filed an amended postconviction petition and attached Dr. Garbarino's report in support of the petition. The State moved to dismiss the postconviction petition, and the trial court granted the motion to dismiss. We note that defendant's initial postconviction petition that this court determined survived summary dismissal at the first stage of proceedings did not include Dr. Garbarino's report.

¶ 19 Based on our review of the supreme court's recent decision in *House*, we conclude defendant's as-applied Illinois Constitution proportionate penalties claim remains viable. First, the most recent decision in *House* precludes distinguishing this case on the basis that defendant was a principal rather than an accomplice where the court outright rejected such an analysis. *Id.* ¶ 31. Second, the court reaffirmed the suggestion in *Harris* that a young adult defendant may raise an as-applied challenge pursuant to the proportionate penalties clause of the

Illinois Constitution. *Id.* ¶ 27. We note that in *Harris*, the defendant raised two distinctive claims. One claim alleged his sentence violated the eighth amendment to the United States Constitution. The supreme court unequivocally rejected that claim when it expressed its agreement "with those decisions and our appellate court that, for sentencing purposes, the age of 18 marks the present line between juveniles and adults. As an 18-year-old, defendant falls on the adult side of that line. Accordingly, defendant's facial challenge to his aggregate sentence under the eighth amendment necessarily fails." *Harris*, 2018 IL 121932, ¶ 61. In contrast, as to the Illinois Constitution proportionate penalties claim, the supreme court distinguished the *Harris* defendant from the 17-year-old defendant in *Holman*, when it stated that unlike the defendant in *Holman*, "defendant in this case was 18 years old at the time of his offenses. Because defendant was an adult, *Miller* does not apply directly to his circumstances. The record must be developed sufficiently to address defendant's claim that *Miller* applies to his particular circumstances." *Id.* ¶ 45. As it did in *Harris*, the *House* court declined to put to rest any notion that an Illinois Constitution proportionate penalties claim based on the *Miller* rationale lacks viability, when it determined "the appellate court improperly found that petitioner's sentence violated the proportionate penalties clause of the Illinois Constitution without a developed evidentiary record on the as-applied constitutional challenge." *House*, 2021 IL 125124, ¶ 29.

¶ 20 Here, defendant alleged that, although he was 18 at the time of the offense, he was less mature and had an underdeveloped sense of responsibility, leading to recklessness, impulsive behavior, and risk taking. Defendant further alleged he was vulnerable to negative influences and his character was less fixed. Defendant urged that his amended petition, coupled with Dr. Garbarino's report, made a substantial showing of a violation of the proportionate penalties clause as applied to his specific circumstances.

¶ 21 Here, unlike the defendant in *House*, defendant did submit for the trial court's consideration a report from an expert, Dr. Garbarino, relating how the evolving science on juvenile maturity and brain development applied to his specific facts and circumstances. Thus, defendant *did* provide evidence in an effort to support his position that the *Miller* principles applied to his specific facts and circumstances. Even so, the trial court dismissed the petition at the second stage.

¶ 22 Regarding the as-applied proportionate penalties claim under the Illinois Constitution, the trial court failed to consider whether the amended petition and the report from Dr. Garbarino made a substantial showing of a violation of defendant's constitutional rights. Instead, the court stated it believed defendant deserved the 115-year sentence because of his actions "and because the [c]ourt doesn't believe that there is any law out there that would change what the Illinois Supreme Court has said in quoting the *Miller* court that 18 is the bright line." Essentially, the court concluded there was no basis in law for defendant to even make the claim he asserted. As previously explained, *Harris* and *House* demonstrate the error in the trial court's analysis. For the foregoing reasons, we conclude the trial court erred by dismissing defendant's postconviction petition at the second stage. Given the circumstances, we conclude remand for further proceedings before a different judge is necessary.

¶ 23 Accordingly, we remand for further second-stage proceedings and direct the new trial court to determine whether defendant, through the allegations in his amended petition and the report from Dr. Garbarino, has made a substantial showing of a violation of his constitutional rights. If the trial court determines the required showing has been made, defendant's petition should be advanced to a third-stage hearing. If the trial court determines defendant has failed to

make the necessary showing, the petition should be dismissed. In remanding this matter, we express no opinion regarding the merits of defendant's claim.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we reverse the trial court's judgment and remand for further proceedings.

¶ 26 Reversed and remanded.

2024 IL App (3d) 240082-U

Order filed May 14, 2024

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2024

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois,
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-24-0082 Circuit No. 23-CF-1782
ALEJANDRO SANCHEZ-SEGURA,	)	Honorable David Carlson,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE DAVENPORT delivered the judgment of the court.
Justices Holdridge concurred in the judgment.
Presiding Justice McDade specially concurred.

ORDER

¶ 1 *Held*: The circuit court failed to make the required findings before granting the State's petition to deny pretrial release.

¶ 2 On September 21, 2023, the defendant, Alejandro Sanchez-Segura, was charged with two counts of predatory criminal sexual assault of a child (Class X) (720 ILCS 5/11-1.40(a)(1), (b) (West 2012)) for acts occurring in 2012 and 2013. The State filed a verified petition to deny pretrial release, alleging the defendant was charged with predatory criminal sexual assault and his release

posed a real and present threat to the safety of any person, persons, or the community under section 110-6.1(a)(5) of the Code of Criminal Procedure of 1963 (725 ILCS 5/110-6.1(a)(5) (West 2022)). The circuit court granted the petition to detain. We vacate the order of the circuit court and remand for a new hearing.

¶ 3 I. BACKGROUND

¶ 4 After a hearing in October 2023, the court granted the State's petition, but indicated its displeasure with bail reform and stated,

> "this law wants me to make a determination that there's some sort of clear and convincing standard of the proof given to this Court that that case is a good case, and I've got to tell you, I'm not making that decision. I am not going to make some sort of advisory opinion and/or act like an appellate court to the Grand Jury indicting him on this case."

Defendant appealed, and this court vacated the detention order and remanded for a new hearing, finding the court was required to make a finding that the State proved each of the three propositions before granting the petition to detain, but the court refused to make a finding that the proof was evident or presumption great that defendant committed a detainable offense. *People v. Sanchez-Segura*, No. 3-23-0497 (2024) (unpublished summary order).

¶ 5 On remand another hearing was held in front of the same judge. The court made a number of statements, stating,

> "This is what the Appellate Court wants. They want me to make these findings. And quite frankly, be careful what you ask for. They can sit in Ottawa and order me to make findings and they want me to follow the bail law, so by clear and convincing evidence I may find two out of the three."

