NO. 131565

IN THE
SUPREME COURT OF ILLINOIS

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

OPENING BRIEF AND ARGUMENT OF PETITIONER-APPELLANT

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NATURE OF THE CASE

Michael McCoy appeals the third-stage dismissal of his post-conviction petition contesting his 1989 conviction for armed robbery and first-degree murder, resulting in a life-in-prison sentence. A.1, ¶ 1; A.16, ¶ 5.[1] The convictions arose from a robbery-shooting at a neighborhood liquor store. A.15, ¶¶ 2-3. The only inculpatory evidence supporting the convictions was: (1) the surviving store employees' dubious identification of McCoy; and (2) a substance on McCoy's shoe that the State erroneously argued at trial was the victim's blood. A.15-16, ¶¶ 4-5; *e.g.* R.336-37. Modern serology testing has since disproved that the substance on the shoe was blood (SR 249; A.4, ¶ 7; CI 2226), and modern science shows that the identifications are unreliable (*see infra* at 12-14).

The post-conviction petition presents a claim of actual innocence contesting the identifications that constitute the only remaining evidence underlying this conviction. As delineated below, at the post-conviction evidentiary hearing McCoy presented: (1) new testimony from the crime's leader admitting his own guilt, exonerating McCoy, and naming his true accomplice, a serial offender named Howard Reed who looked similar to McCoy; (2) evidence of Reed's lengthy criminal history, which included a *modus operandi* matching this crime; (3) an affidavit from an eyewitness who knew Reed, corroborating his involvement; (4) eyewitness expert testimony detailing the flaws and challenges with the original trial witnesses' identifications in this case, casting serious doubt on their accuracy; and (5) serological testing proving that the substance on

[1] Citations to the record are as follows: the brief's appendix is cited as "A.__"; the report of proceedings is cited as "R.__"; the supplemental report of proceedings is cited as "SR __"; the common law record is cited as "C.__"; the impounded common law record is cited as "CI __"; and the supplemental common law record is cited as "SC __".

McCoy's shoe was not blood. In this appeal, McCoy argues that the lower courts applied the wrong standards and erroneously denied post-conviction relief and respectfully asks this Court to reverse and remand for a new trial.

ISSUES PRESENTED

1. Did the post-conviction court misapply the law when the judge viewed each piece of evidence in a vacuum and adjudicated the evidence using a subjective standard, determining that he personally did not believe the new evidence, instead of adjudicating the actual innocence claim by viewing the evidence new and old together and predicting what a jury hearing the evidence would likely do?
2. The trial eyewitnesses collaborated to achieve a single, vague description of the shooter for the investigators, and after one witness failed to identify McCoy from a photo array, the detectives showed them photos "to be sure" they could identify McCoy at the lineup. Did the post-conviction court manifestly err in failing to apply the unrebutted expert testimony explaining the flaws in these identifications, including how exposure to post-event information tainted the identifications?
3. Can a post-conviction actual innocence claim be proven by conclusively refuting all the inculpatory evidence presented at trial?
4. In keeping with in *People v. Lerma*, 2016 IL 118496, should this Court update the factors for evaluating eyewitness identifications set forth in *Neil v. Biggers*, 409 U.S. 188 (1972), to comport with modern social science teachings about how to evaluate eyewitness identifications?

JURISDICTIONAL STATEMENT

McCoy appeals the Illinois First District Appellate Court ruling of January 16, 2025, affirming the dismissal of his post-conviction petition. A.1, ¶ 1. McCoy filed a timely petition for rehearing that the appellate court denied on February 5, 2025. A.12. This Court granted leave to appeal on May 28, 2025. A.13. Jurisdiction lies under Illinois Supreme Court Rule 315(a).

STATUTE INVOLVED

This appeal involves application of a section of the Post-Conviction Hearing Act, 725 ILCS § 5/122-6, reproduced in this brief's appendix. A.56.

STATEMENT OF FACTS

Introduction

On April 10, 1986, four men were working together in a neighborhood liquor-grocery store across the street from the Stateway Gardens public housing complex on Chicago's Southside. R.58-59, 140, 1240. At around 1:00 a.m., three men entered the store, robbed it, and murdered one of the employees. R.12-13, 1255-56, 1259. Petitioner-Appellant Michael McCoy was convicted of being one of the gunmen, the offender who kicked in the door to the locked section of the store, went to the back area, and shot and killed the owner before fleeing with the proceeds. CI 125; R.18-20, 1227, 1257-58, 1263-65. However, evidence "showed that the assailant who kicked in the door to the secured area of the store left a shoe print on the door that did not match the tread of defendant's shoes." A.16, ¶ 5. Nevertheless, McCoy was convicted and sentenced to natural life in prison. CI 173.

There was never any physical evidence linking McCoy to the crime—the fingerprints lifted from the scene did not match him, nor did the footprint left by the assailant who kicked in the door. R.258-59, 261-62, 268-70, 278-80, 356, 1227. *See also* A.16, ¶ 5 (appellate court noting, "There was no physical evidence presented at trial linking the defendant to the crime."). And no proceeds, weapon, statements, or post-offense behavior ever incriminated McCoy. R.158-60. Instead, this conviction relied solely on eyewitness identifications from the surviving victims and on the now-scientifically disproven, false claim at trial that there was blood found on McCoy's shoe. *See, e.g.,* A.16, ¶ 5; R.336-37; CI 2226, 2231; SR 243-45, 249-50.

This appeal pertains to McCoy's successive petition for post-conviction relief asserting his actual innocence. CI 1134-57, 2167-2295.[2] The evidence of innocence presented at the post-conviction evidentiary hearing falls into three categories. First, the crime's leader, Wayne Millighan, now admits his participation in this crime; newly confesses to also shooting a man immediately before the shooting, across the street from the liquor store; and testifies that McCoy was not his accomplice in the crimes, but rather a similar looking man named Howard Reed was Millighan's co-offender. CI 2221-22; SR 126-34, 136, 150; A.3-5, ¶¶ 4-8. McCoy corroborated Millighan's admissions with documentary evidence, including: evidence of Reed's criminal history, showing his lengthy *modus operandi* to commit similar crimes in that neighborhood (CI 2592-2626); and an affidavit from a witness who saw that the offender was Reed, not McCoy. (CI 1946-47).

Second, corroborating Millighan's testimony that McCoy was misidentified, McCoy presented expert Dr. Nancy Franklin to discuss the many flaws in the original eyewitness testimony inculpating him. According to Dr. Franklin, "the eyewitness identifications of Mr. McCoy as the shooter are very likely to have been produced through post-event influences and are at high risk of being inaccurate." SR 44; A.3, ¶ 6.

And third, on post-conviction McCoy disproved the State's vehement claim at trial that he had blood on his shoes. SR 248-50. Modern serological testing has confirmed, "No blood indicated." CI 2226.

[2] This case has a lengthy procedural history not relevant to this appeal. *See* A.16-17, ¶ 6; CI 995-98 (delineating).

The circuit court denied post-conviction relief by considering the evidence individually instead of collectively, thus refusing to account for how the evidence was mutually corroborative, and by using a personal, subjective standard instead of an objective test. *See* A.6, ¶ 12 (appellate court finding that "the circuit court did not conduct a proper analysis of all of the evidence together"); A.7, ¶ 14 ("the 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 ("the circuit court in this case conducted a flawed analysis of the defendant's claim"); A.32-36 (circuit court's consideration of this issue). But the appellate court found that because, during its siloed assessment, the trial judge personally found Millighan incredible in his confession and exculpation of McCoy, the new evidence "would not change the ultimate determination that the defendant failed to prove his entitlement to a new trial." A.6, ¶ 12.

I. The Trial Evidence

A. Evidence About the Crime

Although there was much evidence at trial implicating Millighan, the evidence implicating McCoy in this crime consisted of only: (1) the employees' inconsistent testimony identifying him as the person who they saw fleeing the scene after their friend and colleague had been shot; and (2) the (now scientifically disproven) testimony from the State's serological expert saying that McCoy had blood on his gym shoes when he was arrested. *See, e.g.,* A.16, ¶ 5; A.2, ¶ 3; R.336-37; CI 2226, 2231; SR 243-45, 249-50.

Specifically, all three store employees testified that a couple of hours before the robbery/shooting, at around 11:00 p.m., Wayne Millighan was in the liquor store drinking and bothering customers for about a half hour along with three other men, including

McCoy. R.9-11, 59-60, 63, 65, 1248-51. The employees knew Millighan because he had been employed at the store earlier that week, and they had worked a full shift with him (although Millighan was fired after one day because he seemed to be eyeing the cash register the whole shift, instead of working). R.9-10, 15-16, 57-58, 1242-46.

Hours later, at about 1:00 a.m., immediately before the robbery/murder, Millighan was seen arguing on the street with a man named Donnell Collins in front of the Stateway Gardens public housing complex, just outside the liquor store. R.171-73, 1200, 1296-1300, 1305. Millighan shot at Collins and then crossed the street with the other men to commit the crime in this case. *Id.*; R.1318. No witness testified about seeing McCoy at the Collins shooting or seeing McCoy leave that crime to go to the liquor store. Instead, trial witness Beverly Keziah Barney testified that she saw several men fleeing the liquor store after the crime, but she did not see McCoy, who she knew, among them. R.285-89.

The liquor store crime began with one of the culprits—the one alleged to be McCoy—kicking in the door that separated the register workers from the customers. R.14-15, 1227. This person left a shoeprint that did not match McCoy. A.2, ¶ 3; A.16, ¶ 5; R.261, 278-80. One gunman stayed in the front of the store as a lookout, and two gunmen came into the locked area of the store: Millighan went to the cash register next to store worker Mohammed Ghrayyib; and the shooter—the assailant McCoy was convicted of being—went to the back of the store. R.15, 47, 1253-55. No witness saw the shooter's face when he entered the store. R.18, 48, 60, 72, 1251-57.

Millighan held a gun to Ghrayyib's head and announced a stickup, and Ghrayyib called out to his colleague, Hussein Awwad, who had been in the storage area of the store. R.16, 1252-53. Millighan robbed the front register, and Ghrayyib and Awwad

heard a gunshot from the back of the store. R.17-18, 1256. The assailants then fled the store. R.48, 52. During the entire offense, a third employee, Achmaad Hassan, was in the back of the store in a walk-in cooler with the door shut. R.60. Hassan did not open the door to the cooler until after the culprits had fled, and he did not see anyone commit the crime. R.60, 72, 1226. The fourth employee, Nazih Yousef, had been at the back of the store and died from a gunshot wound. R.18, 125.

A State serologist testified that a substance found on McCoy's shoes—which were taken upon his arrest two days after the crime—tested "positive for the presence of blood." R.98. The serologist did not disclose to the jury that the test he based this claim on was only presumptive and carried a high risk of false positives from other substances, such as vegetables or urine. R.94-102; *see infra* at 14-15. Nevertheless, in closings, the prosecution repeatedly argued that McCoy's shoes had blood on them. R. 336-37.

B. The Eyewitness Identifications

The employees gave a composite description of the shooter through Awwad because he spoke the best English. R.22, 54, 237, 1204, 1228, 1236; A.2, ¶ 3. The sum-total of that collective description of the shooter's physical characteristics was: male, Black, about twenty-eight years old, with an earring, and no facial hair described. R.238-39; A.15, ¶ 4. McCoy lived in Stateway Gardens across the street from the liquor store and was arrested two days later, on April 12, 1986, while parked in a car nearby. R.146-47, 157. McCoy gave his correct name, did not attempt to flee, and had no weapon, proceeds, or illegal items on him at the time of his arrest. R.158-60. The appellate court below characterized McCoy, who was a 24-year-old Black man wearing an earring, as

matching the description. A.2, ¶ 3; R.153; CI 144. According to the arresting officer, however, McCoy had a "thick mustache," a beard, and longer hair. R.148-49, 154.

Hassan did not open the door to the walk-in cooler until after the culprits had fled the store and did not see the shooting or any offenders firsthand. R.16, 60-61, 72, 1252-53. He testified at trial that he identified McCoy during a police lineup, and he also identified McCoy at trial, notwithstanding the fact that he did not see the crime at all while locked in the walk-in cooler. R.16, 60-61, 67, 72, 1252-53. *See also* A.2, ¶ 3 (the appellate court recounting that "all three [Hassan, Ghrayyib, and Awwad] identified [McCoy] as the shooter in a lineup and at his trial.").

Ghrayyib's only view of the shooter was a quick glimpse after his friend was shot, while the shooter was fleeing. R.18, 20, 48, 51. Ghrayyib viewed an initial photo array that included McCoy but made no identification. R.179-80, 203. Ghrayyib testified that after his non-identification, he and the other witnesses were shown pictures "because they wanted to be sure" that "when they brought the person and showed us the line-up" the witnesses would be able to make an identification. R.39. After the officers' photo display, Ghrayyib identified McCoy in a lineup. R.190. Ghrayyib again identified McCoy at trial as the shooter and as the person he saw in the photos. R.26-28, 41-42, 189-90. Awwad, too, identified McCoy as the shooter from a lineup and in court. R.190-91, 1263-65.

Based on these identifications and the supposed blood found on his shoes, McCoy was convicted and sentenced to life in prison without parole. A.16, ¶ 5; CI 173

II. The Post-Conviction Evidentiary Hearing

The lower court dismissed McCoy's innocence claim at second-stage proceedings, but the appellate court reversed and remanded for an evidentiary hearing.

A.14-21. In doing so, the appellate court expressly held, "Given the limited evidence of guilt presented at trial…an exoneration from Millighan would probably change the result if a jury were to hear and believe his testimony. At the very least, Millighan's allegations place the trial evidence in a different light and undermine confidence in the verdict." A.21, ¶ 14. Upon remand, the circuit court admitted the following evidence during the third-stage proceedings.

