NO. 131565

IN THE
SUPREME COURT OF ILLINOIS

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| MICHAEL MCCOY,<br><br>Petitioner-Appellant,<br><br>v.<br><br>PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee. | On Appeal from the Appellate Court of Illinois, First Judicial District, Case No. 1-24-0198<br><br>There Heard on Appeal from the Circuit Court of Cook County, Illinois, Criminal Division, Case No. 86 CR 10404-02<br><br>The Honorable Michael Clancy, Judge Presiding. |

# REPLY BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

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## I. The State's Statement of Facts is Full of Errors and Omissions

This case has startling facts, and the State misrepresents them. The conviction relies on identification testimony from three witnesses who used a collaborative process so insidious that one witness admits he never saw the shooting but nevertheless identified McCoy as the shooter at trial. Op.Br. at 9. The post-conviction expert testified unrebutted that modern social science emphatically refutes the reliability of the resulting identifications for several reasons. Op.Br. at 12-14. And offender Wayne Millighan has been on record for over a decade admitting his role in this crime and exculpating McCoy. Op.Br. at 10-12. Millighan admits he lied under oath at his own trial, and he committed this crime with McCoy's doppelganger, whose criminal history resembles the crime. *Id.* The State, however, misrepresents important facts to hide flaws in the prosecution's evidence. This impermissible effort should be a red flag to the Court that the post-conviction innocence claim has merit and a new trial is warranted. Examples include:

First, the State falsely conflates alleged hearsay descriptions of the shooter from unknown sources with descriptions from the store witnesses, to falsely bolster the witnesses' sparse contemporaneous description, and then uses this sleight of hand throughout its argument. *E.g.*, St.Br. at 2, 29, 47, 52, 59. *Compare* St.Br. at 2 (State's brief claiming, "store employees said…" and recounting a description, citing R.711-12, 720-21); and R.709, 711-12, 714-15, 720-21, 1208 (officer recounting a composite description he arrived at using the store witnesses' amalgamated descriptions and a police report that included up to a dozen descriptions from unnamed sources). Immediately after the shooting, before their collaborative identification effort, the store witnesses could

only describe the shooter as male, Black, 28-years-old, specified clothing, earring, with no mention of McCoy's "thick mustache," beard, and longer hair. R.149, 154, 238-39.

Second, these witnesses' later identifications were collaborative, with integral social contamination starting immediately due to their language barrier. This contamination was so severe that witness Hassan identified McCoy in a photo array and then, in a lineup and at trial, as the shooter, even though he admits that he did not see the shooting or the shooter, as he was in the walk-in cooler the entire time. R.22, 54, 60, 72, 237, 1204-05, 1226, 1228, 1236; SR 44, 68, 71-73; A.2, ¶ 3. The State's brief obscures that Hassan identified McCoy *as the shooter* despite admitting to never seeing the shooter. *See* St.Br. at 5, citing R63-71.

Third, Ghrayyib testified that after the black-and-white photo array, the witnesses were shown color photos:

> A. They showed us pictures because they wanted to be sure. When they brought the — when they brought the person and showed us the line-up and at that same moment, they asked us whether we could identify anyone.
>
> Q. Were you shown any black and white photographs any time prior to viewing –
>
> A. Yes, they did.
>
> Q. The line-up?
>
> A. They showed us what -- black and white pictures and they showed us some color pictures after.

R.39.

At the black-and-white photo array, Hassan identified McCoy as having been in the store earlier, but according to the police, Ghrayyib and Awwad did not make any shooter identification at the array. *See* R.64, 1263-65 (Awwad's identifications were from lineup and in court); St.Br. at 4 (same); St.Br. at 5 (Ghrayyib's identification occurred at

lineup). Thus, the fair reading of Ghrayyib's testimony is that, after a photo array fail, the witnesses were shown McCoy's photo "to be sure" they could identify him at the lineup. Either way, and regardless, Awwad was Hassan's interpreter, so presumably Awwad saw Hassan identify McCoy at the array before Awwad's lineup identification. R.22-23, 53-54, 62, 237, 1236. While there are various ways to interpret this testimony, the State's statement of facts omits it altogether. Then, in argument, the State imagines that Ghrayyib's testimony means that, he put himself in the shoes of the officers and assumed they showed him the color photos "to be sure they had the right suspect, a normal objective of any investigation." St.Br.49. This fanciful effort to impart good intent upon the stunningly suggestive identification technique does not make it any less suggestive or any less contaminating of the witnesses' (improperly collective) memory.