¶ 6 The court went on to say,

> "I think for my purposes, quite frankly I don't want to deal with this. The Appellate Court wants me to deal with this. And the Appellate Court has made it, quite frankly, very difficult for me to deal with certain issues regarding the management of defendants in criminal cases. They want us to make findings, specific findings that they don't want to hear."

The court continued the case for the parties to obtain more information.

¶ 7 At the next court date, the parties presented more argument to the court. Ultimately, the court granted the State's petition. In doing so, it stated, *inter alia*,

> "[T]his State has taken on an academic exercise in some sort of social justice reform. And unfortunately there are members of the third branch of government of which I am a part of that appear to be rubber stamping this endeavor and are essentially allowing for the evisceration of the powers inherent in the third branch of government and particularly in the powers of the trial court to maintain and monitor order in their courtroom and in their court proceedings.
>
> So I'm going to make the findings that they want me to make. Those findings will be as follows. I find by clear and convincing evidence that a grand jury has indicted the defendant showing that there is probable cause that exists that the defendant committed the offenses of predatory criminal sexual assault.
>
> I find by clear and convincing evidence that those are detainable offenses. I find by clear and convincing evidence that that Indictment has been returned. And that I will leave it at that.

> So if someone wants to appeal this decision, perhaps the justices can then now weigh the evidence as presented here in this court and they can tell me whether or not the evidence presented as far as a real and present threat exists based upon the presentation of evidence here in this proceeding."

Defendant appeals.

¶ 8 II. ANALYSIS

¶ 9 On appeal, defendant again argues the court failed to make the required findings. We consider factual findings for the manifest weight of the evidence, but the ultimate decision to grant or deny the State's petition to detain is considered for an abuse of discretion. *People v. Trottier,* 2023 IL App (2d) 230317, ¶ 13. Under either standard, we consider whether the court's determination is arbitrary or unreasonable. *Id.*; see also *People v. Horne*, 2023 IL App (2d) 230382, ¶ 19.

¶ 10 Everyone charged with an offense is eligible for pretrial release, which may only be denied in certain situations. 725 ILCS 5/110-2(a), 110-6.1 (West 2022). The State must file a verified petition requesting the denial of pretrial release. *Id.* § 110-6.1. The State then has the burden of proving by clear and convincing evidence (1) the proof is evident or presumption great that the defendant committed a detainable offense, (2) the defendant poses a real and present threat to any person, persons, or the community or is a flight risk, and (3) no conditions could mitigate this threat or risk of flight. *Id.* § 110-6.1 (a), (e).

¶ 11 Here, the court again failed to make the required findings. While the court to some extent made a finding that the proof was evident or presumption great that defendant committed a detainable offense, it failed to make any findings related to the other two propositions. Moreover, remarks the court made indicated it did not know that it had to make findings on all three

propositions and seemed to want the appellate court to make the finding on whether there was a real and present threat. The court signed a detention order, however, it was in conflict with the oral pronouncement, and when a court's oral and written orders conflict, the oral pronouncement controls. *Barnes v. Lolling*, 2017 IL App (3d) 150157, ¶ 23, n.8. Therefore, we vacate the order of the circuit court and remand for a new hearing on the State's petition to detain. On remand, the new detention hearing should be held in front of a different judge.

¶ 12 III. CONCLUSION

¶ 13 The judgment of the circuit court of County is vacated and remanded.

¶ 14 Vacated and remanded.

¶ 15 PRESIDING JUSTICE McDADE, specially concurring:

¶ 16 Some rudimentary civics principles might be helpful here. The government of the State of Illinois, like its federal counterpart, is comprised of three branches, each with separate functions. Pertinent to this case, the legislative branch makes the law, and it is the function of the judicial branch—the entirety of the judicial branch—to implement it. That is a duty we all have sworn an oath to fulfill unless and until our State supreme court, or the Supreme Court of the United States, finds it to be unconstitutional and relieves us of that obligation. It is not the appellate court that is dictating the parameters of the trial court's findings in this case; the General Assembly has determined that responsibility for all of us.

¶ 17 I agree with remand of this matter to the circuit court, but I would not reassign it to another judge. The trial court should review the statute carefully and do its job as directed therein.

2024 IL App (1st) 220676-U

SECOND DIVISION
March 29, 2024

No. 1-22-0676

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Respondent-Appellee,	)	Cook County.
	)	
v.	)	No. 93 CR 12311
	)	
SHERMAN SCULLARK,	)	Honorable
	)	Stanley Sacks,
Petitioner-Appellant.	)	Judge Presiding.

JUSTICE ELLIS delivered the judgment of the court.
Presiding Justice Howse and Justice Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed in part, reversed in part, remanded with instructions. Petitioner alleged colorable claim of actual innocence but did not show cause for failure to raise ineffectiveness claim in initial petition. Petition remanded for second-stage proceedings on innocence claim and reassignment to new judge, as circuit court made extensive credibility findings at leave-to-file stage.

¶ 2 Petitioner Sherman Scullark was convicted of kidnapping and murdering Darren Payton. He now appeals from the denial of leave to file his second successive post-conviction petition, in which he alleges his actual innocence and his trial counsel's ineffectiveness. Taking the relevant supporting affidavits as true, we find that he has stated a colorable claim of actual innocence but has failed to establish cause for the procedural default of his ineffectiveness claim. We thus grant petitioner leave to file his actual-innocence claim. In an abundance of caution, given the circuit

court's extensive and premature credibility judgments at the leave-to-file stage, we order the case reassigned to a new judge for second-stage proceedings.

¶ 3 BACKGROUND

¶ 4 I. Overview of trial and postconviction proceedings

¶ 5 We begin with a brief summary of pertinent trial evidence to provide background and context for the limited issues now before us. A more comprehensive discussion can be found in our decision affirming the denial of the initial postconviction petition. See *People v. Scullark*, No. 1–06–3267 (2009) (unpublished order under Supreme Court Rule 23); see also *People v. Scullark*, 2015 IL App (1st) 120962-U, ¶¶ 7-16.

¶ 6 Petitioner was one of six members of the Conservative Vice Lords gang convicted of kidnapping and murdering Payton, a fellow gang member who had allegedly violated the gang's rules. The evidence against petitioner came principally from the testimony of Ronald Glover and Devon Fountain, two members of the gang. In exchange for his testimony against petitioner, the State agreed to drop Glover's pending murder charges and propose a 10–year sentence for his aggravated kidnapping conviction. Fountain was never charged in connection with Payton's death. The Cook County State's Attorney's Office kept both Glover and Fountain in witness protection before the trial.