A. Evidence Implicating Howard Reed, Not McCoy, as the Shooter

Wayne Millighan testified at the evidentiary hearing that he participated in this robbery/murder, named his accomplices, and stated that Howard Reed was the culprit who kicked in the door and shot the victim at the back of the store. SR 126-30, 138. Millighan testified that McCoy was in no way involved in this offense. SR 133. Millighan avers that at the time of the crime, Reed and McCoy looked similar. CI 2222.

Millighan also admitted that immediately before walking to the liquor store for this robbery/shooting, he shot Donnell Collins, and McCoy was not present for that crime either. SR 136. Although trial witnesses testified about the Collins shooting, Millighan has never been convicted for that offense. R.171-73, 1200, 1296-1300, 1305; SR 136. McCoy was never charged with that shooting, and no evidence ever implicated him in it.

As for the armed robbery and murder in this case, Millighan admitted that he lied under oath at his own trial and post-conviction proceedings when he denied participation in this crime. SR 139. He testified that he committed perjury hoping to escape criminal liability, but that his admissions about committing this crime—in the form of affidavits and his post-conviction hearing testimony—were all true. SR 139-49. SC 88-89. Although Millighan was suffering from Parkinson's disease and was in a wheelchair, he

twice came in from out of state to testify at the evidentiary hearing and explained in his affidavit that his conversion to Christianity compelled him to take responsibility for this crime, admit his role, and name his accomplices. SR 124-125, 175, 296; CI 2221-22. And Millighan's initial sworn confession and exoneration of McCoy dates all the way back to 2010 and was reaffirmed in 2012 and 2014, before his Parkinson's diagnosis and before his release from prison. CI 1011-12, 1049-50, 2163.

Corroborating Millighan's implication of Reed, McCoy submitted over thirty pages of police reports relating to Reed committing numerous similar armed robberies, demonstrating a *modus operandi*. CI 2593-2626. A Chicago Tribune article dated November 24, 1988, described Reed as an "ex-convict wanted on Indiana murder and attempted murder warrants" who "fired shots at two officers in a Chicago Housing Authority building" on Chicago's Southside. CI 2592; *see also* CI 2594 (outstanding warrant for murder and attempt murder). Most of Reed's arrests were for violence and robberies committed in or around Stateway Gardens, which was across the street from the murder scene in this case. *See, e.g.,* CI 2598 (August 1987, arrest for battery in Stateway Gardens); CI 2599 (October 1986, arrest for rape and battery in Stateway Gardens); CI 2600 (October 1986, wanted for armed robbery in Stateway Gardens).

Supporting Millighan's exculpatory testimony, the post-conviction record also includes Thomas Shanklin's affidavit, adding to witness Beverly Keziah Barney's original trial testimony that she saw several men fleeing the liquor store after the crime, but she did not see McCoy, who she knew for years. R.285-89; CI 1944-47. Shanklin avers that he was standing by Barney, he too saw the culprits fleeing this crime, and he saw Reed, not McCoy, among the offenders. CI 1947. Because Shanklin knew McCoy

and Reed, but was not friends with McCoy and was afraid of Reed, he did not come forward with this information until his 1997 affidavit. CI 1946-47.

B. Post-Conviction Evidence Further Impugning the Identification Testimony

McCoy presented an expert report and testimony from Dr. Nancy Franklin, an expert in cognition, memory, and eyewitness identifications who testified at the evidentiary hearing *pro bono*. CI 2234-2590; SR 25-122. Dr. Franklin discussed the types of factors that can impede the ability to make a reliable identification, focusing on the many such factors present in this case. *Id.* Dr. Franklin found "significant risk" that the witnesses' identifications of McCoy in this case were erroneous. CI 2237; *see also* SR 75 (testifying that these identifications "are highly unreliable and at very high risk of having been an artifact of their exposure to post-event information.").

Dr. Franklin explained that eyewitness identifications are the "single greatest contributor to wrongful convictions," and she cautioned that "[o]ne-third of the misidentification exoneration cases that were overturned based on DNA involved multiple eyewitnesses, all identifying the same innocent suspect." SR 72; CI 2242. Per Dr. Franklin, research shows that memories can be "reconstructed" from inference and post-event information, and people are surprisingly poor at recognizing faces, so post-event influences get woven into the memory. SR 48-49, 68, 71-73. In this case in particular, Dr. Franklin described the high level of social contamination likely occurring because the witnesses collaborated on the offender's description and identification. SR 44, 68, 71-73.

This contamination was exacerbated by what Dr. Franklin called "exposure effect": seeing the suspect's face (in a photo array, for example) creates a feeling of

familiarity in a future identification procedure "and that sense of familiarity tends to produce misidentifications, because people are good at detecting this face is, you know, ringing a bell, it's popping out at me but they're not as good at being able to tell where the familiarity comes from." SR 68. Here, Ghrayyib testified that he and Awwad saw (and failed to identify) McCoy in the earlier photo array and were shown a separate photo of McCoy before eventually identifying him, leading to the exposure effect and supporting the conclusion that McCoy was misidentified. *See* SR 45 (Dr. Franklin explaining that the non-identification in the photo array was "diagnostic of innocence"); SR 61-62, 68. Also, McCoy lived across the street from the store, making for prime conditions for triggering a reaction of familiarity that can lead to a false identification.

And, Dr. Franklin explained, the witnesses in this case faced a highly stressful scene where they had been held at gun point, heard a gun fired, and had their attention divided between three perpetrators (Millighan, the shooter, and the lookout at the front of the store) and their three guns. SR 45, 47. According to Dr. Franklin, the research supports that it would have been the person holding the gun on Ghrayyib and Awwad (Millighan), not the lookout or the escaping assailant running past, "who would have commanded the bulk of their attention." SR 59. *See also* CI 2247 (discussing a study that supports the conclusion that an "identification made for a face that has been encountered under stress *is essentially as likely to be incorrect as correct*.") (emphasis added).

A further impediment to the witnesses' limited, fleeting view, according to Dr. Franklin, is that these were cross-racial identifications and "extracting nuanced information from a person of another race is a slower process than it is with same race." SR 51. Dr. Franklin explained that during cross-racial identifications, witnesses tend to

think that they recognize a person, but they fail to see the nuanced differences and therefore tend to make misidentifications at a higher error rate. SR 45, 51-54. Exacerbating that problem in this case was that the perpetrator wore a hat, which disguises key features like the hairline, which are used to make identifications according to Dr. Franklin. SR 45, SR 59 ("when you cover someone's head with a hat, it imperils people's ability to put a face into memory and to make an identification later. And, again, the research bears this out with substantial increases in misidentifications if someone had been seen in a hat.").

Dr. Franklin described how the witnesses had a "very, very fleeting view of the shooter, under extremely challenging circumstances." SR 45, 51. In fact, in a lab setting with a simulated crime where witnesses had a twelve second exposure to the suspect and attempted an identification only thirty minutes later, the misidentification rate was a whopping 90% according to Dr. Franklin. SR 51. Another experiment Dr. Franklin cited revealed that even without event stress, a ten second exposure to a person results in false identification rates of 80-90%. CI 2246. Dr. Franklin explained that these social science teachings are newly developed since McCoy's trial and much of it is counterintuitive to lay people. SR 55, 119-20; *See also See People v. Starks*, 2014 IL App (1st) 121169, ¶¶ 85-93 (Hyman, J., and Pucinski, J., specially concurring) (collecting cases)

No counter-expert testified, and Dr. Franklin's testimony stands unrebutted.

C. Post-Conviction Evidence Disputing the Claim of Blood on McCoy's Shoe

In 2013, over two decades after McCoy's conviction, the Illinois State Police ran a confirmatory test and found "no blood indicated" from the substance recovered from McCoy's shoe. CI 2226; SR 248-49. Expert in forensic biology and serology, Deanna

Lankford, testified unrebutted at the evidentiary hearing and explained that the original presumptive test administered on McCoy's shoe had a high rate of false positives and could have reacted to a host of substances that were not human blood, including, for instance, fruits, vegetables, milk, and urine. SR 238-39.

The Lower Court Rulings

The circuit court considered the evidence presented at the evidentiary hearing in isolation and found each individual piece alone insufficiently conclusive to warrant a new trial. *See* A.6, ¶ 12; A.7-8, ¶ 14; A.32-36. First, the judge decided that he personally found Millighan to be an incredible witness because Millighan had been convicted of this murder and because Millighan's hearing testimony admitting his guilt contradicted his testimony in his own proceedings denying that he was the perpetrator. A.34-35. Second, the court rejected Dr. Franklin's expert eyewitness testimony as insufficiently conclusive, standing alone, because she "did not observe the witnesses testify at trial and, therefore, did not observe their demeanor, candor or manner while testifying," nor did she interview the eyewitnesses. A.35-36. And, third, the court considered the modern serological testing proving the absence of blood on McCoy's shoe in a vacuum, and not as part of a collective assessment, and rejected it as insufficiently conclusive. A.36.

The appellate court recognized that the circuit court erred by failing to consider the new evidence collectively. *See* A.6, ¶ 12; A.7-8, ¶ 14; A.20, ¶ 13. But the appellate court found that the lower court's negative credibility finding against Millighan dictated the outcome: the court held that, when disregarding Millighan's testimony establishing an alternate offender, evidence proving no blood on McCoy's shoe and the unreliability of the witness identifications cannot warrant relief. A.6, ¶ 12; A.11, ¶ 20.

ARGUMENT

The lower courts' denial of post-conviction relief, notwithstanding compelling new evidence of innocence disproving the entire prosecution, shows how the lower courts have fundamentally misapprehended how to adjudicate the conclusiveness of the actual innocence claims. In this case, that misapprehension means that McCoy is serving a natural life prison sentence based on wholly disproven evidence. A new trial is required.

I. The Standards for Adjudicating Petitioner's Actual Innocence Claim

This Court has long recognized that claims of actual innocence based on newly discovered evidence are cognizable on post-conviction. *See, e.g., People v. Washington*, 171 Ill.2d 475, 489 (1996); *see also People v. Bull*, 185 Ill.2d 179, 212 (1998) ("An important goal of the criminal justice process is the protection of the innocent accused against an erroneous conviction"). To prevail on an actual innocence claim, a petitioner must present "new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *People v. Coleman*, 2013 IL 113307, ¶ 96 (citing *Washington*, 171 Ill.2d at 489). Evidence is new when it is "discovered after trial and could not have been discovered earlier through the exercise of due diligence." *Id.* (citing *People v. Burrows*, 172 Ill.2d 169, 180 (1996)). Material evidence is "relevant and probative of the petitioner's innocence." *Id.* (citing *People v. Smith*, 177 Ill.2d 53, 82-83 (1997)). Evidence is noncumulative when it adds to what the jury heard. *Id.* (citation omitted). Those first three elements are undisputed here—this appeal addresses only whether the new evidence is sufficiently conclusive.

According to this Court's precedents, evidence is sufficiently conclusive for actual innocence purposes when the new evidence, when considered alongside all the

other evidence, new and old together, would probably lead to a different result. *See, e.g., Coleman*, 2013 IL 113307, at ¶ 96 (citing *People v. Ortiz*, 235 Ill.2d 319, 336-37 (2009)). "Probability, not certainty, is the key as the trial court in effect predicts what another jury would likely do, considering all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, at ¶ 97. *See also People v. Galvan*, 2019 IL App (1st) 170150, ¶ 67 (quoting *Coleman*); *People v. Ruddock*, 2022 IL App (1st) 173023, ¶ 47 (same); *People v. Harris*, 2021 IL App (1st) 182172, ¶ 57 (same).

The purpose of this adjudication is to determine "whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *People v. Robinson*, 2020 IL 123849, ¶ 48 (citation omitted). The Court is resolute: "Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence." *Robinson*, 2020 IL 123849, at ¶ 48 (internal citations omitted). In *Coleman*, the Court explained that the probability standard means "the trial court should not redecide the defendant's guilt in deciding whether to grant relief" otherwise "the remedy would be an acquittal, not a new trial." 2013 IL 113307, at ¶ 97. The Court reiterated that clarification in *Robinson*, affirming the longstanding principle that evidence of "total vindication or exoneration" is not required to support an actual innocence claim, and evidence need not "be entirely dispositive to be likely to alter the result on retrial." 2020 IL 123849, at ¶¶ 55-56.

Broken down, this Court's precedent describes three distinct requirements: (1) the evidence—new and old—should be considered together collectively in making the conclusiveness determination; (2) the post-conviction judge should make an objective

determination of what a new jury would likely do with the collective evidence; and (3) "total vindication," irrefutable, or dispositive proof is not required to find the evidence sufficiently conclusive. *Coleman*, 2013 IL 113307, at ¶ 97; *Robinson*, 2020 IL 123849, ¶¶ 55-56.

Generally, a lower court's rejection of an actual innocence claim after an evidentiary hearing is reviewed for manifest error. *Coleman*, 2013 IL 113307, at ¶ 98 (citing *People v. Morgan*, 212 Ill.2d 148, 155 (2004)); *Ortiz*, 235 Ill.2d at 333. "'Manifest error' is defined as 'error which is 'clearly evident, plain, and indisputable.'" *Ortiz*, 235 Ill.2d at 333 (citations omitted). However, where, as here, the lower court fails to follow and apply the relevant, governing Illinois Supreme Court case law, the court commits a legal error warranting *de novo* review. *See, e.g., People v. Moore*, 207 Ill.2d 68, 75 (2003) (where the defendant argues that the court legally erred by misapprehending the applicable standards, reviewing court uses a *de novo* standard); *People v. Williams*, 188 Ill.2d 365, 369 (1999); *People v. Sorenson*, 196 Ill.2d 425, 431 (2001); *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680-81 (1st Dist. 2001).