Fourth, the State claims that defense counsel and petitioner both conceded that McCoy was in the store "with Millighan causing a disturbance" the night of the shooting (St Br. at 12, citing SuppR7-8, *id*. at 12-13, citing SuppR133). Not true. Instead, Millighan testified that he had been in the store earlier and did not see McCoy, but noted there were other people there, not with him. SR 133-34. At SR 7-8, counsel concedes only, "Mr. McCoy was in the store at the time, as well."

There was never an admission that McCoy was part of Millighan's disturbance, a meaningful distinction. McCoy's expert opines that because this was a neighborhood store and McCoy was seen there earlier, it was easy for the witnesses to erroneously transpose McCoy's vaguely familiar face for that of the shooter. *E.g.*, Op.Br. at 29-30, 41-42; SR 48-49, 68, 71-73; *see also People v. Martinez*, 2021 IL App (1st) 190490, ¶ 51, *overruled in part on other grounds by People v. Flournoy*, 2024 IL 129353, ¶ 116

(describing expert testimony about reconstructed memories and unconscious transference, "which occurs when the witness identifies a suspect whom she has seen before due to mere familiarity"); Third Circuit Task Force, *2019 Report of the United States Court of Appeals for the Third Circuit Task Force on Eyewitness Identifications*, 92 Temp. L. Rev. 1, 60 (2019) (discussing "unconscious transference" or "memory-source error," when "the witness recognizes that the person identified is familiar but mistakenly attributes the person's familiarity to the crime"). But the State's factual claim is unsupported by its citations. *See also* St.Br. at 2 (citing R.754, argument, not evidence).

This conviction relies on eyewitness testimony. The State highlights alleged hearsay corroboration from an alleged anonymous informant (St.Br. at 2, 6), questions the non-blood on McCoy's shoe (St.Br. at 6, 15), maligns McCoy for not testifying (St.Br. at 30), and transparently throws shade on McCoy (*e.g.*, St.Br. at 7, 30), but the scene fingerprints and shoe print did not match McCoy, ISP post-conviction testing revealed "no blood" on his shoe, and there was simply no evidence supporting guilt aside from the eyewitness testimony. *See, e.g.,* A.2, ¶ 3; A.16, ¶ 5; Op.Br. at 4-5, 32-33.

## II. Viewing the Post-Conviction Evidence Objectively and Collectively, As Required, Dr. Franklin's Expert Testimony, the Modern Blood Testing, and Millighan's Exculpation Together Warrant Post-Conviction Relief

The parties agree that third-stage evidentiary hearing rulings are reviewed for manifest error. St.Br. at 18; Op.Br. at 18. McCoy argues that, upon finding manifest error, this Court could reverse and remand for further post-conviction proceedings or it could, upon its own review, reverse for a new trial, and he contends that reversal for a new trial is warranted. Op.Br. at 18. The parties agree that these are the options before the Court. *See* St.Br. at 19, quoting *People v. Harris*, 2025 IL 130351, ¶ 44 (this Court may

‘“find that the circuit court’s ruling was manifestly erroneous’ and remand for a new trial; or … find that the circuit court applied the wrong standard of proof, or made other procedural errors, thus ‘warranting a remand for a new third-stage hearing.’”).

### A. The Lower Courts Manifestly Erred by Failing to View the New Evidence Collectively

The State concedes that courts are tasked with viewing post-conviction evidence collectively. Op.Br. 16-17; *see* ILL. SUP. CT. R. 341(h)(7) (“Points not argued are forfeited”). The appellate court has already found that the circuit court rejected the post-conviction evidence with a siloed approach and never conducted the required collective consideration of how the evidence might be mutually corroborative. *See* A.6, ¶ 12 (“circuit court did not conduct a proper analysis of all of the evidence together”); A.7, ¶ 14 (“defendant appears to be correct that the circuit court conducted an improper analysis of the evidence by failing to consider all of the evidence in the case collectively.”); A.20, ¶ 13 (circuit court “conducted a flawed analysis of the defendant’s claim”). That manifestly erroneous lapse means that the courts never considered whether a jury would likely credit Millighan if it heard his exonerating testimony *alongside* the total absence of any inculpatory physical evidence (given the modern serological testing refuting the claim of blood on McCoy’s shoe) and Dr. Franklin’s testimony about how unreliable these witness identifications are. Reversal for a new trial or a new third-stage adjudication is warranted.

The State’s arguments, repeating the lower courts’ errors below, only serve to demonstrate how consequential the court’s failure was. One of the circuit court’s primary reasons for rejecting Millighan’s testimony inculpating Howard Reed as the true shooter is that there was a height discrepancy between the witnesses’ description of the shooter

and Reed, so Millighan's testimony had to be false. A.32; R.249-50; St.Br. at 29. But the store witnesses' contemporaneous description did not include a height. R.238-39. This means that the shooter's height description came *after* the witnesses discussed the shooting and decided amongst themselves—with the help of some police photo arrays—that the shooter must have been McCoy.