¶ 7 Glover and Fountain testified that, in the late afternoon and evening of April 23, 1993, they were at a house at 229 West 110th Place in Chicago, Illinois where petitioner, along with codefendants Delandis Adams, Darnell Luckett, Manuel Mathews, Dwan Royal, and Marvel Scott, held Payton captive. Payton was bound and blindfolded in an upstairs room. Adams told

Glover that Payton was being punished for violating the gang's rules. Fountain testified that Payton was bleeding from his mouth, and Glover testified that he heard "bumps" and screaming from the room where Payton was held. At one point, they brought a piece of lumber into the room where Payton was bound, after which Glover heard more "bumping" noises.

¶ 8 Glover testified that petitioner and the other codefendants eventually carried Payton, who was wrapped in a blanket, blindfolded, and had a cord wrapped around his neck, out to a white car and put him in the trunk. Glover testified that Scott drove the car away. Fountain did not see them put Payton in the white car, but he testified that he saw Adams and Royal remove speakers from the car's trunk. Fountain said he heard the car start and drive away. Fountain later saw a mop and bucket filled with what looked like blood in the room where Payton had been held. Fountain testified that he saw petitioner emptying this bucket the next morning.

¶ 9 Minnie Payton, Darren Payton's mother, testified that she received three phone calls from him in the early morning hours of April 24, 1993. Payton told Minnie to bring his car to the intersection of 71st Street and State Street and leave a package that was under the seat of the car on the passenger's side of the car. Minnie complied. While waiting at the intersection, a car pulled up, and Luckett and Mathews got out. They asked her if she was looking for Payton. Minnie got out of the car but left the package on the passenger side. Eventually, her husband picked her up and brought her home. When she arrived home, she received another call from Payton saying he would be home in five minutes.

¶ 10 Around 8 a.m. on April 24, 1993, Payton's body was found in the trunk of his car. Payton was blindfolded and had a cord wrapped around his neck. He had been strangled to death.

¶ 11 Chicago police officer Darren Washington testified that he received an anonymous call regarding Payton's death on April 27, 1993. The caller directed Washington to the house at 229 West 110th Place, where he arrested petitioner, Fountain, Luckett, Mathews, and Glover. Washington testified that, while he was at the house, Fountain asked to speak with him privately. Fountain told Washington that he knew why the police had come and that he was present "when they killed that boy." Fountain said he could not go to jail because he would be killed there.

¶ 12 After Fountain's arrest, Detective Michael McDermott interviewed him at the Area 2 police station. McDermott testified that Fountain said he saw Payton at the house with Adams and "several others." McDermott testified that Fountain declined to give a handwritten statement. He said that Fountain instead chose to give his statement before the grand jury. (For what it may be worth, Fountain later recanted his trial testimony.)

¶ 13 Bloodstains, a gun, and cords were found in the house. Beer bottles recovered at the scene contained fingerprints that positively matched the prints of Mathews, Royal, and Glover. Separate fires broke out at the house on May 11, 1993 and May 13, 1993, both of which were started by a hand-held open flame. The second fire caused significant damage to the building. Glover testified that Adams told him that he started the fires to destroy evidence in the house.

¶ 14 Records of the Grand Motel South, presented through the motel manager, Robert Tyson, showed that petitioner checked in at 6:14 a.m. on April 24, 1993, and checked out at 12:00 p.m. on that same day.

¶ 15 The trial court found petitioner guilty of murder and aggravated kidnapping, based on an accountability theory, and sentenced him to natural life in prison.

¶ 16 On his direct appeal, which was consolidated with codefendant Mathews, petitioner only challenged his sentence. We affirmed. *People v. Mathews and Scullark,* Nos. 1–95–3207 & 1–95–4010 (cons.) (1997) (unpublished order under Supreme Court Rule 23).

¶ 17 Petitioner filed his initial postconviction petition in 1999. We affirmed the second-stage dismissal of that petition. (But not before reversing two summary dismissals, both ordered by the same judge that denied leave to file here.) We found, in short, that an affidavit from Fountain, attesting that he was coerced into testifying falsely and didn't actually know who killed Payton, was insufficient to support a claim of actual innocence. See *Scullark,* No. 1–06–3267 (2009).

¶ 18 In 2010, petitioner sought leave to file a successive *pro se* petition, arguing that in his first proceeding, appointed counsel failed to support Fountain's claims of police coercion, at the hands of Detectives Boylan and McDermott, with the 2006 Report of the Special State's Attorney on torture at the Area 2 police station. The circuit court denied leave to file, finding that petitioner failed to satisfy the cause-and-prejudice test for a successive petition. We affirmed that ruling. *Scullark*, 2015 IL App (1st) 120962-U, ¶ 39.

¶ 19 II. Second successive petition

¶ 20 In May 2021, this time represented by private counsel, petitioner sought leave to file the second successive petition at issue here. Petitioner alleges two claims: his actual innocence and trial counsel's ineffectiveness.

¶ 21 Petitioner's actual-innocence claim is based in part on an affidavit from codefendant Mathews, who was also convicted on an accountability theory. In an affidavit dated January 10, 2020, Mathews acknowledged that he is "guilty" because he "participated in the kidnapping,"

and though he did not personally kill Payton, he did witness Payton's murder at the hands of codefendants Luckett and Royal during a party at his house. Petitioner, Mathews says, "was not involved with or present during the kidnapping or murder of Darren Payton." To be clear, "petitioner was not present at the house party" at all on the night that Payton was killed.

¶ 22 In somewhat more detail, Mathews gives the following account of the murder. Mathews lived in the building where Payton was killed; on the night of the murder, he threw a party that was attended by 30 or so people. Mathews did not know Payton at the time, but he saw him at the party, in the company of codefendants Luckett and Royal, and Paul Hawkins. Glover and Fountain were drinking and smoking; Glover, in particular, was "wasted" on crack.

¶ 23 The party was held on the first floor; the upstairs was under construction and generally off limits. But Luckett asked to use the upstairs space to "take care of some business." Luckett offered to pay, so Mathews agreed. At some point, Luckett asked Mathews to go get some money with him. They drove to a gas station, retrieved a bag of money from Mrs. Payton, and returned to the house to count it.

¶ 24 At that time, Payton was "tied up" on the upper floor of the house. Mathews "witnessed Luckett and Royal strangle Payton to death" and "carry Payton's body down the back stairs and put it in the trunk of a car." Again, according to the affidavit, petitioner "was not involved or present" at the house when all of this happened.

¶ 25 While Mathews was in custody, Detective McDermott told him that petitioner and codefendant Adams "were going to go down for this crime," because they recently had been acquitted on unrelated charges and McDermott thought they should have been convicted.