Here, because the lower courts' rulings denying the actual innocence claim—and in particular, their reasons for rejecting Millighan's and Dr. Franklin's testimony—are premised on conspicuous errors of law violating the teachings of *Coleman* and *Robinson*, the Court could rely on any one of these manifest errors as a basis for reversing the lower courts. Or this Court could review the innocence claim *de novo* due to the errors. *Id.* Either way, justice requires reversal of the denial of post-conviction relief and remand for a new trial.

II. The Lower Courts Manifestly Erred by Misapplying the Post-Conviction Standards in Rejecting Millighan's and Dr. Franklin's Testimony

As detailed below, the lower courts committed several distinct manifest legal errors in how they adjudicated the petition's innocence claim, any of which warrants reversal of the denial of post-conviction relief. First, the lower courts erroneously viewed the presented evidence in a vacuum, failing to acknowledge how the new testimony mutually reinforced each defense witness's credibility and was corroborated by the other evidence. Second, the circuit court rejected Millighan's and Dr. Franklin's exculpatory post-conviction testimony by erroneously conducting a purely subjective adjudication instead of following this Court's repeated instructions to try to predict the evidence's impact on a new jury, and the appellate court ratified that error. And third, the courts impose an unwarranted higher standard for innocence claims, implicitly holding that new evidence thoroughly disproving the State's case on post-conviction is not enough to meet conclusiveness requirements without extra evidence affirmatively proving something else, like impossibility or an alternate offender. Each of these manifest errors contravened this Court's clear instructions and led to the denial of a meritorious innocence claim.

Conducting the proper analysis, Millighan has confessed to this crime and named his co-offender, Howard Reed, and this testimony is corroborated by: (1) Reed's extensive, similar *modus operandi*; (2) the lack of any physical evidence implicating McCoy from a crime scene; (3) the mismatch between the shooter's footprint on the door he kicked in and McCoy's; (4) the lack of any evidence corroborating the eyewitness identifications; (5) Barney's trial testimony that she saw the fleeing offenders and McCoy was not among them; (6) Shanklin's affidavit averring that he stood near Barney in the aftermath of the crime, and he saw Reed, not McCoy flee from the scene; (7) and Dr.

Franklin's unrebutted testimony about the extreme likelihood that the trial's inculpatory eyewitnesses misidentified the shooter. The supposed blood on McCoy's shoe has been disproven, and grave doubt has been cast on the identifications. Reversal for a new trial is warranted.

A. The Lower Courts Manifestly Erred in Failing to Consider the Evidence New and Old Together, as Required

The appellate court recognized that the circuit court committed a legal error in its siloed adjudication of the evidence but nevertheless concluded that it owed deference to the lower court's negative credibility finding against Millighan, even though that finding directly resulted from the court's erroneous refusal to consider the evidence collectively. *See* A.6, ¶ 12 (appellate court finding that "the circuit court did not conduct a proper analysis of all of the evidence together"); A.7, ¶ 14 ("the 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 ("the circuit court in this case conducted a flawed analysis of the defendant's claim"); A.8, ¶ 15 (nevertheless affording deference to the lower court's credibility assessment). Had the lower court assessed the evidence collectively, instead of via its siloed approach, its credibility determination should have been different, especially given Dr. Franklin's unrebutted, strong support for Millighan's testimony that the witnesses mistook McCoy for Reed.

There was abundant testimony—from both the original trial and the post-conviction evidentiary hearing—corroborating Millighan's new testimony that he committed this crime with Reed, not McCoy. This evidence corroborates that Millighan's evidentiary hearing testimony admitting his guilt and naming his accomplices was the true testimony, while his original denial of guilt was the false testimony.

Specifically, the eyewitnesses had recently worked an entire shift with Millighan, and they were understandably focused on him as the person who held them at gunpoint, so their identification of him as a culprit was reliable. R.9-10, 15-16, 57-58, 1242-44. And Millighan's testimony that Reed, not McCoy was his accomplice was supported by the facts that: the shoe print made by the shooter did not match McCoy (A.31, ¶ 5); trial bystander witness Beverly Keziah Barney testified that she saw several men fleeing the liquor store after the crime, but she did not see McCoy (R.286-89); there was no physical evidence, confession, post-incident behavior, proceeds, or anything else to connect McCoy to this crime aside from the identifications (A.31, ¶ 5; R.158-60); Reed had a very similar *modus operandi* to this crime, much of it in the same neighborhood as the crime (CI 2592-2626); and Thomas Shanklin averred that he stood near Barney in the aftermath of the crime, and he saw Reed, not McCoy flee from the scene (CI 1947).

Also, Millighan's testimony should have been assessed in the context of the new evidence discrediting the deeply flawed identification testimony fingering McCoy. Recall, witness Hassan was in the back cooler with the door shut during the entire crime, and he admitted that he did not see anyone commit the crime. R.60, 72, 1226. But that did not stop him from testifying that he identified "the shooter" at the lineup, which underscores how tainted by post-event information this identification process was. R.67. Ghrayyib testified that after he failed to identify McCoy at the black and white photo array, the police showed him and the other witnesses color pictures "because they wanted to be sure" that "when they brought the person and showed us the line-up" the witnesses would be able to make an identification. R.39. It was only after the officers' "to be sure"

photo display that Ghrayyib and Awwad identified McCoy in a lineup and then again at trial. R.26-28, 39, 189-91, 1263-65.

Dr. Franklin's unrebutted testimony puts the flaws of this procedure into perspective. Her explanation of how memories get reconstructed through post-event influences is particularly relevant given the witnesses' collaboration and the photos they were shown after their failure to identify McCoy in the initial photo array. SR 44, 48-49, 68, 71-73. The witnesses seeing McCoy occasionally in the neighborhood store, then in the non-identifying photo array, and then in the "to be sure" photo display would create the exposure effect Dr. Franklin cautioned about, where McCoy's face would just appear familiar through repetition and get erroneously linked to the crime. SR 68. Dr. Franklin explained that, according to the research, the witnesses' "non-identification of the black-and-white photo array" should instead be considered "diagnostic of innocence." SR 45.

Dr. Franklin also described the serious limits to the witnesses' ability to accurately encode a memory of the shooter's face. The witnesses had a "very, very fleeting view of the shooter, under extremely challenging circumstances," and Dr. Franklin described how in experiments under similar circumstances, *the error rate for identifications ran as high as 90%.* SR 45, 47, 51, 59; CI 2246-47. Adding to the challenges were that these were cross-racial identifications, which greatly augments the error rate. SR 45, 51-54. And the shooter wore a hat, which disguises key features needed to make an accurate identification. SR 45, 59. When properly considered, Dr. Franklin's unrebutted testimony and report corroborate Millighan's testimony and the evidence supporting his testimony indicating that the true offender was not McCoy, but rather a

similar looking man with an extensive, contemporaneous *modus operandi* for committing this kind of brutal crime in this same neighborhood.

But the circuit court erroneously refused to consider any of the corroborative evidence supporting Millighan's evidentiary hearing testimony while adjudicating his credibility. And the appellate court doubled down on this mistake. A.8-11, ¶¶ 15-20. The appellate court recognized that the circuit court erred by not assessing the evidence collectively, but then nevertheless afforded deference to the lower court's negative credibility finding that was premised on that very legal error. A.6, ¶ 12; A.7, ¶ 14; A.8, ¶ 15; A.20, ¶ 13.

Millighan's testimony inculpating Reed, not McCoy, was supported by abundant evidence. It was error for the courts not to consider that corroboration as part of the evidence "new and old," in the context of the credibility assessment. *Coleman*, 2013 IL 113307, at ¶ 96-97; *Velasco*, 2018 IL App (1st) 161683, at ¶ 118; *Ortiz*, 385 Ill. App. 3d at 12; *Galvan*, 2019 IL App (1st) 170150, at ¶ 67; *Ruddock*, 2022 IL App (1st) 173023, at ¶ 47; *Harris*, 2021 IL App (1st) 182172, at ¶ 57.

B. The Lower Courts Manifestly Erred in Using a Subjective Assessment of Credibility Instead of the Required Objective Adjudication

1. Millighan's Testimony

The post-conviction judge rejected the evidence of innocence because he simply decided that he personally disbelieved Millighan's testimony and concluded that Millighan therefore could not support the petition's innocence claim, and the appellate court gave deference to this ruling. A.5-6, ¶¶ 9-10; A.8-11, ¶¶ 15-20; A.34-35. This subjective assessment was also a legally impermissible approach to a post-conviction innocence claim. *See, e.g., Coleman*, 2013 IL 113307, at ¶ 97; *Robinson*, 2020 IL

123849, at ¶ 48; *Galvan*, 2019 IL App (1st) 170150, at ¶ 67; *Ruddock*, 2022 IL App (1st) 173023, at ¶ 47; *Harris*, 2021 IL App (1st) 182172, at ¶ 57.

Notably, the lower court did not make any negative credibility findings against Millighan based on his manner of testifying or demeanor and never cited any of those intangible factors that a trier of fact might uniquely glean from being able to watch a witness testify. *See* A.34-35. Indeed, the external credibility factors weigh heavily in support of Millighan's credibility: he testified to his great personal detriment; he traveled a great distance despite being wheelchair bound with a serious illness; and he has been asserting McCoy's innocence since 2010, long before he was released from prison and well before his diagnosis. Millighan had nothing to gain and everything to lose from admitting his own culpability to exonerate McCoy.

Instead of factoring in these considerations, the circuit court gave three reasons for its subjective conclusion that Millighan's testimony was unreliable, but none of the reasons warrants a finding that, as a matter of law, a jury would not credit Millighan. Specifically, the court chose to disbelieve Milligan because: (1) he had denied his guilt in his own criminal proceedings; (2) he was a convicted murderer (from this crime); and (3) his named accomplice, Howard Reed, was listed in police reports as taller than the description of the shooter. A.5-6, ¶¶ 9-10; A.32, 34-35; R.249-50.

These reasons, however, underscore the lower courts' error in using a subjective test, rather than trying to predict how a jury might view the evidence if Millighan testified to exonerate McCoy. To correctly assess this evidence under *Coleman* and *Robinson* the circuit court should have imagined: (1) Millighan testifying about his own guilt and Reed's, while exonerating McCoy; and (2) Millighan being impeached with (a) his

testimony at his prior criminal proceedings denying involvement in this crime, (b) his murder conviction in this case, and (c) police reports that Reed was taller than the shooter. Had the courts conducted this correct inquiry then, objectively speaking, a jury would likely find the post-conviction testimony credible, notwithstanding the potential impeachment.

Millighan gave testimony that is definitively against his own penal interest, admitting to two uncharged crimes: he admitted committing the earlier, uncharged shooting against Donnell Collins; and he admitted committing perjury at his criminal proceedings (*see* 720 ILCS 5/32-2(b)). Millighan also made the self-inculpatory admission of his role in this murder, testimony that is abundantly corroborated by the trial witnesses who inculpated him. He came in from out of state twice to testify of his own volition, despite being confined to a wheelchair, and explained that his religious conversion compelled him to admit his culpability for these crimes.

A jury is likely to find this highly corroborated, self-inculpatory testimony to be more credible than Millighan's decades-old self-serving denial of misdeeds. *See, e.g., People v. James*, 118 Ill.2d 214, 223 (1987) ("Courts and commentators have observed that admissions against penal interest may, by their very nature, possess inherent indicia of reliability."); *United States v. Harris*, 403 U.S. 573, 583 (1971) ("People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility[.]"); *People v. Carpenter*, 95 Ill. App. 3d 722, 725 (1st Dist. 1981) (finding added reliability "when a participant in a crime identifies his

accomplices"); *People v. Kornegay*, 2014 IL App (1st) 122573, ¶ 35 (statement admitting criminal conduct bolsters a witness's reliability).

The court's second reason for rejecting Millighan's testimony, that he was a convicted murderer, is circular. A.34-35. It is precisely because Millighan is one of the admitted (and convicted) offenders in this case that he is able to identify who his co-offenders were and name them. This unique insight into the crime gives him a greater ability than anyone else to accurately identify the other offenders. *See, e.g., Coleman*, 2013 IL 113307 (co-defendants' self-inculpatory testimony exonerating petitioner warranted post-conviction relief).

Lastly, the court was troubled that Reed's reported height made him too tall to be the offender who was listed as 5'9" in the police report. A.32; R.249-50. However, there was never any testimony at trial about when or how the witnesses arrived at that height guesstimate, how confident they were in it, or even whether they agreed on it (there was no translator, and only Awwad spoke English. R.22, 54, 237). In fact, it is not even clear from the testimony whether the height description was recorded before or after McCoy's arrest. And, in any case, the claim that Reed was 6' tall is hearsay. *See, e.g., Capsel v. Burwell*, 2024 IL App (3d) 230170, ¶ 32 (statements in police report constitute hearsay); *People v. Toliver*, 246 Ill. App. 3d 842, 850 (1st Dist. 1993) ("Police reports are not to be used to divulge substantive evidence….because they are the product of secondhand knowledge and hence, hearsay").

But even crediting the alleged height discrepancy, the court failed to account for Dr. Franklin's testimony establishing just how unreliable the witnesses' collaborative height estimate would have been given the number of offenders, high stress, weapons

focus, cross-racial identification demands, and the witnesses' fleeting glimpse of the shooter while he fled. Viewing the evidence collectively, as required, a jury is far more likely to find the combined evidence—Millighan's self-inculpation, Dr. Franklin's explanation of how challenged the witnesses' limited description was; Reed's extensive, similar *modus operandi* in that neighborhood; and Barney and Shanklin's testimony about seeing Reed, not McCoy—sufficiently corroborative to accept Millighan's testimony.