Dr. Franklin explained that the way social contamination and unconscious transference works is that once the witnesses together decided that the shooter might have resembled a person who they saw earlier, their memory of the shooter inextricably merged with the memory of that person. The memory of the crime was thus altered, and subsequent descriptions had a memory-source error. SR 44, 48-49, 68, 71-73; *see also* Third Circuit Task Force, 92 Temp. L. Rev. at 60 (discussing "unconscious transference" and "memory-source error"); *Lerma*, 2016 IL 118496, at ¶¶ 14, 28; *Martinez*, 2021 IL App (1st) 190490, at ¶ 51 (describing expert testimony about unconscious transference).

Indeed, here the unconscious transference/memory-source error happened so thoroughly that Hassan identified McCoy as the shooter even though he did not see the shooting, not because Hassan was malicious or a liar, but because this is how memory, social contamination, and unconscious transference work. Thus, the lower court's central conclusion that the height discrepancy renders Millighan's testimony impossible relies on the manifest error of siloing Millighan's testimony, without considering it alongside the scientific evidence explaining the exposure effect, social contamination, memory-source errors, and unconscious transference.

Additionally, Millighan's testimony is supported by the lack of any physical evidence supporting the witnesses' identification: there were no matching fingerprints

from the crime scene, the door shoeprint did not match McCoy, and ISP testing found "no blood" on McCoy's shoe. CI 2226; R.258-59, 261-62, 268-70, 278-80, 356, 1227; A.16, ¶ 5. The courts were, again, required to view Millighan's testimony in the context of the complete dearth of inculpatory physical evidence but manifestly erred by failing to do so.

The State argues that post-conviction serologist Lankford's testimony is not new, is cumulative, and leaves open the possibility that there was blood on the shoe. St. Br. at 33-37. But the courts below were tasked with adjudicating what the evidence would look like at a new trial. *See* Op.Br. at 16-17. The State would bear the burden of proof at that new trial, and modern testing revealed that there is no evidence of blood on McCoy's shoe that the State could present at a new trial. It does not matter whether the Court reaches that conclusion via Lankford, the post-trial Illinois State Police testing finding "no blood," or even the State's original witness's admissions, as explained through modern science by Lankford at the evidentiary hearing.

The important thing is that McCoy demonstrated on post-conviction that no evidence of blood on McCoy's shoe exists that the State could present at a new trial, and the circuit court's erroneously siloed assessment of the evidence failed to account for this.

The State also responds by trying to poke holes in Millighan's testimony, but no hole is significant enough to render the court's adjudication error on this key assessment harmless. The State complains that Millighan is unreliable because he previously denied guilt and did not exonerate McCoy until 2010 (St.Br. at 25-26), but this timing left Millighan with a lot to lose by coming clean, including possible perjury charges for his new testimony here and possible charges for his new admissions relating to the uncharged Collins shooting. The State argues that Millighan is impeached by McCoy's

admission that he was with Millighan on the night of the shooting, but as argued above, there was no such admission. St.Br. at 26. The State contends that Millighan's story confuses facts and adds a third cash register, but its citations again do not support its contentions. St.Br. at 27. The State contends that Millighan cannot be believed because he is a murderer. St.Br. at 25. But this does not mean a jury could not credit him. *See*, *e.g.*, *People v. Coleman*, 2013 IL 113307, ¶ 104 (trial court manifestly erred in finding murder co-defendants' exculpation insufficiently conclusively to probably change the result on retrial). Indeed, juries routinely credit confession evidence, as the State well knows. *E.g.*, *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991) ("A confession is like no other evidence.").

Millighan does recount that there was one more offender in the store than the witnesses realized, but here too, viewing that contention in the context of Dr. Franklin's testimony is key. Dr. Franklin explains the scientific research indicating that this incredibly stressful scene, where the employees were held at gun point, heard a gun fired, and had their attention divided between perpetrators, would have made it very hard to process details accurately. *See*, *e.g.*, SR 45, 47, 59; CI 2247.