McDermott and Boylan pressured Mathews to "point the finger at Scullark and Adams and commit perjury." When Mathews refused to cooperate, McDermott punched him in the eye.

¶ 26 Mathews explained that he "did not come forward and admit [his] involvement earlier" because he thought, for a time, there was some chance that he "would get out on appeal."

¶ 27 Petitioner also includes an affidavit from Danelle Adams, an alibi witness known to the defense before trial. The affidavit is offered in support of the actual-innocence claim and, in the alternative, an ineffective-assistance claim alleging that trial counsel failed to interview Adams. In her affidavit, dated April 4, 2018, Adams attests that she was with petitioner from roughly noon on April 23, 1993 (the day of the murder) until roughly 1:00 p.m. the following day.

¶ 28 More specifically, she avers, petitioner picked Adams up from her grandmother's house around noon on the day of the murder. They drove to the home of her other grandmother to celebrate her 20th birthday with various family members named in the affidavit, all of whom unfortunately are now deceased. Petitioner and Adams spent the whole day together at her grandmother's house. They spent the night there, too, sleeping in the living room. They woke up around 5:00 a.m. the next morning and drove to the Grand Motel, making only one stop, at a gas station, along the way. They checked out of the motel around noon, and petitioner drove Adams back to her grandmother's house.

¶ 29 After petitioner was arrested, Adams called his trial attorney, Craig Katz, to discuss these events. In fact, she called twice. Both times, Katz told Adams that he needed to interview her and said that he would call her back to make arrangements. But Katz never contacted or interviewed Adams. And "no investigator or attorney ever contacted" Adams to discuss the events "until

2012 at the earliest," when petitioner "hired a private investigator *** as part of his post-conviction appeal efforts."

¶ 30 In his own affidavit, petitioner similarly attests that he was with Adams the whole time, first at her grandmother's house, and then at the Grand Motel. He further attests that he told all of this to attorney Katz after he was arrested. Katz told petitioner that he had spoken to Adams and would be contacting her soon, but "[o]n information and belief," Katz never did. Petitioner tried to find Adams himself after his trial (which Adams says she did not attend) but to no avail. He did not identify Adams in his previous filings because he had not yet located her and thus "did not know whether she would be willing to testify."

¶ 31 In denying leave to file, the circuit court found, among other things, that the affidavits were not "conclusive." In so finding, Judge Sacks explicitly and extensively "weighed" the affidavits against both the trial evidence and evidence submitted in other proceedings—either petitioner's own previous postconviction pleadings, or even those of his codefendants.

¶ 32 ANALYSIS

¶ 33 I. Actual innocence based on the Mathews affidavit

¶ 34 Petitioner claims he should be granted leave to file his claim of actual innocence, based on the Mathews and/or Adams affidavits. The Adams affidavit is not newly discovered, for reasons we will explain, but even taking just the Mathews affidavit as true, petitioner has pleaded a colorable claim of actual innocence.

¶ 35 Leave to file a successive petition "should be denied only where it is clear from a review of the petition and supporting documentation that, as a matter of law, the petition cannot set forth

a colorable claim of actual innocence." *People v. Robinson*, 2020 IL 123849, ¶ 44. At the leave-to-file stage, "all well-pleaded allegations in the petition and supporting affidavits that are not positively rebutted by the trial record are to be taken as true." *Id.* ¶ 45. The court is "precluded" at this stage from making factual findings or determinations about the credibility or reliability of the supporting evidence. *Id.* ¶¶ 45, 61. Such findings "are to be made *only* at a third-stage evidentiary hearing in a successive postconviction proceeding." (Emphasis added.) *Id.* ¶ 61. We review the denial of leave to file *de novo*. *Id.* ¶ 40.

¶ 36 To establish a claim of actual innocence, the supporting evidence must be: (1) newly discovered; (2) material and not cumulative; and (3) of such conclusive character that it would probably change the result on retrial. *Id.* ¶ 47. There is no dispute on appeal that the Mathews affidavit is material and not cumulative. The State argues that it is neither newly discovered nor conclusive.

¶ 37 "Newly discovered evidence is evidence that was discovered after trial and that the petitioner could not have discovered earlier through the exercise of due diligence." *Id.* ¶ 47. The State concedes that the evidence in the Mathews affidavit was not available to petitioner before trial, and that the circuit court erred in ruling otherwise. We agree. Even when the defense knows of a witness before trial, that witness's later affidavit may still be newly discovered if the defense could not have compelled the witness to testify to the statements in his affidavit. *People v. Fields*, 2020 IL App (1st) 151735, ¶ 48; *People v. White*, 2014 IL App (1st) 13007, ¶ 20.

¶ 38 Here, Mathews was a codefendant, charged and convicted on a theory of accountability. Petitioner could not compel Mathews to put himself at the scene and thus exonerate petitioner at

the expense of implicating himself. *People v. Molstad*, 101 Ill. 2d 128, 135 (1984) ("no amount of diligence could have forced the codefendants to violate their fifth amendment right to avoid self-incrimination").

¶ 39 That fact alone renders the Mathews affidavit newly discovered. Petitioner need not demonstrate, as the State claims, that he diligently pursued an affidavit in his earlier postconviction proceedings; "he need only demonstrate that his failure to discover the evidence *prior to trial* was not due to a lack of diligence." (Emphasis added.) *People v. Smith*, 2015 IL App (1st) 140494, ¶ 19; see also *People v. Beard*, 2023 IL App (1st) 200106, ¶ 49 ("[w]e only consider whether the evidence was discoverable before trial" by diligent defense); *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 134. Because "[s]tatements of a codefendant" are not "discoverable before trial," they "are considered newly discovered," full stop. *Beard*, 2023 IL App (1st) 200106, ¶¶ 49-50.

¶ 40 Our supreme court's decision in *People v. Edwards*, 2012 IL 111711, ¶¶ 1, 38, illustrates this point. The court held that a codefendant's self-incriminating affidavit was newly discovered, for purposes of a successive petition alleging actual innocence, without requiring the petitioner to detail any diligent efforts he may (or may not) have made to secure the affidavit in his earlier postconviction proceedings. It was enough to note that the codefendant could not be compelled to incriminate himself, and thus "[n]o amount of diligence could have forced him to violate that right if he did not choose to do so." *Id.*¶ 38.

¶ 41 The State would have us view this case differently, perhaps as an exception to the general rule, because Mathews's conviction had already been affirmed on direct appeal when the initial

petition was filed. Thus, the State says, Mathews was "no longer at risk" of incriminating himself," and so petitioner had to commence a diligent effort to secure his affidavit.