Recall, Awwad's entire original description to the detectives on behalf of the witnesses was only: male, Black, about twenty-eight years old, with an earring, and no facial hair described, no height given. R.238-39; A.15, ¶ 4. The description of a Black man in his twenties is so common in Chicago as to be worthless. *See, e.g., People v. Johnson*, 2024 IL App (1st) 220494, ¶ 48, *appeal allowed*, 256 N.E.3d 981 (Ill. 2025) (finding that a more detailed description would still "apply to tens of thousands of local young men"). Also, male earrings were fashionable and ubiquitous in 1986. *See* *https://archive.nytimes.com/tmagazine.blogs.nytimes.com/2009/09/25/what-a-stud-the-return-of-mens-earings/* (last checked 6/24/25) (discussing men's earring trends in the 1980's). And, contrary to the witness description, McCoy had a "thick mustache," beard, and longer hair. R.148, 154. In the context of an exceptionally vague description of the offender that omitted facial hair, a minor height difference is inconsequential.

The courts below failed to comply with *Coleman* and *Robinson* and consider how a jury might evaluate the new evidence. And the courts' reasons for rejecting Millighan's testimony as a matter of law were baseless. Applying the correct standard, McCoy has

met his burden, and a new trial is warranted so a jury can hear Millighan's exoneration of McCoy and decide for itself whether to credit it.

2. Dr. Franklin's Testimony

The courts below similarly committed reversible error by refusing to consider how a jury might be influenced by Dr. Franklin's testimony, as required by *Coleman* and *Robinson*. As with Millighan, the circuit court judge personally found Dr. Franklin's testimony uncompelling, relying on legally untenable reasons for doing so. The circuit court's stated basis for rejecting Dr. Franklin's testimony was that she "did not observe the witnesses testify at trial and, therefore, did not observe their demeanor, candor or manner while testifying," nor did she interview the eyewitnesses. A.13. But this reasoning shows a fundamental misunderstanding of Dr. Franklin's testimony and ignores years of jurisprudence about the relevance of expert testimony on the reliability of eyewitness identifications. *See People v. Lerma*, 2016 IL 118496.

Like Dr. Franklin, the experts in *Lerma* spoke on the issues of memory and eyewitness identification generally, without interviewing the witnesses or watching them testify. Nevertheless, this Court found that, as here, when the only evidence of guilt is the eyewitness identifications, "there is no question that this is the type of case for which expert eyewitness testimony is both relevant and appropriate." 2016 IL 118496, at ¶ 26. And the expert in *Lerma* addressed many of the same challenges to eyewitness identifications that are present here: "the stress of the event itself, the use and presence of a weapon, the wearing of a partial disguise [(a hat)], exposure to postevent information, … and cross-racial identification." *Id.* at ¶ 26.

The lower court's refusal here to consider how expert testimony could both reinforce Millighan's exonerating testimony and ultimately undermine any confidence in the guilty verdict was legally erroneous. *See Lerma*, 2016 IL 118496, ¶ 33 (finding reversible error where the lower court excluded "relevant and probative expert testimony relating to the State's sole testifying eyewitness, in a case lacking any physical evidence linking defendant to the crime"); *People v. Martinez*, 2021 IL App (1st) 190490, ¶ 116, *overruled in part on other grounds by People v. Flournoy*, 2024 IL 129353, ¶ 116 (holding that where the strongest piece of evidence against defendant was an identification, expert testimony would cast doubt on witness's ability to see offender and corroborate post-conviction evidence that the identification was false).

Indeed, the lower court's complaint that Dr. Franklin failed to evaluate these specific witnesses' testimonial demeanor underscores the court's misunderstanding of the limits of eyewitness identification testimony, particularly where the identifications have been contaminated. Dr. Franklin explains that in a case like this one where there is post-event contamination, the witness's testimonial demeanor may appear extremely candid and confident, because he has no intent to deceive, but that impression is entirely misleading because the witness's misidentification is unintentional and unknowing.

This is because when memories are reconstructed from inference and post-event information, those post-event influences get woven into the memory. SR 48-49, 68, 71-73. The resulting "exposure effect" has been found to "double the rate of misidentifications." SR 48, 68-69. *See also* Emma D. Kruisselbrink, Ryan J. Fitzgerald & Daniel M. Bernstein, *The Impact of Viewing Social Media Images on Eyewitness Identification*, 29 Psychol. Pub. Pol'y & L. 457 (2023) ("If an eyewitness has been

exposed to an innocent suspect before a lineup, there is an increased risk that the witness will mistakenly identify the suspect when they are seen again in the lineup."). "Memory contamination" "alters the relationship between confidence and accuracy for suspect identifications….[P]revious exposure to a suspect can increase a witness's confidence in their identification, making a high-confidence judgment unreliable." Kruisselbrink, *et al.*, 29 Psychol. Pub. Pol'y & L. 457 (citation omitted).

According to Dr. Franklin, the witnesses in this case had only a "very, very fleeting view of the shooter, under extremely challenging circumstances." SR 45, 51. And even under the best circumstances, in a lab setting with a simulated crime where witnesses had a twelve second exposure to the suspect and attempted an identification only thirty minutes later, research shows that the misidentification rate is 90%. SR 51. Another experiment Dr. Franklin cited revealed that even without event stress, ten second exposure to a person resulted in false identification rates of 80-90%. CI 2246.

Dr. Franklin's testimony is borne out by the data on wrongful convictions: "Empirical evidence reveals eyewitness identification to be 'the single greatest cause of wrongful convictions in this country.'" *People v. Starks*, 2014 IL App (1st) 121169, ¶ 85 (Hyman, J., concurring) (quoting *Perry v. New Hampshire*, 565 U.S. 228, 263 (2012) (Sotomayor, J., dissenting)); *see also Johnson*, 2024 IL App (1st) 220494, at ¶ 90; *United States v. Wade*, 388 U.S. 218, 228 (1967) ("The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification.") (footnote omitted); *Lerma*, 2016 IL 118496, at ¶ 24 ("Scientific advances have confirmed that eyewitness misidentification is now the single greatest source of wrongful convictions in the United States, and responsible for more wrongful convictions

than all other causes combined.") (cleaned up and citation omitted); *Commonwealth v. Walker*, 625 Pa. 450, 476, 92 A.3d 766, 782 (2014) ("the "extensive and comprehensive scientific research, as reflected in hundreds of peer reviewed studies and meta-analyses, convincingly demonstrates the fallibility of eyewitness identification testimony and pinpoints an array of variables that are most likely to lead to a mistaken identification.") (footnotes and citations omitted).

Dr. Franklin did not need to interview the witnesses or watch them testify to opine about the modern social science research demonstrating the severe limits of this case's identifications. *See Lerma*, 2016 IL 118496. Indeed, doing so would have been fundamentally useless. Because the social science is new and so counterintuitive to lay people, it was essential for the jury to hear this testimony. *Id.*, 2016 IL 118496, at ¶ 24; *Starks*, 2014 IL App (1st) 121169, at ¶¶ 85-93; SR 55, 119-20.

The lower court's subjective rejection of Dr. Franklin's testimony is contrary to law. The expert testimony reinforces Millighan's exoneration and also, in and of itself, casts grave doubts on the accuracy of this conviction. A new trial is warranted.

C. The Lower Courts Erroneously Imposed an Augmented Burden

The lower courts seemed to require that McCoy do something more than convincingly disprove the entire prosecution with new evidence on post-conviction in order to warrant relief. *See* A.11, ¶¶ 20-21. But such an additional requirement is contrary to *Robinson*, which reaffirmed that "the conclusive-character element requires only that the petitioner present evidence that places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." 2020 IL 123849, at ¶ 56. Following that edict, other courts have allowed innocence claims based on disproving the

prosecution's identification case, without affirmatively proving something additional, facilitating the exoneration of innocent petitioners. *See, e.g., People v. Montanez*, 2016 IL App (1st) 133726, ¶ 39, 42 (post-conviction relief where "[t]he trial evidence that is not directly called into question by the postconviction evidence is extremely flimsy") (certificate of innocence awarded in 2016); *Martinez*, 2021 IL App (1st) 190490, at ¶¶ 116-117 (granting relief on post-conviction claim of innocence based on claim that a post-conviction eyewitness expert undermined the only inculpatory evidence) (certificate of innocence awarded in 2024); *see also Johnson*, 2024 IL App (1st) 220494 (reversing conviction solely based on eyewitness identifications, where impugning those identifications was sufficient to undermine the conviction reliant on them); *People v. Hernandez*, 312 Ill. App. 3d 1032, 1037 (1st Dist. 2000) (reversing conviction where identification of defendant was "fatally weak"); *People v. Smith*, 185 Ill.2d 532, 541-46 (1999) (reversing conviction due to flaws in the identification testimony).

With Millighan's testimony and the extensive evidence corroborating it, McCoy has presented far more proof of innocence than just disproving the prosecution's identifications, as the appellants did in *Montanez*, *Martinez*, *Johnson*, *Hernandez*, and *Smith.* But even if this Court were to agree with the lower courts and reject Millighan's exoneration of McCoy, the evidence disproving blood on McCoy's shoe and casting grave doubts on the reliability of the identifications suffice to require a new trial. *Id.*

III. Alternatively, Post-Conviction Relief is Required Applying a *De Novo* Standard of Review Because the New Evidence is Conclusive Enough to Likely Change the Result on Retrial

At the original trial, the State hammered its (now-disproven) claim that there was blood on McCoy's shoe. R.336-37. And witness Hassan identified McCoy as the shooter

at trial, despite admitting that he never saw the crime or offenders. R.60, 67, 72, 1226. Indeed, Hassan's secondhand identification was so insidious that even the appellate court, in discussing the strength of the evidence, relied on the fact that "all three" of the surviving store employees "identified [McCoy] as the shooter in a lineup and at his trial," erroneously counting Hassan among the eyewitnesses. A.2, ¶ 3. The only remaining evidence supporting this conviction is Awwad's and Ghrayyib's identifications, made after Ghrayyib's non-identification at the photo array and after the police showed the witnesses pictures to "make sure" they could make an identification at the lineup. R.39.

Weighed against those identifications are: (1) the lack of any inculpatory physical evidence implicating McCoy; (2) the lack of any witnesses seeing McCoy at the Donnell Collins shooting immediately before this crime and Shanklin and Barney's testimony that McCoy was not present; and (3) the lack of any inculpatory statements, behavior, weapon, or evidence corroborating McCoy as the offender; and *exculpatory* evidence in the form of: (1) the shooter's footprint that did not match McCoy's; (2) Dr. Franklin's unrebutted testimony about the extreme likelihood of a misidentification; and (3) Millighan's corroborated testimony that Reed, not McCoy, was the shooter. McCoy has presented ample evidence that "places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, at ¶ 56. Accordingly, a new trial is required.

In weighing the evidence to adjudicate this claim, this Court should revise the factors from *Neil v. Biggers*, 409 U.S. 188 (1972), promulgated over fifty years ago to protect against "the likelihood of misidentification," to update them to comport with modern social science's instruction about identification testimony.

A. The Original Trial Evidence Was Exceptionally Weak

Even the appellate court acknowledged that there was "limited evidence of guilt presented at trial[.]" A.21, ¶ 14. And this assessment of the weak prosecution was made with the court's erroneous belief that there were three eyewitnesses who implicated McCoy, failing to recognize that Hassan was enclosed in the walk-in cooler for the entire offense and did not see any offenders firsthand. *Compare* A.16, ¶ 4l; R.60, 72, 1226.

As for Awwad's and Ghrayyib's identifications, as explained above, Dr. Franklin's testimony demonstrates how unreliable and likely wrong they are. But applying the *Biggers* factors further underscores their unreliability, while demonstrating the need to update the considerations courts should be using to evaluate eyewitness identifications. The *Biggers* factors include: (i) the witnesses' opportunity to view the perpetrator during the crime; (ii) their degree of attention; (iii) their accuracy in describing the perpetrator; (iv) their level of certainty at the time of identification; and (v) the length of time between the crime and the identification. *Id.* at 199-20; *People v. Slim*, 127 Ill.2d 302, 307-08 (1989). Applying those factors here demonstrates just how weak the limited inculpatory evidence is, to be weighed against the abundant post-conviction evidence necessitating a new trial, and, also, just how in need of an update the fifty-year-old *Biggers* factors are.

1. There Was Almost No Opportunity to View the Shooter

The opportunity to view the offender is the most important factor in weighing the reliability of an identification, and in this case, that opportunity was minimal. *See, e.g., People v. Davis*, 2018 IL App (1st) 152413, ¶ 56. According to the witnesses' own accounts, they did not have a clear view of the shooter on his way into the store, but

rather only saw a glimpse of him as he fled, after their friend had been shot (except for Hassan, who never saw the shooter at all because he was closed in the walk-in cooler). R.18, 48, 60, 72, 1251-57. Dr. Franklin analyzed the testimony and concluded, in her unrebutted professional opinion, that the witnesses had only a "very, very fleeting view of the shooter, under extremely challenging circumstances." SR 45, 51. This factor militates against the reliability of the identifications.

In thinking about this factor, the Court should consider incorporating modern science indicating how long of an opportunity to view an offender it takes for an eyewitness to encode the memory of a stranger's face. *See, e.g.,* SR 51; CI 2246; Brian L. Cutler, Ph.D., *A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. 327, 331 (2006) (recounting a study where participants viewed a videotaped reconstruction of a robbery in which the perpetrator's face could be seen for twelve seconds, and subjects made false identifications 80-90% of the time). And this factor should recognize that an opportunity to view an offender is undermined by factors like disguise (a hat or bandana) and cross-racial identifications. *See, e.g., Lerma*, 2016 IL 118496, at ¶ 26; SR 45, 51-54, 59.

2. The Witnesses' Attention to the Shooter Was Minimal

Ghrayyib and Awwad were held at gunpoint by Millighan, and according to Dr. Franklin, their attention would have been focused on their assailant, with minimal attention left over for the fleeing shooter or the armed lookout. *See, e.g.,* SR 59 (Dr. Franklin testifying, "my interpretation of this case, in light of the research literature, is that it would be the person holding Mr. Ghrayyib and Mr. Awwad at the cash register who would have commanded the bulk of their attention.").