The State's remaining arguments are baseless. The State erroneously contends that McCoy fails to provide record citations in support of this claim. St.Br. at 20-21. *But see* Op.Br. at 20, citing A.6, ¶ 12; A.7, ¶ 14; A.20, ¶ 13; Op.Br. at 15, citing *id.* and A.32-36. The State points out that the lower court expressly stated it considered all the evidence. St.Br. at 21. But, as the appellate court found, the circuit court did so piecemeal instead of collectively as required. The State argues that the circuit court did consider some evidence in the context of other evidence, so its adjudication was not a completely

siloed approach. St.Br. at 21 (citing R.2941-45, 2949-51). Notably, the pages cited demonstrate the precise error that the appellate court has already found: the circuit court conducted a siloed consideration of the new evidence, without any consideration of how it was collectively corroborative. This was manifest error because the court was instead required to consider the evidence collectively. *E.g.*, *Harris*, 2024 IL 129753, at ¶ 65; *Coleman*, 2013 IL 113307, at ¶ 97. Had the court done so, it would have found the new evidence mutually corroborative, warranting a different outcome. Post-conviction relief on this claim is warranted.

### B. The Lower Court Manifestly Erred by Failing to Conduct an Objective Adjudication of the Post-Conviction Evidence

The circuit court judge found that he personally did not believe Millighan for cold-record reasons only and notably did not find Millighan's presentation or manner unbelievable. While the court was indeed required to adjudicate witness credibility, in doing so, it was required to ask not "do I, the post-conviction judge, personally believe this witness," but rather whether "the fact finder would reach a different result after considering the prior evidence along with the new evidence." *People v. Robinson*, 2020 IL 123849, ¶ 48 (internal citations omitted); *see also Coleman*, 2013 IL 113307, at ¶ 97; Op.Br. at 23-24 (and citations therein). The court failed to conduct this adjudication correctly.

The State has little to say about this error. The State argues generally that Courts must afford deference to lower court credibility findings (St.Br. at 18, 21-22), but it fails to address that such deference is not warranted when the court's factual findings are premised on a legally erroneous framework. *See*, *e.g.*, *Baggett v. Indus. Comm'n*, 201 Ill.2d 187, 200 (2002) (setting aside factual finding predicated on error of law).

Neither of the State's cited cases, *People v. Reed*, 2020 IL 124940, ¶ 51, and *People v. Fair*, 2024 IL 128373, ¶ 80, St.Br. at 18, involve errors in how the courts conducted the factual assessment, and neither stands for the proposition that when the court adjudicates the facts via a legal error, its adjudication nevertheless remains entitled to deference. Here, the lower court's negative credibility assessment against Millighan incorporated the court's adjudication error, and so its findings are not entitled to deference. *Baggett*, 201 Ill.2d at 200.

## III. In the Context of this Case, Entirely Reliant on Atypical and Highly Dubious Identifications, the Expert Testimony Warrants a New Trial

Should this Court reject the other post-conviction evidence, McCoy contends that, regardless, the courts below manifestly erred by failing to recognize that the actual innocence conclusiveness requirement is met with new evidence disproving the entirety of the prosecution's case. Dr. Franklin's testimony and the modern serological testing do that, and post-conviction relief is therefore warranted.

### A. Dr. Franklin's Post-Conviction Evidence is New and Not Cumulative

The State argues that Dr. Franklin's testimony is not new and is cumulative, but it forfeited these contentions by conceding both issues in the appellate court. *See Robinson*, 223 Ill.2d 165, 174 (2006) (failure to argue issue in appellate court forfeits issue before this Court); *People v. Schott*, 145 Ill.2d 188, 201 (1991) (same). This case presents the Court with important questions about the reliability of the eyewitness identifications, the only evidence supporting a murder conviction and natural life imprisonment sentence. This Court should not exclude the post-conviction claim relating to the eyewitness expert based on the State's belated, and in any case, meritless arguments.

Ironically, the State argues that McCoy has forfeited his claim by failing to argue in his opening brief that Dr. Franklin's testimony is new evidence and not cumulative. St.Br. at 37, 43. Because the State conceded these issues in the appellate court, *see Robinson* and *Schott*, and newly raises them here, McCoy may address this argument in his reply. *See, e.g.*, *People v. Whitfield*, 228 Ill.2d 502, 514 (2007) ("It would be unfair for us to require an appellant, when writing his or her opening brief, to anticipate every argument that may be raised by an appellee."); *Jones v. Country Mut. Ins. Co.*, 371 Ill. App. 3d 1096, 1102 (1st Dist. 2007) (reply permitted by Supreme Court Rule 341(g)).

As for the State's contention that the expert testimony is not new because the defense could have tried to present an expert at the 1989 trial, the Court in *Martinez* reviewed a 2001 trial and resoundingly rejected this argument, holding:

> [T]he State makes the somewhat disingenuous argument that [the expert's] report does not constitute newly discovered evidence because expert testimony on eyewitness identification predates defendant's conviction. The State has clearly missed the thrust of *Lerma*. The tone set by *Enis*, which was in effect at the time of defendant's trial, resulted in the common exclusion of expert testimony on eyewitness identification. It would have done little good for defendant to procure [the expert's] report at the time of trial.