¶ 42 This fact does not meaningfully distinguish petitioner's case from *Molestad*, as the State suggests. Or *Edwards*, for that matter. Nor does it make rational sense to impose this requirement on evidence like the Mathews affidavit, for at least two reasons.

¶ 43 For one, the State ignores a basic fact about the affidavit: it was the first time Mathews proved willing to incriminate himself by admitting that he was present for the murder. Until then, he had maintained that he was not. Not to belabor the obvious, but petitioner had no way to know that Mathews would one day change his story. Imposing a diligence requirement, in this context, would require petitioner to start pursuing evidence before it existed, and when petitioner had no particular reason to believe that it would ever exist. Put differently, it would require petitioner to proactively *ask* Mathews to recant his previous statements and abandon his own longstanding theory of defense, all for petitioner's benefit.

¶ 44 What's more, it is simply not true that Mathews was "no longer at risk" of incriminating himself once his direct appeal was resolved. Ironically enough, in a postconviction case, the State acts as if Mathews had no right to seek relief in a postconviction proceeding of his own. Not surprisingly, that is exactly what he did. We do not know when those proceedings came to an end, but it doesn't matter. For as long as Mathews remained in custody, asserting his innocence and believing that he had a potential avenue of relief on collateral review, he had every reason in the world to avoid incriminating himself. And petitioner could not compel him to do otherwise.

¶ 45 As Mathews himself puts the point in his affidavit, he "did not come forward and admit [his] involvement earlier" because he thought (or hoped, anyway) that there was some chance he "would get out on appeal." The State seizes on the word "appeal," but it seems obvious enough that Mathews uses it in a broad, non-technical sense, to encompass not only his direct appeal but also his post-conviction proceedings. (Note the phrase "post-conviction appeal efforts" in the Adams affidavit.)

¶ 46 For reasons like these, a petitioner is not required to diligently pursue a codefendant's affidavit, either before or after his direct appeal is resolved. The correct rule, simply stated, is this: a codefendant's affidavit is unavailable until he agrees to provide it, and so it is newly discovered when he does. Thus, the Mathews affidavit is newly discovered.

¶ 47 It is also conclusive. Taking the Mathews affidavit as true, "it is more likely than not that no reasonable juror would have convicted petitioner." *Robinson*, 2020 IL 123849, ¶ 61. Mathews attests that petitioner "was not involved with or present during the kidnapping or murder of Darren Payton," and indeed was "not present at the house party" at all on the night in question. Even on an accountability theory, the Mathews affidavit exonerates petitioner.

¶ 48 (We do not mean to imply that "total vindication or exoneration" is necessary; *Robinson* made clear that it is not. *Id.* ¶¶ 48, 55-56. Our point, rather, is that the Mathews affidavit, taken as true, easily clears the bar that *Robinson* established.)

¶ 49 In *Edwards*, 2012 IL 111711, ¶¶ 39-41, an affidavit stating that the petitioner "had nothing to do with this shooting" was not conclusive, because the petitioner was convicted on an accountability theory; thus, the affiant needed to attest that the petitioner was not *present* at all

when the shooting took place. Here, Mathews states exactly that.

¶ 50 To be sure, one can be accountable from a distance. But that was not the theory, or the evidence, presented at trial; petitioner was found accountable for conduct allegedly performed at the scene of the crimes. If he was not there at all, no rational juror could convict him.

¶ 51 Because the Mathews affidavit is exonerating on its face, there is only one way in which it might fall short of establishing petitioner's innocence: it might be deemed unworthy of belief. But that finding, if it proves warranted, can properly be made "*only* at a third-stage evidentiary hearing." (Emphasis added.) *Robinson*, 2020 IL 123849, ¶ 61.

¶ 52 Until then, the Mathews affidavit must be taken as the truth of the matter, since there was no objective, irrefutable evidence at trial to positively rebut it. (Recall that the only evidence was the testimony of Glover and Fountain.) And Mathews attests that petitioner was not present at all when other gang members killed Payton. So for purposes of the leave-to-file stage, petitioner was not present—and therefore not accountable. The Mathews affidavit is conclusive.

¶ 53 Parroting the circuit court's ruling below, the State argues that the Mathews affidavit is "rebutted by the record" because it conflicts with "his own prior sworn statements" and with other "affidavits which have sworn that Mathews was innocent and not present at the party."

¶ 54 We cannot reject that argument strongly enough. This is exactly the view that *Robinson* rejected as "fundamentally illogical" (*id*. ¶ 57): that new evidence of innocence is positively rebutted, and thus not conclusive, simply because it conflicts with other available evidence that tends to establish guilt. *Of course* the new evidence of innocence conflicts with the trial evidence of guilt; how could it not? If that were a deal-breaker, no actual-innocence petition would ever

succeed. That thinking would also effectively abolish the rule that the new evidence of innocence is *taken as true* at a pleading stage. A mere conflict between the new evidence of innocence and the trial evidence of guilt is not the standard; the new evidence of innocence must positively rebut the trial evidence in 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.* ¶ 60.

¶ 55 This is a case in point: the State and the circuit court note that the Mathews affidavit conflicts with other evidence and go on to conclude, on this basis alone, that a jury would not believe the affidavit. That is *exactly* what *Robinson* rejected. If taking an affidavit as true means anything at all, it means we assume, at a pleading stage, that a jury would believe the affiant over other witnesses who told a conflicting story. Of course this assumption may unravel at an evidentiary hearing, when the credibility of the affidavit is put to the test. But until then, the assumption prevails.

¶ 56 The evidence that is said to conflict with the Mathews affidavit—and thus to show, in so many words, that the affidavit lacks credibility—comes from three sources: the trial testimony; affidavits that petitioner submitted with his *prior* postconviction pleadings; and an affidavit that Mathews submitted with *his own* petition, and which petitioner has never submitted or otherwise adopted in any proceeding of his own. The circuit court thus compounded the already serious and prejudicial error of making credibility judgments at a pleading stage by going outside the record in this case to do so. See *People v. Sanders*, 2016 IL 118123, ¶¶ 38-44 (error to consider credibility finding made at hearing in *codefendant's* case).

¶ 57 Taken as true, the Mathews affidavit is conclusive evidence of petitioner's innocence. On

this basis of this affidavit alone, petitioner thus states a colorable claim of actual innocence. We reverse the judgment denying him leave to file this claim.

¶ 58 II. The Adams affidavit

¶ 59 Petitioner also bases his innocence claim, in part, on the Adams alibi affidavit. Taken as true, the Adams affidavit is no less exonerating than the Mathews affidavit, and in that sense it can surely be called evidence of innocence. But the Adams affidavit is not newly discovered, as is generally required for a claim of actual innocence.