Dr. Franklin's unrebutted testimony on this point is supported by research in the field. *See, e.g., Johnson*, 2024 IL App (1st) 220494, at ¶ 33 ("Over 40 years of extensive research on eyewitness identification shows that the presence of a weapon commands an eyewitness's attention and diminishes the ability of the eyewitness to describe or recognize the offender, a phenomenon known as the weapon-focus effect."); *People v. Allen*, 376 Ill. App. 3d 511, 524-25 (1st Dist. 2007) (noting the academic consensus that witnesses tend to focus on weapons, not the offenders' faces); Connie Mayer, *Due Process Challenges to Eyewitness Identification Based on Pretrial Photographic Arrays*, 13 Pace L. Rev. 815, 849-50 (1994) ("If there is a weapon present during the commission of a crime, the reliability and accuracy of an identification decreases because the witness's attention will be focused on the weapon rather than on encoding the perpetrator's facial features"); Elizabeth F. Loftus, *et al*., *Some Facts About Weapon Focus*, 11 L. & Hum. Behav. 55, 55 (1987) (experiments showed that the presence of a weapon significantly lowered identification accuracy of eyewitnesses). In fact, the witnesses here were notably able to give quite a detailed description of the gun. R.20-21, 48-49, 1253-54.

Additionally, Dr. Franklin explained that the highly stressful scene the witnesses faced—with multiple offenders and seeing the fleeing gunman only after hearing their friend get shot—also would have impeded their ability to accurately encode the perpetrator's face. SR 45, 47, 59; *see also* CI 2247 (discussing a study that supports the conclusion that an "identification made for a face that has been encountered under stress is essentially *as likely to be incorrect as correct*.") (emphasis added).

Scientific research confirms, "High levels of stress or fear can have a negative effect on a witness's ability to make accurate identifications." *State v. Lawson*, 352 Or. 724, 741, 744, 291 P.3d 673, 687 (2012); *see also Lerma*, 2016 IL 118496, ¶ 26 (discussing expert testimony establishing that stress contributes to the unreliability of eyewitness testimony); Brian L. Cutler, Ph.D*., A Sample of Witness, Crime, and Perpetrator Characteristics Affecting Eyewitness Identification Accuracy*, 4 Cardozo Pub. L. Pol'y & Ethics J. at 334 ("research shows that extreme stress has a debilitative effect on subsequent identification accuracy"); Charles A. Morgan III *et al.*, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L & Psychiatry 265, 272 (2004) (discussing a 2004 study of active-duty United States military personnel who were subjected to high-stress 40 minute interrogations, where 24 hours later, subjects could correctly identified their interrogators in line-ups only 30% of the time and photo arrays only 34% of the time).

Thus, this factor also supports the unreliability of the identifications. And the Court should consider building considerations like multiple offenders, stress, and weapon focus into this factor, for a more robust assessment of the witnesses' degree of attention.

3. The Witnesses' Description Undermines Their Identification of McCoy

The witnesses' collaborative description of the offender was vague, general, and failed to include McCoy's distinctive "thick mustache," beard, and long hair. The witnesses' collective initial description to the detectives was merely male, Black, about twenty-eight years old, with an earring, and no facial hair described. R.238-39; A.15, ¶ 4. McCoy is a Black man who was twenty-four-years old at the time and who, like many

young men in the 1980s, wore an earring (but also wore the long hair and facial hair not mentioned by the witnesses). R.148, 154; CI 144.

The witnesses' generic description omitting McCoy's facial hair undermines their identification. *See, e.g., Johnson*, 2024 IL App (1st) 220494, at ¶ 48 (finding that the witness's more detailed description, which included height, weight, complexion, and hairstyle, "would apply to tens of thousands of local young men"); *People v. Powell*, 2021 IL App (1st) 181745, ¶ 39 (where witness's description of suspect described no physical features, it "weigh[ed] against finding the identification reliable"); *People v. Ford*, 195 Ill. App. 3d 673, 676-77 (1st Dist. 1990) (identification undermined by witness's failure to mention facial scarring or skullcap); *People v. Simmons*, 2016 IL App (1st) 131300, ¶¶ 49, 95 (generic description did not support identification). Moreover, the witnesses' generic description is even less reliable because it arose from a collaborative group effort. *See, e.g., People v. Brown*, 100 Ill. App. 3d 57, 71 (2d Dist. 1981) (discussing expert testimony opining "that an identification resulting from a group consensus is 40-50 per cent more inaccurate than an individual identification.").

4. Post-Event Contamination Renders Meaningless Any Confidence the Witnesses Might Have Had

As for the fourth factor, the degree of certainty, there are no court findings below about the witnesses' level of confidence in their identifications. But to the extent that any confidence can be intuited, reliance on it would be misplaced. *See* SR 121 (Dr. Franklin explaining that "a witness's confidence is highly non-diagnostic in most criminal cases.").

During the half century since *Biggers* was decided, the degree-of-confidence factor has been discredited by a large body of social science research and a legion of

cases considering the relationship between confidence and accuracy in eyewitness identification testimony. *See, e.g., Allen*, 376 Ill. App. 3d at 524 ("studies show jurors tend to rely on a witness's confidence in her identification as a guide to accuracy, but that there are low correlations between the witness's confidence and the accuracy of her identification."); *Lerma*, 2016 IL 118496, at ¶ 8 (considering expert testimony that "would include the following scientifically documented finding[]… that the witness's level of confidence does not necessarily correlate to the accuracy of the identification"); *Starks*, 2014 IL App (1st) 121169, at ¶ 87 (Hyman, J., specially concurring) (citing *Brodes v. State*, 279 Ga. 435, 614 S.E.2d 766, 771 (2005) (holding juries cannot be instructed to consider a witness's level of certainty when assessing the reliability of an identification because of the "scientifically-documented lack of correlation between a witness's certainty in his or her identification of someone as the perpetrator of a crime and the accuracy of that identification"); *Brown*, 100 Ill. App. 3d at 71 (discussing expert testimony opining that "there is no relationship between an individual's confidence in his ability to identify another and the accuracy of the identification"); *People v. Lofton*, 2021 IL App (1st) 181618, ¶ 16 (discussing expert testimony opining that '"a confident witness may not be an accurate witness,' as shown both by reversed convictions based on confident but false identifications and by studies."); *State v. Long*, 721 P.2d 483, 490 (Utah 1986) ("Research has also undermined the common notion that the confidence with which an individual makes an identification is a valid indicator of the accuracy of the recollection. In fact, the accuracy of an identification is, at times, inversely related to the confidence with which it is made.") (citations omitted); *Johnson*, 2024 IL App (1st) 220494, at ¶ 53; *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 77 (Hyman, J.,

dissenting; citations omitted) ("The reliability of a witness's certainty about his or her identification has been roundly criticized in this court and elsewhere."). Accordingly, any confidence in the identifications the witnesses appeared to display at trial does not support the reliability of the identifications.

McCoy urges the Court to modernize the *Biggers* criteria to eliminate this outdated factor altogether. Jurors are unaware of the disconnect between confidence and reliability, which can seem counterintuitive, and are instead often swayed by the trope of the perpetrator's face being seared into the witnesses' memory due to the stress of situation. *See, e.g., Starks*, 2014 IL App (1st) 121169, ¶ 72; Morgan III *et al.*, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L & Psychiatry at 272; SR 55, 119-20. In response, state and federal courts around the country are incorporating the recent teachings of social science research around eyewitness identifications, to modernize their approach. *See Starks*, 2014 IL App (1st) 121169, ¶¶ 85-93 (Hyman, J., and Pucinski, J., specially concurring) (collecting cases). This Court should consider doing the same and eliminating this factor altogether.

But, importantly, even if this Court wants to continue to use this discredited factor, in this case, Dr. Franklin's testimony establishes that any witness confidence in the identification in this case was the result of post-event contamination, fatally undermining any potential correlation with accuracy. SR 121; *see supra* at 12-13, 29.

5. The Timing of the Identifications—after a Failure to Identify McCoy in a Photo Array and a Display of Pictures Ahead of the Lineup—Undermines the Reliability of the Identifications

Finally, regarding the timing of the identifications, this factor too weighs against the reliability of the identifications. The shooting occurred early on April 10, 1986, and the lineup identifications were two days later. R.184-86, 234.

Modern social science teaches that two days is ample time for memory decay to set in, undermining identification memory retention. A study Dr. Franklin cited looked at accuracy rates only a half hour later, instead of days later, and found 90% inaccuracy rates when the sightings were brief and the circumstances were stressful. SR 51. *See also* Morgan III *et al.*, *Accuracy of Eyewitness Memory for Persons Encountered During Exposure to Highly Intense Stress*, 27 Int'l J. L & Psychiatry at 272 (finding lineup inaccuracy rate of 70% when military personnel were subjected to a high-stress 40-minute interrogation and asked to identify their interrogators only 24 hours later); *State v. Guilbert*, 306 Conn. 218, 238, 49 A.3d 705, 722 (2012) (for identification purposes, "a person's memory diminishes rapidly over a period of hours rather than days or weeks") (footnote omitted).

And this factor can only be properly understood in the context of this case by accounting for the contamination that occurred during the period between viewing and identification: the witnesses' collaborative description process, their viewing of the photo array picture of McCoy, and then their viewing color photos in advance of the lineup. *See, e.g.*, *Perry*, 565 U.S. at 263-64 (Sotomayor, J., dissenting) ("Study after study demonstrates that eyewitness recollections are highly susceptible to distortion by postevent information or social cues"); Elizabeth F. Loftus, *Planting misinformation in*

the human mind: A 30-year investigation of the malleability of memory, 12 Learn. Mem. 361 (2005) https://learnmem.cshlp.org/content/12/4/361.full.pdf+html (last checked 6/26/25) (surveying the expansive empirical literature and showing how external information substantially influences the memories of eyewitnesses); C.A. Morgan III *et al*., *Misinformation can influence memory for recently experienced, highly stressful events*, 36(1) Int'l J. L. Psychiatry 7 (2013), https://pubmed.ncbi.nlm.nih.gov/23219699/ (last checked 6/26/25) (detailing a study demonstrating that "memories for stressful events are also highly vulnerable to modification by exposure to misinformation"); Ronald P. Fisher, *Interviewing Victims and Witnesses of Crime*, 1 Psychol. Pub. Pol'y & L. 732, 740 (1995) ("There is little argument, however, that the phenomenon of postevent suggestibility exists, that it is robust, and perhaps most important, that witnesses truly believe that they observed an event that was only suggested").

Given the two-day delay and the severe post-event contamination between the crime and the lineup, this factor also undermines the reliability of the identifications.

* * * *

At the end of the day, none of the *Biggers* factors supports the reliability of the identifications in this case. It is rare to have a record that displays the identifications' contamination so explicitly. McCoy urges the Court to use this opportunity to update the *Biggers* factors, to do away with witness confidence as a factor and to account for modern social science teachings on factors such as weapons focus, stress, multiple offenders, disguise (like the hat worn by the shooter here), memory degradation, cross-racial identification, and post-event contamination. In furtherance of that goal, the Supreme Court of Connecticut promulgated a useful set of considerations worthy of this

Court's adaptation as a replacement for the outdated ones supplied fifty years ago in *Biggers*:

> Courts across the country now accept that (1) there is at best a weak correlation between a witness' confidence in his or her identification and its accuracy, (2) the reliability of an identification can be diminished by a witness' focus on a weapon, (3) high stress at the time of observation may render a witness less able to retain an accurate perception and memory of the observed events, (4) cross-racial identifications are considerably less accurate than same race identifications, (5) a person's memory diminishes rapidly over a period of hours rather than days or weeks, (6) identifications are likely to be less reliable in the absence of a double-blind, sequential identification procedure, (7) witnesses are prone to develop unwarranted confidence in their identifications if they are privy to postevent or postidentification information about the event or the identification, and (8) the accuracy of an eyewitness identification may be undermined by unconscious transference, which occurs when a person seen in one context is confused with a person seen in another.

State v. Guilbert, 306 Conn. 218, 237-39, 49 A.3d 705, 721-23 (2012).

But even applying the *Biggers* factors as they stand, the factors all demonstrate the profound unreliability of the identifications and show that the inculpatory evidence in this case is alarmingly weak.

B. Weighed Against the Limited Evidence of Guilt, the New Evidence of Innocence Warrants a New Trial

Contrary to the State's strenuous argument at trial, there was no blood on McCoy's shoe. Indeed, none of the physical evidence from the scene implicates McCoy. Modern social science instructs that the identifications this conviction relies upon are deeply problematic and far more likely to be wrong than correct. The leader of the crime, Wayne Millighan, has admitted his guilt, implicating himself in two additional crimes, and has fully exonerated McCoy. Justice demands a new trial where Dr. Franklin can explain the flaws in the identifications, the lack of physical evidence can be affirmatively

asserted without the erroneous claim of blood on McCoy's shoe, and Millighan can testify about how Reed, who looked similar to McCoy, was the shooter.

CONCLUSION

Michael McCoy is serving a natural life sentence despite minimal inculpatory evidence—evidence that has been thoroughly discredited on post-conviction—and compelling new evidence of innocence. He respectfully asks this Court to reverse the dismissal of his post-conviction petition and remand this case for a new trial.

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 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 44 pages.

Respectfully submitted,

/s/ Debra Loevy
Counsel for Petitioner-Appellant

NO. 131565

IN THE
SUPREME COURT OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

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PLEASE TAKE NOTICE that on July 2, 2025, Petitioner-Appellant filed OPENING 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: July 2, 2025

Respectfully submitted,

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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 July 2, 2025, I caused the foregoing Proof of Service and accompanying Opening Brief and Argument of Petitioner-Appellant to be served upon the following by electronic mail:

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APPENDIX

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2025 IL App (1st) 240198-U

FOURTH DIVISION
Order filed: January 16, 2025

No. 1-24-0198

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL McCOY, Defendant-Appellant.	)))))))))	Appeal from the Circuit Court of Cook County. No. 86 CR 10404 Honorable Michael R. Clancy, Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Rochford and Justice Lyle concurred in the judgment.