2021 IL App (1st) 190490, ¶ 113.

The *Martinez* court's adjudication is consistent with the rulings of this Court and others. *See*, *e.g.*, *Lerma*, 2016 IL 118496, at ¶ 24 (discussing the "dramatic shift in the legal landscape, as expert testimony concerning the reliability of eyewitness testimony has moved from novel and uncertain to settled and widely accepted."); *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 38 ("The *Lerma* court acknowledged that expert witnesses on the reliability of eyewitness testimony were being routinely excluded at the time, at

least partly due to skepticism expressed by the supreme court and repudiated in *Lerma*….”); *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 53-55.

It is telling that the only cases the State cites demonstrating “that experts testified about those same factors before 1989,” are out-of-state, from California, Arizona, and Washington. St.Br. at 39. The State’s one (unpublished) Illinois case, *People v. Porter*, 2024 IL App (1st) 231330-U, ¶ 38, St.Br. at 41, does not speak to the newness of such testimony twenty-five years earlier, but does stand for the proposition that undermining an eyewitness identification when the conviction hinges on that identification can warrant post-conviction relief. *Id.* The remainder of the State’s authority is not from eyewitness expert cases and does not address this issue. St.Br. at 41-43.

The State also contends that the lower court correctly held that Dr. Franklin’s testimony is cumulative because counsel cross-examined the witnesses and argued that the identifications were deficient. St.Br. at 43, citing R.2945. The court below observed that there was cross-examination and argument about the adequacy of the identifications, but it did not hold that Dr. Franklin’s testimony was cumulative. *See* R.2945.

Regardless, the State’s argument misses the point of eyewitness expert testimony. The jury never heard expert testimony about the phenomena present here, especially the exposure effect, likelihood of unconscious transference, and impact of social contamination. This allowed the State to argue, directly contrary to science, that the witnesses’ vague familiarity with McCoy would have enhanced their ability to recognize him in the lineup. *E.g.,* R.338. Dr. Franklin’s testimony, however, would have instead informed the jury that science proves the opposite. *See supra* at 3-4, 6. As this Court held,

such information was unknown to jurors, even twenty-five years later. *Lerma*, 2016 IL 118496, at ¶ 24.

Finally, the State's reliance on *People v. Prante*, 2023 IL 127241, is inapposite. St.Br. at 43-45. Here, unlike *Prante*, the expert testimony would have directly countered the State's arguments about how eyewitness memory perception works. Cross-examination was an inadequate substitute for the counter-intuitive scientific evidence Dr. Franklin would have conveyed. *See* SR 55, 119-20; *Lerma*, 2016 IL 118496, at ¶ 24; *People v. Starks*, 2014 IL App (1st) 121169, ¶¶ 85-93 (Hyman, J., and Pucinski, J., specially concurring). This testimony is not cumulative.

### B. The Actual Innocence Conclusiveness Standard Is Met by Disproving the Entirety of the State's Case

The parties agree that the actual innocence standards set forth in *Robinson* and *Coleman* require petitioners to present evidence that "would probably change the result on retrial." St.Br. at 22-23 (quoting *Robinson*). Even if this Court ultimately chooses to accept the lower court's rejection of Millighan's testimony, McCoy's expert witness' thorough refutation of the limited evidence supporting the conviction alone suffices to meet the conclusiveness standard and warrants post-conviction relief.

Indeed, the State's citation to *Prante* supports this. St.Br. at 24. *See Prante*, 2023 IL 127241, ¶¶ 77-78, 81-86 (using the lens McCoy advocates here, evaluating whether new evidence on post-conviction undermined the entirety of the prosecution, but concluding that post-conviction relief was not warranted because affirmative evidence supporting conviction remained, independent of post-conviction evidence). Here, unlike *Prante*, there is no remaining evidence that is not thoroughly undermined by the post-conviction evidence, so McCoy has made the required showing, warranting a new trial.