¶ 60 Assuming (as we must at this stage) that the Adams affidavit speaks the truth, petitioner obviously knew that he was with Adams at the time of the murder. As did trial counsel, since Adams told him so. Trial counsel told Adams that he needed to interview her and said that he would call her back to make arrangements. But he never did. According to Adams, "no investigator or attorney ever contacted" her about this case until petitioner "hired a private investigator *** as part of his post-conviction appeal efforts." Petitioner's own affidavit similarly attests that counsel told him, before trial, that he spoke to Adams and would contact her soon; but ("[o]n information and belief") counsel never followed through.

¶ 61 Taken as true, the Adams affidavit thus demonstrates that a diligent attorney could have secured her testimony, and that trial counsel was not, in fact, diligent in this respect. So the Adams affidavit is not newly discovered. *Robinson*, 2020 IL 123849, ¶¶ 47, 53; *Edwards*, 2012 IL 111711, ¶ 38; *People v. Harris*, 206 Ill. 2d 293, 301 (2002).

¶ 62 The flip side of this coin is that trial counsel was deficient for failing to interview a known alibi witness. *People v. Henry*, 2016 IL App (1st) 150640, ¶¶ 56-57; *People v. Bolden*,

2014 IL App (1st) 123527, ¶¶ 30, 45-46; *People v. Tate*, 305 Ill. App. 3d 607, 612 (1999); see *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (counsel "has a duty to make reasonable investigations or reasonable decisions that make particular investigations unnecessary"). And in the alternative to his actual-innocence claim, petitioner does allege that trial counsel was ineffective for this reason.

¶ 63 The distinction between evidence that a diligent defense could not have obtained, on the one hand, and available evidence that a *non*-diligent defense failed to obtain, on the other, marks the basic fault line between actual-innocence and ineffective-assistance claims. And there is no question on which side of the line the Adams affidavit falls: the allegations, taken as true, establish that trial counsel was deficient in failing to diligently investigate an available alibi witness.

¶ 64 Petitioner would have us consider the Adams affidavit in support of both his claims. He argues that when counsel fails to investigate or present an available witness, that deficiency in counsel's performance renders the witness *un*available to the defendant, such that a later-obtained affidavit will be deemed newly discovered. In this way, an affidavit that on its face supports a claim on ineffective assistance can also be used as evidence of actual innocence.

¶ 65 If counsel's deficiency is precisely what renders the evidence newly discovered, then there is no distinction at all between the two types of claims. As a general proposition, this is plainly not an accurate statement of Illinois law. So petitioner's argument is at best overbroad. A close look at the "well-established precedent" he cites confirms that there is no such general rule, though there are rare, unusual scenarios in which we will relax the strict definition of "newly

discovered evidence" to avoid an obvious injustice. This case, as we will see, is not one of them.

¶ 66 First up is *People v. Triplett*, 2021 IL App (1st) 180546-U, a non-precedential decision that illustrates our point exactly. As here, the petition in *Triplett* alleged claims of ineffective assistance and actual innocence. The ineffectiveness claim was based on trial counsel's failure to interview a known alibi witness and was supported by an affidavit from that witness. *Id.* ¶¶ 3, 37. The actual-innocence claim was based on a new affidavit from Robinson, attesting that Johnson, a key witness who identified the petitioner at trial, was with him, elsewhere, at the time of the shooting, and therefore could not have witnessed it. *Id.* ¶¶ 3, 46. There was no claim, and no finding by the court, that the alibi affidavit was *also* evidence of actual innocence, on the ground that counsel's deficient performance rendered the alibi witness unavailable at trial. In suggesting otherwise, petitioner misdescribes the case.

¶ 67 In *Ayala*, 2022 IL App (1st) 192484, two codefendant-petitioners, Ayala and Soto, were jointly tried and convicted of murder and other offenses—Soto as the shooter, Ayala on a theory of accountability. *Id.* ¶ 2. They alleged their actual innocence in their respective petitions based on affidavits from Abarca and Mullins, who identified Rodriguez as the real shooter. *Id.* ¶¶ 66-68, 81. In an unusual twist, it turned out that DeLeon, one of two attorneys who jointly represented both petitioners at trial, *also* represented Rodriguez, who had been separately charged (in juvenile court) as the shooter. *Id.* ¶¶ 2, 5, 51, 129.

¶ 68 Given these highly unusual facts, the Abarca and Mullins affidavits technically failed to qualify as newly discovered evidence, because the witnesses were in some sense known to the defense before trial. *Id.* ¶ 141. At least attorney DeLeon would have known of them. Even so, we

deemed the affidavits newly discovered, and considered them in support of the actual-innocence claims, because the witnesses were "available" at trial in what we might call an overly technical sense: they were known to a conflicted attorney who allegedly failed to call them because they would implicate his other client. *Id.* And the petitioners, we reasoned, had no way to force their attorney to violate his duty of loyalty to Rodriguez, though we note that it is unclear whether the petitioners themselves even knew of the witnesses before trial. *Id.*

¶ 69 The actual-innocence framework is meant to ensure that technical defaults do not work a "fundamental miscarriage of justice" against a petitioner with an otherwise legally viable claim of innocence. *People v. Pitsonbarger*, 205 Ill. 2d 444, 459 (2002). In so many words, *Ayala* thus relaxed the strict definition of "newly discovered evidence" to avoid what we perceived as an injustice arising from a unique set of circumstances.

¶ 70 But we never intended this exception to apply to an alibi obviously known to the *petitioner himself* before trial. *Ayala* itself makes this plain. Among the affidavits submitted was one from Mora, an alibi witness who claimed she was with the petitioners, at Ayala's home, when the shooting took place. *Ayala*, 2022 IL App (1st) 192484, ¶ 79. The Mora affidavit was not newly discovered, and so did not support the petitioners' actual-innocence claims, for the simple reason that the alibi was obviously known to the defense before trial. *Id.* ¶ 142. Given these garden-variety facts—like ours here—the usual rule applied.

¶ 71 In *People v. Warren*, 2016 IL App (1st) 090884-C, the petitioner, represented by counsel, alleged his actual innocence in his initial petition. *Id.* ¶ 3. Multiple witnesses provided affidavits in support of this claim; when the time came to file, all that remained was for counsel to get their

signatures and attach their affidavits to the petition—which he failed to do. *Id.* ¶¶ 3, 26, 38. The limitations period was about to run out, as counsel explained, and he apparently couldn't get his act together, so he filed the petition without the affidavits or any explanation of why they might be considered unavailable. *Id.* The petition was dismissed, in part, for a lack of evidentiary support. *Id.* ¶ 3.