ORDER

¶ 1 *Held*: The denial of the defendant's postconviction petition following a third-stage evidentiary hearing is affirmed when the actual-innocence claim at issue depended on the credibility of a codefendant's testimony, the circuit court found that the codefendant lacked credibility, and that determination was not manifestly erroneous.

¶ 2 Following a third-stage evidentiary hearing, appellant Michael McCoy (the defendant) appeals the denial of his successive petition for postconviction relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2018)). At issue in the hearing was

the defendant's claim of actual innocence, which was premised primarily on new evidence from codefendant Wayne Millighan purportedly exonerating the defendant and identifying another man as the true perpetrator of the crime for which the defendant was convicted. The circuit court found Millighan's testimony at the hearing to lack credibility and denied the defendant's petition. We see no error in that credibility finding and affirm the denial of the petition.

¶ 3 The defendant's third-stage evidentiary hearing was held on remand from our reversal of the second-stage dismissal of the defendant's petition. The facts of the defendant's case and the postconviction petition at issue in this appeal have been adequately set forth in our opinion in that case (*People v. McCoy*, 2023 IL App (1st) 220148, ¶ 9) and in our opinion affirming the defendant's convictions and sentences (*People v. McCoy*, 238 Ill. App. 3d 240 (1992)). For the present appeal, it suffices to say that the defendant was convicted of armed robbery and first-degree murder for robbing M&R Food and Liquor (M&R) with two other men and shooting and killing store owner Nazih Youssef during the robbery. The evidence against the defendant consisted primarily of the identifications of the three surviving store employees, who collectively gave police a description of the shooter that matched the defendant. Two of the employees identified the defendant as the shooter in a photo array, and all three identified him as the shooter in a lineup and at his trial. In addition to that evidence, the State presented testimony that a swab of a substance found on the defendant's shoe tested positive for the presence of blood, although there was not enough of a sample to conduct any further testing on the substance. Testimony also established that a shoe print that the shooter left on a door in the store did not match the tread pattern of the defendant's shoes.

¶ 4 The defendant's present successive postconviction petition raised four claims for relief, only one of which remains at issue. In that claim, the defendant asserted that he was actually innocent, citing a new affidavit from Millighan averring that Millighan was one of the robbers and that the defendant was not. Instead, Millighan identified a man named Howard Reed as the true shooter. The defendant also alleged in a supplemental petition that at a hypothetical new trial a serology expert would testify that the substance on his shoe was not blood and that an expert on eyewitness identifications would explain why the identifications made by the store employees were of dubious credibility.

¶ 5 At the hearing on the defendant's petition, Millighan testified that he was diagnosed with Parkinson's Disease about three years earlier, but that the disease did not affect his memory or comprehension. Millighan admitted that he participated in the robbery of M&R along with men named "Buck," "Geno," and Howard Reed. He did not know Buck's or Geno's last name. According to Millighan, Reed was the one who entered the back of the store and shot Youssef. Millighan knew the defendant and had seen him many times prior to the robbery. He testified that the defendant was not involved in the robbery. Millighan acknowledged that he lied when he professed innocence in his trial and in subsequent postconviction proceedings, which he explained was motivated by a desire "to go home."

¶ 6 The defendant also presented testimony from Dr. Nancy Franklin, an expert on eyewitness identification and memory. She testified that the M&R employees' identifications of the defendant as the shooter "are very likely to have been produced through post-event influences and are at high risk of being inaccurate." She explained that this conclusion was based on the fact that the witnesses only observed the shooter for a short amount of time; the observation occurred in the

presence of multiple weapons during a high-stress event in which their friend had been shot; the shooter was wearing a hat; and the shooter was of a different race. Dr. Franklin also noted that one of the witnesses had initially failed to identify anyone from a photo array that contained the defendant, "which would be diagnostic of innocence." Additionally, according to Dr. Franklin, the live lineup contained an inadequate number of suspects, and only one of those suspects, the defendant, was wearing clothing that was similar to what the witnesses had described the shooter as wearing, which, Dr. Franklin testified, "produces a very high risk of what's referred to as 'clothing bias.' "

¶ 7 The defendant also presented testimony from Deanna Lankford, a forensic casework director at Bode Technologies, which performs forensic tests and analysis for the Illinois State Police. She testified that she had not performed any testing for the defendant's case, but she had reviewed reports from tests that had been conducted by others, which included the original 1986 ortho-tolidine preliminary test on the substance on the defendant's shoe, as well as the report of a 2013 phenolphthalein (PTH) test on that same substance. She explained that the type of ortho-tolidine test that was performed in 1986 is very sensitive and that the presence of certain fruits or vegetables, milk, or urine can produce a false positive result. As a consequence, a positive ortho-tolidine test would only indicate that a "particular stain is possibly indicating the presence of blood." According to Lankford, the testimony of the State's serology witness at the defendant's trial "overstated" the import of that presumptive test; the substance should not have been referred to as "blood," but rather "possibly blood." As for the 2013 PTH test, Lankford testified that it was negative for the presumptive presence of blood, meaning that "there was no blood present or there was not enough blood present to detect."

¶ 8 In addition to the testimony of those witnesses, the defendant also introduced documents concerning Howard Reed, including arrest reports and a booking photo.

¶ 9 Following the evidentiary hearing and argument from the parties, the circuit court denied the defendant's petition. The court first noted that Howard Reed's height was consistently listed in the police reports as six feet, zero inches, which did not match the witnesses' reported height of the shooter of five feet, nine inches. The court also found that Millighan's testimony at the hearing was positively rebutted by his testimony at his trial, in which he denied being involved in the robbery. The court further observed that the trial testimony of the M&R employees identifying the defendant as the shooter was "positive, consistent, clear, and credible."

¶ 10 Conversely, the court found Millighan to not be a credible witness:

> I find Wayne Milligan's testimony at the hearing and his affidavits to lack credibility. Milligan's two testimonies -- at his original trial, and now at the evidentiary hearing -- vary greatly, are completely different, contradictory, highly and inherently unreliable.
>
> Mr. Milligan's multiple and varied claims are not worth the paper they have been written on. His testimony now, and his value as a witness, given his multiple claims under oath, is worthless. The only value of Milligan's testimony is that he finally confirms, after decades and decades of denials at his trial and postconviction filings, he finally confirms that the eyewitnesses at trial accurately described and identified Milligan's role in this murder and armed robbery.

Mr. Millighan is a convicted murderer, who has now completed his IDOC sentence. The affidavits and testimony of Millighan at the evidentiary hearing are not of such a conclusive character that it will probably change the result on retrial.

¶ 11 As for Dr. Franklin's testimony, the court discounted its significance, explaining that she had not observed the witnesses testify at trial or interviewed them and was instead basing her opinion on photos, police reports, and trial transcripts. Further, the court noted that the witnesses "were questioned extensively on direct and cross-examination before the jury regarding their observations, descriptions, and identifications." Therefore, the court found that Dr. Franklin's testimony was not of such conclusive character that it would probably change the result on retrial. The court also found that, "due to the overwhelming evidence presented" at the defendant's trial, Lankford's testimony regarding the negative presence of blood on the defendant's shoe was likewise not of such conclusive character that it would probably change the result on retrial. This appeal follows.

¶ 12 On appeal, the defendant essentially argues that the circuit court committed two legal errors. First, he contends that the court improperly assessed Millighan's credibility and based its credibility finding on unsound reasons. Second, he argues that the court failed to properly consider all of the new and old evidence collectively and instead incorrectly viewed the evidence in a piecemeal manner. We agree with the defendant's second argument that the circuit court did not conduct a proper analysis of all of the evidence together, but, because we see no basis to reverse the court's finding that Millighan was not a credible witness, a correct consideration of all of the evidence in light of that credibility finding would not change the ultimate determination that the defendant failed to prove his entitlement to a new trial.

¶ 13 The Act provides a three-stage review process for a defendant's claim of a constitutional violation. The defendant's present petition was denied following an evidentiary hearing at the third stage of this procedure. At a third-stage evidentiary hearing, the defendant must show by a preponderance of the evidence that there was a substantial violation of a constitutional right during his trial proceedings. *People v. Coleman*, 2013 IL 113307, ¶ 92 (citing *People v. Stovall,* 47 Ill. 2d 42, 47 (1970)). For a claim of actual innocence, a defendant "must present new, material, noncumulative evidence that is so conclusive it would probably change the result on retrial." *Id.* ¶ 6. "At the third stage, unlike the first and second stages, the allegations are not taken as true; instead, 'the trial court acts as a factfinder, making credibility determinations and weighing the evidence.' " *People v. House*, 2023 IL App (4th) 220891, ¶ 78 (quoting *People v. Reed*, 2020 IL 124940, ¶ 51)). "A reviewing court will not reverse a trial court's findings regarding credibility determinations or fact finding after a third-stage evidentiary hearing unless the findings are manifestly erroneous." *Id.* (citing *Reed*, 2020 IL 124940, ¶ 51). Manifest error is clear, plain, and indisputable, and "a decision is manifestly erroneous when the opposite conclusion is clearly evident." *Coleman*, 2013 IL 113307, ¶ 98 (citing *People v. Morgan,* 212 Ill. 2d 148, 155 (2004), and *In re Cutright,* 233 Ill. 2d 474, 488 (2009)).

¶ 14 To begin, the 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. Indeed, at the third stage of proceedings, the circuit court's ultimate goal is to "predict[] what another jury would likely do, *considering all the evidence, both new and old, together*." (Emphasis added.) *Id.* ¶ 97. In its ruling denying the defendant's petition, the court in this case considered each piece of new evidence, *i.e.*, the testimonies of Millighan, Dr. Franklin, and Lankford, and determined one-

by-one that none of them was of such a conclusive character that it would probably produce a different result on retrial. The court did not consider all of the evidence together, as it should have. However, because the court found that Millighan was not a credible witness, which we will discuss next, a proper consideration of all of the evidence would not change the outcome of the proceeding. See *People v. Travis*, 329 Ill. App. 3d 280, 285 (2002) ("Inspection of the record in the present case reveals that the trial court applied the incorrect standard. However, we will affirm if we find that the result would have been the same had the trial court applied the correct standard.").

¶ 15 To first address the standard of review, although the defendant contends that we owe no deference to the circuit court's determination of Millighan's credibility and should apply *de novo* review because the court did not comment on Millighan's demeanor or conduct while testifying and instead based its credibility determination on Millighan's history of false and inconsistent statements, he provides no support for drawing such a distinction and instead only cites caselaw dealing with rulings made without an evidentiary hearing or live testimony. See *In re County Collector*, 2023 IL App (1st) 210523, ¶ 17 (applying *de novo* review to a lower court's findings of fact when there was "no live testimony and no credibility determinations of witnesses" and "the matter was decided entirely on documents and written and oral argument"). That argument, therefore, is unpersuasive. Rather, it is well-established that, following a third-stage evidentiary hearing, "the finder of fact is generally the best judge of credibility and such determinations will not be overturned on appeal absent manifest error." *People v. Fair*, 2024 IL 128373, ¶ 97; see also *House*, 2023 IL App (4th) 220891, ¶ 78 ("A reviewing court will not reverse a trial court's findings regarding credibility determinations or fact finding after a third-stage evidentiary hearing unless the findings are manifestly erroneous." (citing *Reed*, 2020 IL 124940, ¶ 51)).

¶ 16 The circuit court found that Millighan was not a credible witness because his testimony at the evidentiary hearing contradicted his testimony at his own trial, making both accounts "highly and inherently unreliable," and because he was a convicted murderer who had already completed his sentence. The defendant contends that, for several reasons, these were unsound bases to find Millighan not credible. We see no merit to any of the defendant's arguments.

¶ 17 First, the defendant contends that inculpatory statements, like those that Millighan gave at the evidentiary hearing, are usually considered to be inherently reliable. While that is generally true (see *People v. James*, 118 Ill. 2d 214, 223 (1987) ("Courts and commentators have observed that admissions against penal interest may, by their very nature, possess inherent indicia of reliability.")), that logic does not apply when the witness has already been convicted and sentenced for the crime in which he is admitting involvement. See *People v. Gabriel*, 398 Ill. App. 3d 332, 343 (2010) (affirming a lower court's finding that a witness who admitted his involvement in a crime was not credible when, among other things, the witness "did not face the potential for further criminal prosecution based on his statements" because "he had already been convicted and was serving his sentence for his role in the shooting"). Admissions against penal interest are considered reliable because people normally do not freely open themselves to criminal liability, and their willingness to do so suggests that they are likely telling the truth. But, in the present case, Millighan has already been convicted and served his sentence for his role in the robbery and murder at issue, so admitting that involvement now carries no risk, and his admission, therefore, does not carry the usual suggestion of reliability.

¶ 18 Second, the defendant asserts that it does not make sense to discredit Millighan's testimony because he is a convicted murderer. Rather, he argues that Millighan's involvement in the robbery

and murder actually makes his testimony *more* reliable because his "unique insight into the crime gives him a greater ability than anyone else to accurately identify the other offenders." However, while that may be true, it has been well-established that a criminal conviction can be introduced as impeachment evidence and that a felony conviction can make a witness less credible. See *People v. Mullins*, 242 Ill. 2d 1, 14 (2011) (explaining that "evidence of a witness' prior conviction is admissible to attack the witness' credibility"); *People v. Guerrero*, 2021 IL App (2d) 190364, ¶ 92 (observing that a witness' status as a convicted felon "cast[ed] further doubt on his credibility as a witness"). As a result, it was not manifestly erroneous for the court to view Millighan as less credible because he is a convicted felon.