The State contends that "impeachment evidence" "typically is insufficient to justify postconviction relief." St.Br. at 45-46, quoting *Prante*, 2023 IL 127241, ¶ 80. This is a red herring. The expert testimony at issue is substantive evidence, not impeachment. *See People v. Lewis*, 2017 IL App (4th) 150124, ¶¶ 33-36 (explaining distinction between impeachment and substantive evidence). Nor was Dr. Franklin even refuting the witnesses' veracity. Rather, Dr. Franklin explained that, despite the witnesses' best efforts, science proves that their identifications "are highly unreliable and at very high risk of having been an artifact of their exposure to post-event information." SR 75; *see also* Martin Blinder, M.D., *Eyewitness testimony: Highly esteemed, highly unreliable, Psychiatry in the Everyday Practice of Law* § 10:1 (5th ed.) (June 2025) (science behind eyewitness testimony reveals "that 80-90% of incarcerated felons freed by DNA evidence had been convicted largely through testimony from sincere, persuasive but hugely mistaken eyewitnesses."); Third Circuit Task Force, at 12 (memories can "be distorted or contaminated, without an individual intending or even knowing that his/her memory is inaccurate.").

The State's additional authority *People v. Rodriguez*, 2024 IL App (1st) 210907-U, and *People v. Berry*, 2022 IL App (3d) 200082-U (St.Br. at 46), hold that because impeachment evidence is typically insufficiently conclusive to support relief, eyewitness expert testimony cannot warrant post-conviction relief. But these cursory, unpublished rulings beg the questions McCoy asks the Court to decide: (1) can such evidence suffice when there is *no* remaining inculpatory evidence, absent the eyewitness identifications?; and (2) can such evidence suffice if it is strong enough to comprehensively refute the

identifications, rather than merely impeach witnesses? McCoy's cited authorities and the interests of justice support an affirmative answer to both questions.

Additionally, McCoy's cited authority supports his position, and the State's attempt to distinguish it fails. St.Br. at 24, n.3. The courts in *Martinez*, 2021 IL App (1st) 190490, and *People v. Montanez*, 2016 IL App (1st) 133726, did remand for further post-conviction proceedings, and in both, the courts did so based on post-conviction evidence disproving the entirety of the prosecution with new evidence, rather than affirmatively proving something new like an alternate offender. *See Montanez*, 2016 IL App (1st) 133726, at ¶ 39, 42; *Martinez*, 2021 IL App (1st) 190490, at ¶¶ 116-117. As the *Montanez* and *Martinez* courts found, allowing for post-conviction relief when the prosecution's only inculpatory evidence has been proven all but impossible is the correct result. When eyewitness testimony is thoroughly disproven by new evidence on post-conviction, and it constitutes the only evidence in support of the conviction, relief is warranted. *See*, *e.g.*, *People v. Gardner*, 2025 IL App (1st) 231650-U, ¶ 64 (remanding for a new trial where inculpatory witnesses were impeached by officers' pattern and practice of abusing witnesses).

Moreover, the direct appeal cases cited in the opening brief stand for the related proposition that disproving an identification is enough to warrant relief from a conviction, even without affirmative proof of an alternate offender, thus they too support relief here. *See People v. Johnson*, 2024 IL App (1st) 220494, appeal pending, 256 N.E.3d 981 (2025); *People v. Hernandez*, 312 Ill. App. 3d 1032, 1037 (1st Dist. 2000); *People v. Smith*, 185 Ill.2d 532, 541-46 (1999). A post-conviction petitioner is not and has never been required to solve the crime or prove an alternate offender to prove innocence.

McCoy's new evidence disproves every piece of evidence the State used to convict him. That is sufficient for post-conviction relief.

### C. Unrebutted Post-Conviction Evidence Thoroughly Refutes the Only Inculpatory Evidence, Meeting the Conclusiveness Standard

Dr. Franklin's testimony would inform the jury of several key points that would likely change the outcome of the trial. Dr. Franklin's unrebutted expert testimony compared the length of the witnesses' claimed view of the shooter to experiments with stress and far more generous viewing times wherein the error rate for identifications was still around 90%. SR 45, 47, 51, 59; CI 2246-47. And she discussed the additional challenges to the identifications here, including weapons, disguise, and cross-racial identification demands, which greatly augment the error rate. SR 45, 51-54, 59.

Additionally, this case involved an extreme level of social contamination, where the witnesses inadvertently, but irrevocably, distorted their memories by working together to reconstruct the memory from inference and post-event information. SR 44, 48-49, 68, 71-73; *see also* Third Circuit Task Force, 92 Temp. L. Rev. at 12 (memories are malleable and can "be distorted or contaminated, without an individual intending or even knowing that his/her memory is inaccurate.").