¶ 72 These facts are a dead ringer for ineffective assistance, and that would undoubtedly be the appropriate claim if an attorney failed to make use of available evidence *at trial* because he ran out of time to perform some foundational tasks. But there's a wrinkle: *Warren* involved an initial petition, not a trial, and, critically, there is no such claim as ineffective assistance of post-conviction counsel. *Id.* ¶ 128. So there was only one way to provide meaningful relief: allow the petitioner to raise his innocence claim in a successive petition, with the supporting affidavits attached, and free of any procedural bars. *Id.* ¶ 130.

¶ 73 There was an argument to be made that the affidavits were not new. *Id.* ¶¶ 115, 130. But we did not insist on technicalities at the expense of fundamental fairness. *Id.* ¶ 130. A petitioner should not be barred from presenting his evidence of innocence, leaving him with *no* avenue for relief at all, just because his lawyer couldn't pull a submission together in time. *Id.* On "facts as unique as these," an attorney's incompetence should "excuse the failure to present new evidence [of innocence] in an earlier petition." *Id.* ¶ 132.

¶ 74 There are no unique or extraordinary circumstances in this case that compel us to relax the usual definition of "newly discovered evidence" to preserve the ultimately equitable nature of the actual-innocence framework. Petitioner's claim is a garden-variety example of ineffective

assistance of trial counsel. The Adams affidavit is indistinguishable from the alibi affidavits in *Triplett* and *Ayala*. Unlike the petitioner in *Warren*, petitioner here did not assert his claim, or for that matter, acquire the evidence in question (minus the signatures) for his initial petition. And unlike the petitioner in *Warren*, the usual *Strickland* remedy is available to him.

¶ 75 The problem for petitioner is that it has taken him the better part of 30 years to so much as mention an alibi witness who was known to him before trial. His first and best opportunity to pursue a remedy was immediately after his trial, at a *Krankel* proceeding—a forum literally made for claims like his. See *People v. Krankel*, 102 Ill. 2d 181, 184 (1984) (post-trial allegation giving rise to *Krankel* rule was that "counsel failed to investigate an alibi witness"). He could have alleged his claim in his initial petition, and if, as he now asserts, an affidavit from Adams could not be obtained at that time, through no fault of his own, he could have explained why. (More on this topic shortly.) Instead, petitioner said nothing at all about his known alibi until his successive petition. The usual rules for newly discovered evidence apply in this context. Which means that his claim is one of ineffective assistance—and it is a defaulted claim at that.

¶ 76 So petitioner must obtain leave to file. To this end, he must demonstrate that there was "cause for his or her failure to bring the claim in his or her initial post-conviction proceedings," and that "prejudice results from that failure." 725 ILCS 5/122-1(f) (West 2012); see *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002) (cause and prejudice test must be applied to each individual claim in successive petition, other than actual innocence).

¶ 77 "Cause," the basis for our ruling here, means "an objective factor that impeded his or her ability to raise a specific claim during his or her initial postconviction proceedings." 725 ILCS

5/122-1(f) (West 2022). An "objective" impediment is one that is "external to the defense," on account of which the legal or factual basis for the claim "was not reasonably available" in earlier proceedings. *People v. Blalock*, 2022 IL 126682, ¶ 39; *People v. Pitsonbarger*, 205 Ill. 2d 444, 462 (2002). The cause determination is made on the pleadings, taking the allegations and supporting affidavits as true, and is subject to *de novo* review. *People v. Smith*, 2014 IL 115946, ¶¶ 33-35; *People v. Bailey*, 2017 IL 121450, ¶ 13. We note, in passing, that the circuit court entirely failed to address the cause-and-prejudice test.

¶ 78 Petitioner alleges in his own affidavit that after his trial, he "tried to find Ms. Adams" but "could not locate her." Without her affidavit in hand, he "did not know whether she would be willing to testify." Thus, he did not "specifically identify" Adams in his initial petition, despite alleging that trial counsel was ineffective for failing to investigate other witnesses. Since Adams "had not yet come forward," and because he "could not locate her" on his own, petitioner alleges that Adams's testimony "was previously unavailable" to him.

¶ 79 These allegations are too little, too late, to adequately plead cause for petitioner's failure to raise his claim in his initial petition. In *People v. Coleman*, 2023 IL App (1st) 210263, the petitioner alleged, in a successive pleading, that his trial counsel was ineffective for failing to present an exculpatory witness known to the defense before trial. *Id.* ¶¶ 11, 21. He further alleged "that he was unable to obtain [the witness's] affidavit" until after he had filed his initial petition and "therefore was incapable of supporting his ineffective assistance claim, as required," in that pleading. *Id.* ¶ 22. Much like petitioner alleges here.

¶ 80 We held that these allegations were insufficient to plead cause. Because the petitioner

was aware of the facts that the witness was to provide in an affidavit, he could have alleged these facts in support of his claim and attached "his own affidavit *** explaining why [the witness] could not be located." *Id.* ¶ 23. This would have stated the gist of a claim, at the first stage of an initial petition, and satisfied the statutory requirement that a "petition shall have attached thereto affidavits, records, or other evidence supporting its allegations *or shall state why the same are not attached*." (Emphasis added.) 725 ILCS 5/122-2 (West 2022); see *People v. Collins*, 202 Ill. 2d 59, 67 (2002). A failure to take these steps in the initial petition results in a procedural default of the claim without good cause shown.

¶ 81 *Coleman* thus holds that where a petitioner alleges that trial counsel failed to present a known witness but does not have an affidavit from the witness in hand, he must still allege the claim in his initial petition, document his diligent efforts to locate the witness, and thus explain why the lack of a supporting affidavit is not his fault. And note that a petitioner's incarceration, while no doubt a significant practical obstacle to finding a witness, has never been recognized as a sufficient reason to excuse the absence of a supporting affidavit.

¶ 82 One might object that the Adams affidavit should not be subject to stricter requirements than the Mathews affidavit. But fundamental differences between the witnesses justify different treatment. Mathews was a codefendant who one day proved willing to incriminate himself; no amount of diligence by petitioner could have brought that about. Adams was a known alibi who was evidently willing to speak up on petitioner's behalf and who was never in any danger of self-incrimination. Petitioner did not need her to change her story, abandon her own defense, or waive her privilege. Petitioner simply needed to find her. Granted, that is not always easy from

prison. But it was his burden.

¶ 83 As in *Coleman*, the factual basis for petitioner's claim was obviously known to him when he filed his initial petition: he knew he was with Adams at the time of the murder; he knew that Adams told trial counsel; and he knew that trial counsel failed to interview her. Petitioner thus knew what his alibi was, who his alibi witness was, and how trial counsel knew of the witness but failed to conduct a reasonable investigation into this defense. Even without an affidavit from Adams to support his claim, petitioner could have alleged the facts on which his claim was based and attached his own affidavit explaining what steps he took to locate Adams and why his diligent efforts failed through no fault of his own. (If, indeed, that was the case.)