¶ 19 Third, the defendant argues that the court failed to consider the other evidence corroborating Millighan's testimony at the evidentiary hearing, and he contends that this corroboration demonstrates that Millighan's testimony was credible. Specifically, the defendant points to evidence that the shoe print on the office door did not match the tread pattern of his shoes, that there was no physical evidence connecting him to the crime, that Howard Reed looked like him and had been involved in other robberies in the area, that there was no blood on his shoes, and that, according to Dr. Franklin, the identifications made by the store employees were unreliable. However, none of this evidence is so clearly supportive of Millighan's present account of the defendant's lack of involvement in the crime as to render the circuit court's credibility finding manifestly erroneous. In other words, this additional evidence would all be consistent with Millighan's account, but none of it conclusively demonstrates that Millighan was testifying truthfully and that the court's credibility finding was indisputably wrong.

¶ 20 For the same reason, when we factor in the court's credibility finding and consider all of the old and new evidence together, as the circuit court should have done, we reach the same ultimate conclusion as the lower court that the defendant has not met his burden of demonstrating that his new evidence would probably change the result on retrial. If Millighan were credible and believable, then, as we found in the defendant's prior appeal, it is likely that the result of a new trial would be different. However, the circuit found his testimony to lack credibility, and without that evidence we do not believe that the testimony of Dr. Franklin regarding the alleged unreliability of the witness identifications and Lankford's testimony definitively excluding the presence of blood on the defendant's shoe is enough to probably change the result. That evidence would certainly help the defendant's case to some degree and cast doubt on the State's evidence, but in the absence of conclusive evidence pointing to another perpetrator or excluding the defendant, the type of evidence that Millighan would have provided if he were credible, the addition of Dr. Franklin's and Lankford's testimony would not be enough to probably change the result. In other words, their testimony would be probative of the defendant's innocence, but not conclusive, which is what is required to warrant postconviction relief.

¶ 21 Ultimately, the defendant's actual innocence claim was reliant on the credibility of Millighan, and the determination of his credibility was a matter for the circuit court to decide. The court found him not credible, and the defendant has not demonstrated that the court's credibility determination was manifestly erroneous. Without that key evidence, the defendant cannot show that there would probably be a different result on retrial. Accordingly, we affirm the circuit court's denial of the defendant's petition.

¶ 22 Affirmed.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT- FOURTH DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
	)	
Respondent-Appellee,	)	
	)	
v.	)	No. 1-24-0198
	)	
	)	
MICHAEL McCOY,	)	
	)	
Petitioner-Appellant.	)	

ORDER

This cause having come on for hearing on the petition of the petitioner, Michael McCoy, for rehearing of this court's Rule 23 Order entered on January 16, 2025, affirming the circuit court's denial of his postconviction petition following a third-stage evidentiary hearing; and the court being advised in the premises:

IT IS HEREBY ORDERED THAT the petition of the petitioner, Michael McCoy, for rehearing of this court's Rule 23 Order entered on January 16, 2025, affirming the circuit court's denial of his postconviction petition following a third-stage evidentiary hearing is DENIED.

ENTER:

Mary K Rochford
Justice

Justice

Justice

ORDER ENTERED

FEB 05 2025

APPELLATE COURT FIRST DISTRICT

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721
(217) 782-2035

FIRST DISTRICT OFFICE
160 North LaSalle Street, 20th Floor
Chicago, IL 60601-3103
(312) 793-1332
TDD: (312) 793-6185

May 28, 2025

In re: People State of Illinois, Appellee, v. Michael McCoy, Appellant.
Appeal, Appellate Court, First District.
131565

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Theis, C.J., took no part.
Rochford, J., took no part.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

2023 IL App (1st) 220148

FOURTH DIVISION
Order filed: February 2, 2023

No. 1-22-0148

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. MICHAEL McCOY, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 86 CR 10404 Honorable Michael Clancy, Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion. Justices Rochford and Martin concurred in the judgment and opinion.

OPINION

¶ 1 Appellant Michael McCoy ("the defendant") appeals the circuit court's second-stage dismissal of his successive petition for postconviction relief filed under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq*. (West 2018)). In the petition, the defendant raised four grounds for relief, including a claim of actual innocence based on newly discovered evidence in the form

of a codefendant's affidavit averring that the defendant was not involved in the crime that led to his convictions. Because the circuit erred in conducting its analysis of that issue, we reverse the court's order and remand for the defendant's petition to be advanced to third-stage proceedings.

¶ 2 The events that led to the defendant's convictions occurred over the course of the late evening of April 9 and early morning of April 10, 1986. Around 11:00 p.m. on April 9, several men entered a neighborhood liquor and grocery store in south Chicago, purchased some liquor, began drinking in the back of the store, and harassed some customers. The store employees recognized one of the men as Wayne Millighan, who had briefly worked at the store a week earlier.

¶ 3 A couple of hours later, around 1:00 a.m. on April 10, a witness observed Millighan arguing in the street with another man approximately a hundred feet from the liquor store. Millighan shot the man with whom he was arguing and then walked to the liquor store with two other men. Millighan and the two accomplices then entered the store and proceeded to conduct an armed robbery. During the course of the robbery, Millighan and another man entered the secured section of the store, with Millighan going to the cash register and the other man going to a back office. The assailant who entered the back office shot one of the store's four employees in the head, killing him.

¶ 4 Immediately after the robbery, the three surviving employees, speaking through their best English-speaker, collectively gave police a description of the shooter as a black male, 5'9" tall, and approximately 28 years old. They also reported that the suspect was wearing a black jacket, blue jeans, and gym shoes and had an earring in his left ear. The following day, the defendant, who matched the physical description provided by the witnesses, was arrested while sitting in his car in front of his apartment building, which was across the street from the victimized store. The defendant was wearing a gold earring in his left ear. Subsequently, two of the store employees

identified the defendant as the shooter in a photo array, and all three employees identified the defendant in a lineup as having been the shooter.

¶ 5 Following a jury trial in 1989, the defendant was convicted of armed robbery and firstdegree murder, and he was sentenced to life in prison. There was no physical evidence presented at trial linking the defendant to the crime. The primary evidence consisted of the store employees' identifications, as well as testimony from a police officer that a swab of a substance found on the defendant's shoe tested presumptively positive for the presence of blood. However, there was not enough of a sample to conduct any further lab testing on that substance. Testimony also showed that the assailant who kicked in the door to the secured area of the store left a shoe print on the door that did not match the tread of defendant's shoes. This court ultimately affirmed the defendant's convictions and sentence. See *People v. McCoy*, 238 Ill. App. 3d 240 (1992).

¶ 6 In the three decades since, the defendant has pursued numerous state and federal postconviction remedies, including three petitions for postconviction relief, one in 1997 and two in 2000. All three petitions were dismissed, and we affirmed all three dismissals on appeal. See *People v. McCoy*, 355 Ill. App. 3d 1185 (2005) (table) (unpublished order under Supreme Court Rule 23); *People v. McCoy*, 326 Ill. App. 3d 1156 (2001) (table) (unpublished order under Supreme Court Rule 23); *People v. McCoy*, 294 Ill. App. 3d 1100 (1998) (table) (unpublished order under Supreme Court Rule 23). In 2015, he was granted leave to file the instant successive petition for postconviction relief, which he eventually filed in 2019, raising four claims for relief: (1) actual innocence, supported by an affidavit from Millighan averring that another man, Howard Reed, was the shooter in the robbery and that the defendant was not involved in the crime; (2) a *Brady*[1]

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

violation related to the State's alleged failure to disclose exculpatory serology evidence; (3) ineffective assistance of trial and appellate counsel for their failures to uncover the evidence at issue in claims one and two; and (4) cumulative error. On the State's motion to dismiss, the circuit court conducted a second-stage review of the petition and found that the defendant had not shown that any of his four claims should be advanced to the third stage. Accordingly, the court dismissed the petition. This appeal follows.

¶ 7 In this appeal, the defendant contests only the court's ruling on his actual-innocence claim, and he expressly abandons the remaining three. Because the court dismissed the defendant's petition at the second of the Act's three stages, our review is focused on "whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act." *People v. Sanders*, 2016 IL 118123, ¶ 31. For a claim asserting actual innocence, the defendant must make a "substantial showing" (*Id.* ¶ 37) that the evidence supporting his claim is "newly discovered, material and not merely cumulative, and of such conclusive character that it would probably change the result on retrial" (*Id.* ¶ 46 (citing *People v. Ortiz*, 235 Ill. 2d 319, 333 (2009))). We review the second-stage dismissal of a petition *de novo*. *Id.* ¶ 31.

¶ 8 The defendant's actual-innocence claim is premised on an affidavit from his codefendant Wayne Millighan. In the affidavit, Millighan avers that, although the defendant was drinking in the liquor store with Millighan earlier in the evening on April 9, the defendant was not involved in the robbery at the liquor store in early morning of April 10 and that the shooter was actually a man named Howard Reed. Millighan states that his recent conversion to Christianity compelled him to come forward with the truth.

¶ 9 The defendant asserts that this evidence is newly discovered because Millighan would not have been willing to incriminate himself previously and is non-cumulative because there was no other evidence presented at trial that established these facts. The defendant also alleges that the evidence is material and conclusive because it tends to show his innocence and because the State's evidence implicating him in the offense was not particularly strong. Further, the defendant argues that the liquor store employees' identifications were unreliable and tainted by their familiarity with the defendant's face from the time he spent in the store earlier in the evening, an argument that he claims would be supported at a potential new trial by expert testimony concerning witness identifications. Ultimately, the defendant claims that Millighan's testimony would be of sufficient character to undermine the witness identifications, which were the primary evidence of guilt. However, the circuit court found that the allegations in Millighan's affidavit are "positively rebutted by the sworn testimony of Wayne Millighan at his own trial," in which Millighan claimed to have not been involved in the robbery. As we explain below, and as the State concedes, the court erred in reaching this conclusion because a postconviction court cannot look to the record of another proceeding to discredit evidence supporting a claim of actual innocence and because the record in the defendant's case does not positively rebut Millighan's allegations.

¶ 10 In a second-stage proceeding "[w]ell-pleaded factual allegations of a postconviction petition and its supporting evidence must be taken as true unless they are positively rebutted by the record of the original trial proceedings." *Sanders*, 2016 IL 118123, ¶ 48. And, indeed, in some cases courts have refused to credit newly discovered evidence that is directly and conclusively contradicted by other evidence in the original trial record. For example, in *Sanders*, a codefendant's recantation was positively rebutted by the trial record and was, therefore, not conclusive, when the recanting

codefendant claimed that the victim had only been shot once, but the medical examiner had testified at trial that the victim had in fact been shot twice. *Id.*

¶ 11 Although it is, therefore, permissible to discredit newly discovered evidence that is positively rebutted by the trial record, the circuit court in this case found that Millighan's allegations were rebutted not by the record in *the defendant's* case, but rather by the record in *Millighan's* case. This was not the proper analysis. "The Act itself contemplates that the trial court will look only to the record of the subject petitioner's case." *Id.* ¶ 43. Accordingly, the circuit court may not "consider the record of proceedings not involving the petitioner whose case is before the court." *Id.* ¶ 44. Thus, the circuit court erred in concluding that the defendant had failed to establish conclusiveness by virtue of Millighan's allegations being in conflict with the record from his trial. In a second-stage postconviction proceeding, such a conclusion may only be drawn from a review of the petitioner's case alone.

¶ 12 Further, when we look only at the defendant's case, Millighan's allegations are not conclusively and positively rebutted by anything in the defendant's trial record. The allegations naturally conflict with the identifications made by the liquor store employees, but some degree of conflict is to be expected in this situation. See *People v. Robinson*, 2020 IL 123849, ¶ 57 ("[Requiring a lack of conflict] would be fundamentally illogical. If the new evidence of innocence does not contradict the evidence of petitioner's guilt at trial, the filing of the successive petition would be pointless, and the purpose of the Act would be rendered meaningless, which is a result that must be studiously avoided."). Moreover, the witnesses' identifications are not of the same conclusive character as a medical examiner's testimony regarding the number of times that a victim had been shot, as was the case in *Sanders*. The mere fact that the witnesses identified the defendant as the shooter does not positively rebut Millighan's allegations at this stage of proceedings.

¶ 13 Having determined that the circuit court in this case conducted a flawed analysis of the defendant's claim, we must now apply the correct analysis. See *id.* ¶ 61. First, Millighan's affidavit is indeed newly discovered, as the defendant could not have been expected to obtain such selfincriminating evidence from Millighan earlier. See *People v. Molstad*, 101 Ill. 2d 128, 134–35 (1984) (finding that self-incriminating post-trial affidavits from codefendants qualified as newly discovered). Second, Millighan's assertions are material because, if they are true and believed by a jury, as we must assume they would be at this stage in proceedings, they would undermine the State's evidence of guilt and would tend to show the defendant's innocence. See *Coleman*, 2013 IL 113307, ¶ 96 ("Material means the evidence is relevant and probative of the petitioner's innocence."). Third, the allegations are non-cumulative, as the trial record does not otherwise contain this account of the evening in question. See *id.* ("Noncumulative means the evidence adds to what the jury heard.").

¶ 14 Lastly, Millighan's proffered testimony, if true, is of such conclusive character that it would probably produce a different result on retrial. For this element, "the question is whether the evidence supporting the postconviction petition places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 48. Millighan's allegations in this case satisfy that requirement. If a jury were to believe Millighan's testimony that he was involved in the robbery and if it were to believe his claim that the defendant was not involved in any way, then it is hard to believe that the jury would still convict the defendant based solely on the contrary identifications of the store employees. *Cf. People v. Wilson*, 2022 IL App (1st) 192048, ¶ 75 ("If taking [that] affidavit testimony *as true* means anything at all, it must mean that a juror, hearing from [the new witness] at a hypothetical retrial, would *believe* his testimony." (alterations and emphases in original) (quoting *People v. Brooks*, 2021 IL App (4th)

200573, ¶ 44)). Given the limited evidence of guilt presented at trial, which consisted only of the employees' identifications and the presumptive blood test, an exoneration from Millighan would probably change the result if a jury were to hear and believe his testimony. At the very least, Millighan's allegations place the trial evidence in a different light and undermine confidence in the verdict. Accordingly, the defendant has made a substantial showing of actual innocence sufficient to advance his petition to a third-stage evidentiary hearing.