And this case exemplifies what the social scientists call "exposure effect," where vague familiarity with McCoy's face from the neighborhood store likely caused the witnesses to erroneously transpose him with the shooter. SR 68. *See also* Op.Br. at 29-30, 41-42; SR 48-49, 68, 71-73; Third Circuit Task Force, at 60 (discussing "unconscious transference" and "memory-source error"); *Lerma*, 2016 IL 118496, at ¶¶ 14, 28. So, too, would the police showing McCoy's photo to the eyewitnesses before the lineup and/or Awwad translating while Hassan made his photo array identification. *Id.*; R.39, 62;

Jacqueline Katzman, Elaina Welch & Margaret Bull Kovera, *In-Court Identifications Affect Juror Decisions Despite Being Unreliable*, 49 Law & Hum. Behav. 376, 384 (2025) ("decades of social scientific findings demonstrate that eyewitness memory is malleable, and an eyewitness cannot access a memory of the perpetrator that is independent of a suggestive out-of-court procedure.").

Rather than address the science, the State doubles down on the attractive but false contrary-to-science claim that vague familiarity would enhance the identifications. *See* St.Br. at 28. But it is precisely this loose exposure, out of the context of the crime, that leads to the memory source error in the identification, particularly when the crime is chaotic, violent, involves weapons, and is exacerbated by cross-racial identification limits, contamination, and the offender wearing a disguise. And the State's erroneous contentions demonstrate exactly why expert testimony on these eyewitness issues is so critical—they are counterintuitive to average jurors, as explained by this Court in *Lerma*.

At the end of the day, in a case with exculpatory physical evidence and no flight, proceeds, weapon, inculpatory statement, or other corroboration for the eyewitness identifications, Dr. Franklin's testimony illustrating how very likely it is that the identifications were incorrect is sufficiently conclusive to probably change the results on retrial and warrants a new trial. McCoy was identified under highly unusual, questionable circumstances. If the jury had understood the extreme likelihood that the witnesses picked McCoy from the lineup as the only familiar face, who they saw in the earlier photo arrays and at the neighborhood store, transposed in their minds as the shooter's (indeed, transposed so powerfully that even Hassan, who never saw the shooting,

identified McCoy as the shooter), the outcome of this trial likely would have been different. Post-conviction relief is warranted.

No counter-expert testified, and Dr. Franklin's testimony stands unrebutted. The State argues that Dr. Franklin's testimony is contradicted by McCoy's "admission" he was in the store causing a disturbance, but McCoy never made such an admission. *See* St.Br. at 46-47 (citing arguments of counsel). Moreover, the State completely misses that it is precisely because McCoy was a vaguely familiar face to the store employees that they likely transposed his face for that of the shooter's. *See supra* at 3-4, 6, 16-17 (discussing exposure effect and the malleability of memory).

The State argues that Dr. Franklin's testimony (and presumably the decades of scientific research that she presents) is inapplicable here because the witnesses gave such a detailed description of the shooter, matching McCoy. St.Br. at 47. The problem, of course, is that the witnesses gave a profoundly generic description that omitted McCoy's distinctive hair and mustache, and the State's record citations do not corroborate its spin. *See* St.Br. at 29, citing R.1208 (Officer Ballard explaining that he did not record the description and instead made a composite from the witnesses and his police report); and R.147-49 (McCoy's description upon arrest). *See also* R.714-15 (Ballard testifying that he spoke to multiple anonymous sources in addition to the eyewitnesses); R.1095 (court noting that the description Ballard took included information from an anonymous source); R.1203 (description Ballard took was not contemporaneous).

With no evidence to counter Dr. Franklin, the State nonetheless argues that the witnesses had "excellent" opportunities to view the shooter, but it once again ignores the science. St.Br. at 28-29. Neither witness saw the shooter until he fled, after their friend

had been shot and while they were being held at gunpoint by Millighan, generating high stress, divided attention, and extremely low likelihood of reliable viewing. *E.g.,* SR 59, CI 2246-47; Op.Br. at 7-8. The State tries to bolster its bald argument with citations to: (1) its false claim that the witnesses gave a detailed contemporaneous description; (2) its false claim that McCoy admits to causing a disturbance with Millighan earlier; 3) a claim that an alleged anonymous informant mentioned in a police report corroborates the identification, as if alleged anonymous hearsay carries more weight than decades of scientific research[1]; and (4) a claim that modern scientific testing showed it is not impossible that there was blood on McCoy's shoe, even though the Illinois State Police found "no blood" (CI 2226). St. Br. at 29.