¶ 84 A petition alleging these facts, and supported by petitioner's affidavit, as thus described, would have stated the gist of a claim and should have advanced to the second stage. And we note that his initial petition advanced to the second stage, anyway. Either way, petitioner would have had the assistance of post-conviction counsel in his efforts to find Adams—but only if he alleged his claim at that time.

¶ 85 Of course, there's no guarantee that post-conviction counsel would have found Adams. But even if Adams proved elusive, and a lack of diligence wasn't the problem, petitioner could have established that her affidavit was not "reasonably available" when he asserted his claim in his initial petition. *Blalock*, 2022 IL 126682, ¶ 39. And if the affidavit later became available, he could then reassert his claim and support it with his new evidence. See *People v. Brandon*, 2021 IL App (1st) 172411, ¶ 42; *People v. Wrice*, 406 Ill. App. 3d 43, 52 (2010), *aff'd*, 2012 IL 111860, ¶ 85.

¶ 86 Having done none of this, petitioner procedurally defaulted his claim. His bare allegation that he could not locate Adams, until one day he did, is not good cause shown. For this reason, we affirm the denial of leave to file his ineffective-assistance claim and respectfully reject his contention that the Adams affidavit is newly discovered evidence of actual innocence.

¶ 87 III. Reassignment to new judge

¶ 88 Petitioner argues that the case should be assigned to a different judge on remand, because the circuit judge improperly prejudged the credibility of his allegations and supporting evidence at the leave-to-file stage.

¶ 89 We recognize that the decision to reassign a case to a new judge is not to be made lightly, and certainly not on the basis of adverse rulings or ordinary judicial error alone. *People v. Vance*, 76 Ill. 2d 171, 181 (1993); *Eychaner v. Gross*, 202 Ill. 2d 228, 280 (2002). Rather, the question is whether "fair judgment" will be possible in the proceedings to follow on remand. *Eychaner*, 202 Ill. 2d at 281. We agree with petitioner that the answer here is no.

¶ 90 The circuit judge's ruling—this time at the leave-to-file stage—was replete with premature credibility findings. These findings were all couched in the language of "conclusive" evidence, but we agree with petitioner that the judge determined whether evidence was conclusive by asking whether it deserved to be believed, when it was "weighed against" the other available evidence from trial, petitioner's prior filings, and even Mathews's own post-conviction petition. These are nothing but credibility judgments.

¶ 91 For example, the judge found that the Mathews affidavit was not conclusive "when weighed against the unimpeached and consistent testimony of the trial witnesses." In other

words, the trial witnesses were credible and thus Mathews was not.

¶ 92 The court found that the Mathews affidavit was "inherently unreliable," and thus not conclusive, because it conflicts with prior statements Mathews made in support of his own post-conviction petition. In short, Mathews was not a consistent—and thus not a credible—witness. The fact that the judge, as we noted above, would go outside the record in this case to find reasons to reject the Mathews affidavit only adds to our skepticism that he has approached petitioner's allegations and supporting evidence with an open mind.

¶ 93 The court similarly rejected the Mathews affidavit as less than conclusive because it conflicted with statements made by other witnesses in support of petitioner's earlier filings. The same points that we just made apply here, too.

¶ 94 Those points also apply in spades to the Adams affidavit. Judge Sacks "did not find this alibi compelling and found both Glover and Fountain credible." And the alibi affidavit was not conclusive given Adams's longstanding "silence" on this issue. That, too, equates conclusiveness with credibility. We recognize that the Adams affidavit will no longer be at issue, in light of our ruling, but the judge's reasons for rejecting it nonetheless bear emphasis, as they underscore the extent to which the judge has prematurely decided that petitioner's claims should fail because they are not worthy of belief.

¶ 95 We are not at all confident that any judge could preside over an evidentiary hearing with an open and impartial mind after prematurely deciding *every* question of fact and credibility that was supposed to be reserved for the hearing. These judgments will inevitably color the court's perception of the evidence; it is unrealistic, at best, to assume otherwise. This alone renders "fair

judgment *** impossible" in the proceedings to come. *Eychaner*, 202 Ill. 2d at 281.

¶ 96 Petitioner points to other remarks as evidence that the judge had already made up his mind about the outcome of the case long ago, from the earliest status hearings. But we have said enough; the fact that the trial judge has already passed judgment on every key factual question that must eventually be decided at a hearing is reason enough to reassign the case.

¶ 97 Illinois Supreme Court Rule 365(a)(5) (eff. Feb. 1, 1994) permits a reviewing court, in its discretion, to make any order or grant any relief that a particular case may require. "This authority includes the power to reassign a matter to a new judge on remand." *Eychaner*, 202 Ill. 2d at 279. Out of an abundance of caution, and to preserve petitioner's right to a fair hearing, we exercise that authority here.

¶ 98 CONCLUSION

¶ 99 The judgment of the circuit court is affirmed in part and reversed in part. The case is remanded for second-stage proceedings on petitioner's actual-innocence claim. On remand, the case shall be reassigned to a different judge of the circuit court.

¶ 100 Affirmed in part; reversed in part; remanded with instructions.

No. 129695

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS, Petitioner-Appellant, -vs- ANGEL CLASS, Respondent-Appellee.	)	Appeal from the Appellate Court of Illinois, No. 1-20-0903. There on appeal from the Circuit Court of Cook County, Illinois, No. 02 CR 13513. Honorable Angela Munari Petrone, Judge Presiding.

NOTICE AND PROOF OF SERVICE

Mr. Kwame Raoul, Attorney General, 115 S. LaSalle St., Chicago, IL 60603, eserve.criminalappeals@ilag.gov;

Ms. Kimberly M. Foxx, State's Attorney, Cook County State's Attorney Office, 300 Daley Center, Chicago, IL 60602, eserve.criminalappeals@cookcountysao.org;

Mr. Angel Class, Register No. 1200903, VADOC Centralized Mail Distribution Center, 3521 Woods Way, State Farm, VA 23160

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 September 11, 2024, the Brief and Argument 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 respondent-appellee 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 Brief and Argument to the Clerk of the above Court.

/s/Monica Rios
LEGAL SECRETARY
Office of the State Appellate Defender
203 N. LaSalle St., 24th Floor
Chicago, IL 60601
(312) 814-5472
Service via email is accepted at
1stdistrict.eserve@osad.state.il.us