The State also argues that Dr. Franklin misapprehended the record (although the lower courts found no such thing) because she discusses the witnesses' non-identification. St.Br. at 47-48. *See* SR 68-69, 71-73. But the police testified that Ghrayyib did not identify anyone in the black-and-white array. *See, e.g.*, R.179-81, 203. Nor is there any testimony suggesting he made an identification after being shown color photos. R.39; St.Br. at 5; *supra* at 2-3. And Awwad never made a photo array identification, despite translating for Ghrayyib and Hassan during their array attempts (R.22, 54, 62, 237), so he was exposed repeatedly to photos of McCoy and to Hassan's identification of McCoy before his own lineup identification. Under any of these scenarios, Dr. Franklin's discussion of the resultant exposure effect and the witnesses' non-identifications

[1] If anything, this cryptic hearsay allegation probably explains how McCoy was erroneously ensnared in this investigation in the first place.

resonates. Modern scientific teachings about eyewitness testimony are likely to change the outcome of this trial, and post-conviction relief is warranted.

Finally, the State misapprehends McCoy's argument relating to the factors this Court extrapolated from *Neil v. Biggers*, 409 U.S. 188 (1972), for evaluating eyewitness identification. St.Br. at 1, 55-59. McCoy argues that the lower courts manifestly erred *vis a vis* the eyewitness evidence by failing to recognize that post-conviction evidence negating the only inculpatory evidence can be a stand-alone basis for McCoy's innocence claim. Because of this manifest error, the Court can conduct its own review of the evidence and consider granting the post-conviction petition. St.Br. at 19; *Harris*, 2025 IL 130351, at ¶ 44; *People v. Moore*, 207 Ill.2d 68, 75 (2003); *People v. Williams*, 188 Ill.2d 365, 369 (1999); *People v. Sorenson*, 196 Ill.2d 425, 431 (2001).

To aid the Court in conducting that review, McCoy applies the *Biggers* factors and, where appropriate, argues that the Court should consider updating how Illinois applies them. Op.Br. at 32-44. He provides the Court with citations discussing modern research and the flaws and limits of the factors as they currently stand. Indeed, Dr. Franklin testified that these factors are "misleading" given the modern scientific understanding. SR 121-22. The State has provided no counter authority, here or below. The growth in this area merits a nuanced assessment of eyewitness identifications, much like the Court conducted in *Lerma.*

The State posits several arguments about applying the *Biggers* factors to this case. First, the State argues that proving an identification sufficiently unreliable to merit relief is difficult. St.Br. at 58-59. However, McCoy has cited considerable authority demonstrating that it is not an impossible burden, and under the facts of this case,

McCoy's post-conviction evidence sufficiently disproves the identification evidence to warrant a new trial.

Second, the State argues that McCoy has not established that the police used suggestive identification procedures. St.Br. at 59. But the collaborative nature of the procedures here, with witness Awwad serving as an interpreter for the other two witnesses, and the possibility of the "to be sure" photograph in advance of the lineup, are extremely suggestive.

Lastly, the State's rapid-fire recitation of how the *Biggers* factors cut their way relies on misrepresentations of the facts and ignoring Dr. Franklin's testimony entirely. *Id*. The unrebutted post-conviction evidence in this case meets the post-conviction conclusiveness standard, and a new trial is warranted.

## CONCLUSION

Petitioner-Appellant Michael McCoy respectfully asks the Court to reverse the lower court and remand for a new trial due to his post-conviction evidence disproving the entirety of the prosecution's case. Alternatively, he asks the Court to reverse and remand or for further third-stage proceedings using the correct standards.

Date: November 14, 2025

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Counsel for Appellant hereby certifies that this brief conforms to the requirements of Supreme Court Rule 341(a) and (b). The length of this brief, excluding the pages or words required for the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,979 words.

Respectfully submitted,

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NO. 131565

IN THE
SUPREME COURT OF ILLINOIS

| | |
|---|---|
| MICHAEL MCCOY,<br><br>Petitioner-Appellant,<br><br>v.<br><br>PEOPLE OF THE STATE OF ILLINOIS,<br><br>Respondent-Appellee. | On Appeal from the Appellate Court of Illinois, First Judicial District, Case No. 1-24-0198<br><br>There Heard on Appeal from the Circuit Court of Cook County, Illinois, Criminal Division, Case No. 86 CR 10404-02<br><br>The Honorable Michael Clancy, Judge Presiding. |

**NOTICE OF FILING AND PROOF OF SERVICE**

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PLEASE TAKE NOTICE that on November 14, 2025, Petitioner-Appellant filed REPLY BRIEF AND ARGUMENT OF PETITIONER-APPELLANT with the Clerk of the Supreme Court of Illinois via the Court's Odyssey electronic filing system, a copy of which is hereby served upon you.

DATED: November 14, 2025

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## CERTIFICATE OF SERVICE

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, and that on November 14, 2025, I caused the foregoing Proof of Service and accompanying Reply Brief and Argument of Petitioner-Appellant to be served upon the following by electronic mail:

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