¶ 15 While the State concedes that result, it asserts that two other pieces of evidence that the defendant discusses in his petition, specifically expert testimony regarding witness identifications and a 2013 serology test that allegedly showed that the substance on the defendant's shoe was not blood, do not qualify as newly discovered evidence of actual innocence. However, the actualinnocence claim in the defendant's petition relies only on Millighan's affidavit and not these other pieces of potential evidence, so we will not address this issue. To the extent that the State's argument on this issue might be asking for a ruling that this additional evidence should not be admissible at the third-stage evidentiary hearing on the defendant's actual-innocence claim, we will not provide an advisory opinion regarding the admissibility of evidence at a future hearing when that question has not yet been litigated below. See *People v. Stitts*, 2020 IL App (1st) 171723, ¶ 33 (declining to opine on a future evidentiary question that the circuit court had not yet had an opportunity to address); *People v. Latimer*, 403 Ill. App. 3d 595, 599–600 (2010) (declining to opine on a future evidentiary question that was outside of the scope of the order on review).

¶ 16 For the foregoing reasons, we reverse the order dismissing the defendant's successive petition for postconviction relief and remand for the circuit court to conduct third-stage proceedings on the petition.

¶ 17 Reversed and remanded with instructions.

No. 1-22-0148

***People v. Michael McCoy, 2023* IL App (1st) 220148**	
Decision Under Review:	Appeal from the Circuit Court of Cook County, 86 CR 10404, Honorable Michael Clancy. Judge, presiding.

Attorneys for Appellant:	Debra Loevy, Lauren Myerscough-Mueller EXONERATION PROJECT 311 N. Aberdeen Street, 3rd Floor Chicago, IL 60607 (312) 789-4955
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney of Cook County Enrique Abraham, Paul E. Wojcicki, Amy McGowan – Asst. State's Attorneys, Of Counsel 309 Richard J. Daley Center Chicago, IL 60602 (312) 603-5496

STATE OF ILLINOIS)
)SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY,ILLINOIS
COUNTY DEPARTMENT - CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

MICHAEL MCCOY,
Defendant.

Case No. 86 CR 10404-02

REPORT OF PROCEEDINGS held in the hearing in the above-entitled cause before the HONORABLE MICHAEL R. CLANCY, Judge of said court, on the 8TH day of JANUARY, 2024.

APPEARANCES:

HONORABLE KIMBERLY M. FOXX,
STATE'S ATTORNEY OF COOK COUNTY, by:
TODD DOMBROWSKI, Assistant State's Attorney
on behalf of the People;

LAUREN MYERSCOUGH-MUELLER,
KARL LEONARD,
Attorneys-at-Law
appeared on behalf of the Defendant.

TONJA R. JENNINGS BOWMAN
License #084-002995
Official Court Reporter
2650 South California
Chicago, IL

THE COURT: This is the case of Michael McCoy. This is here for the Court's ruling after a third-stage evidentiary hearing.

The parties can introduce themselves, please. Mr. McCoy is here in open court.

MS. MYERSCOUGH-MUELLER: Judge, for the record, Lauren Myerscough-Mueller on behalf of Mr. McCoy, who is present to my left.

MR. LEONARD: And good morning, your Honor. Also for Mr. McCoy, I'm Karl Leonard, K-A-R-L L-E-O-N-A-R-D.

MR. MCCOY: And for the State, Assistant State's Attorney Todd Dombrowski.

THE COURT: Can you spell last name, Mr. Dombrowski?

MR. MCCOY: Yes, your Honor. It's D-O-M-B-R-O-W-S-K-I.

THE COURT: Thank you.

MR. MCCOY: Yes.

THE COURT: Petitioner, Michael McCoy, seeks post conviction relief from the judgment and conviction entered against him following a jury trial.

The petitioner was found guilty of first-degree murder and armed robbery on September 18th of 1989. The petitioner was then sentenced to concurrent terms of life imprisonment for murder and 30 years imprisonment for armed robbery on October 31st of 1989. As grounds for relief, petitioner claims, one, actual innocence based on newly-discovered evidence; two, a Brady violation by the State; three, ineffective assistance of counsel; and four, a due process violation resulting in cumulative error.

The background that I'm going to go through, the following is a brief summary of some of the trial testimony.

For a complete recitation, please review the numerous and multiple trial court orders and appellate court opinions, including my written order of January 6th of 2022.

At trial Hussain Awad testified that he worked as a cashier in a store owned by the victim, Natse (phonetic) Youssef. Prior to the incident Awad observed a new employee, Wayne Millighan, was not working but instead watching where the cash was being kept. Millighan only

worked one night after being informed of Milligan's activity, the victim first paid him and then fired him.

On April 9th of 1986, at approximately 11:00 or 11:30 p.m., Awad observed Millighan and another person enter the store, buy some liquor, drink inside the store and bothered customers. At about 1:00 a.m. on the following early morning 1:00 a.m. on April 10th of 1986 Awad was in the stockroom, and Mohammed Gyrayyib, another witness, was working in the grocery section near a cash register making coffee. The victim in the liquor store was at the back of the store, and another victim -- another witness, Achmaad Hasaan was in the beer walk-in cooler. Awad then heard a loud noise and a locked door that separated the counter from the lobby area. He proceeded to the front of the store, saw Millighan holding a small, silver firearm and heard him announce a stick-up. Millighan then entered the restricted area through the door leading from the customer area and was standing next to the cash register.

After Millighan ordered Gyrayyib to

open the cash register, Millighan grabbed the entire tray from the cash register and started taking money. Awad then heard a shot which came from the liquor section of the store; Millighan then say: Come on. Let's go. We're done. Millighan exits. And another defendant was in the entrance walked out second. The shooter, the petitioner, then fled last from the liquor section holding a dark, long-barreled revolver and a bag of the type used to hold money.

Awad stated he had seen the shooter, petitioner, before. The petitioner, the shooter, was walking fast and passed within four feet of the -- four or five feet of the witness. Awad, finding the blood-covered victim lying on the floor in a small office where money was kept, called the police. The victim was shot in the left side of the head.

Awad described a man who came from the shooting area as having an earring, a mustache, small beard wearing blue jeans. The offender was about five feet nine inches tall with a dark complexion.

Two days later, on April 12 of 1986

Awad identified the petitioner in a line-up as the person who left with the black revolver coming from the area where the shot was heard. He also identified the petitioner in court as that man. And on July 24th of 1986, Awad identified Millighan in a line-up.

In the afternoon of April 12th, Officer Ballard and his partner received a radio call regarding petitioner's location and proceeded to 3618 South State Street. Petitioner was placed under arrest.

Loretta Jackson testified that on April 10th of 1986 at about 1:00 a.m. she was leaving her friend Cecilia Hale's Chicago Housing Authority apartment located across the street from the incident, with her fiance, Donel Collins. Millighan approached him and shot Collins following an argument. He used a small to medium-sized silver automatic handgun. Jackson picked Millighan out of a photo display about a week later.

Cecilia testified that as Collins was being driven to the hospital, she remained in her apartment. From her window she observed

Millighan with two other males across the street enter Youssef's food and liquor store. Twenty minutes later she went back to the window and saw police cars in front of the store.

Mohammed Gyrayyib in addition to substantially corroborating Awad's testimony asserted that he identified the petitioner from a photographic array and from a line-up as the man who came from the immediate area from which the victim was shot carrying a black .38 caliber revolver and a bag of money. He also identified the petitioner in court. Gyrayyib subsequently identified Millighan in a line-up.

Achmaad Hasaan, who was in the cooler area during the incident until hearing shots, verified that Millighan had worked at the store, as well as the events which took place prior to the incident. He identified Millighan from a photographic display. He identified petitioner as one of the people drinking inside the store prior to the homicide. He also identified petitioner in court and Millighan in a line-up.

Officer Rick Roberts, the Chicago

Police Department -- from the Chicago Police Department testified as an expert in forensic serology. He received the petitioner's gym shoes and a vial of the victim's blood. He was able to determine that a preliminary test for blood on the shoes yielded a positive reaction; however, serological tests were precluded due to insufficient amount of sample.

The procedural history will not be cited in this oral ruling. For a complete recitation, please review the numerous and multiple trial court orders and Appellate Court opinions, as well as my written order of January 6th of 2022.

Petitioner first claims he is actually innocent based on newly-discovered evidence. This newly-discovered evidence includes Wayne Milligan's claim that Howard Reed is the shooter. In Nancy Franklin's opinion, the testimony of the eyewitnesses are unreliable. There were multiple affidavits of testimony of Wayne Millighan.

Petitioner alleges that Milligan's affidavits and his testimony at the evidentiary

hearing constitutes newly-discovered evidence because the co-defendant, Wayne Millighan, more 20 years after the shooting provided affidavits that the petitioner is not the shooter and the shooter is a man named Howard Reed, who has been dead since 1988. Howard Reed was killed approximately two years after the shooting -- in this case, one year before the jury trial; more than 20 years before Wayne Millighan provided any of his affidavits.

Wayne Millighan states in the affidavits, and later testifies at the evidentiary hearing, that he was a participant in the armed robbery and murder along with Gino -- quote, Gino, Buck, and Howard Reed. The only full name provided by Wayne Millighan of the alleged partners in crime is the deceased, Howard Reed. The other two alleged participants are merely -- are described merely by nicknames.

The petitioner has included a voluminous number of arrest reports of Howard Reed as exhibits for this successive petition, as well as an arrest photo of Howard Reed identified by Millighan at the evidentiary hearing.

The arrest reports establish that Mr. Reed had been arrested for a variety of alleged offenses, and more importantly, that Mr. Reed's height was consistently reported time and time again as being six feet, zero inches. Mr. Reed's height does not match the description of the shooter in this case.

The eyewitnesses, Hussain Awad and Mohammad Gyrabe -- Gyrayyib have never recanted the trial testimony identifying the petitioner as the individual carrying a gun and a bag of money walking from the location where the victim was fatally shot, nor had they ever identified Howard Reed as having anything to do with this case.

The affidavit and testimony under oath at the hearing of Wayne Millighan is positively rebutted by the sworn testimony of Wayne Millighan at his own trial. Under oath at his own trial Wayne Millighan testified that on the evening of the crime in question, he visited a jazz club located at the intersection of 49th and Cottage Grove Avenue, leaving the club at about 11:00 p.m. and returned to Stateway Gardens Housing Projects. After returning, he went across

the street to a liquor store to buy some cigarettes. Millighan testified he went alone and stayed at the front of the store -- he stayed at the store for about five minutes and then returned to 3618 South State Street, where he talked to people that he knew. About 1:00 a.m. Loretta Jackson, who Millighan formally dated, came into the breezeway at Stateway Gardens. According to Milligan's sworn testimony at trial Donel Collins appeared and started an argument with Millighan and struck Millighan. In a fistfight Collins supposedly reached under his jacket and then Millighan shot him. Millighan testified that he went to the nearby home of his brother-in-law, Kim Hicks, staying there until the morning and then from there to his mother's home in Wisconsin.

The affidavits and testimony at the evidentiary hearing of Wayne Millighan is completely undermined by and totally contrary to his sworn trial testimony in which he denied any participation or involvement in the armed robbery at the liquor store and any knowledge of the shooter.

The trial testimony of both Awad

and Gyrayyib, who identified petitioner as the shooter, with Hasaan identifying petitioner as one of the people drinking in the store prior to shooting, was positive, consistent, clear and credible. The eyewitnesses had an adequate opportunity to view the petitioner.

I find Wayne Milligan's testimony at the hearing and his affidavits to lack credibility. Milligan's two testimonies -- at his original trial, and now at the evidentiary hearing -- vary greatly, are completely different, contradictory, highly and inherently unreliable.

Mr. Milligan's multiple and varied claims are not worth the paper they have been written on. His testimony now, and his value as a witness, given his multiple claims under oath, is worthless. The only value of Milligan's testimony is that he finally confirms, after decades and decades of denials at his trial and post conviction filings, he finally confirms that the eyewitnesses at trial accurately described and identified Milligan's role in this murder and armed robbery.

Mr. Millighan is a convicted

murderer, who has now completed his IDOC sentence. The affidavits and testimony of Millighan at the evidentiary hearing are not of such a conclusive character that it will probably change the result on retrial.

The affidavit and testimony of Dr. Nancy Franklin --

Dr. Nancy Franklin has a Ph.D in Psychology who has provided both an affidavit and testimony at this evidentiary hearing addressing a number of challenges that she believes the eyewitnesses faced in this case, including the opportunity to view the shooter, cross-race identifications, and a stressful event involving weapons, her opinion has been formed approximately 30 years after the trial, and during trial -- after the trial testimony and jury trial have concluded.

Dr. Franklin did not observe the witnesses testify at trial and, therefore, did not observe their demeanor, candor or manner while testifying. Dr. Franklin has not subsequently, in the intervening 30-plus years, interviewed, deposed, performed tests on any of the trial

witnesses; rather, she relies on photos, police reports and trial transcripts of various witnesses -- of various witness' testimony to form her opinion.

At the time of the trial, the eyewitnesses were questioned extensively on direct and cross-examination before the jury regarding their observations, descriptions, and identifications.

At trial there was no evidence presented that the eyewitnesses were influenced by the police when they described the offenders immediately after the shooting nor when the eyewitnesses made their various identifications of the offenders.

Further, the issue of identification was thoroughly addressed in closing arguments by both defense counsel and the prosecution. The affidavit and testimony at the evidentiary hearing are not of such conclusive nature that it would probably change the results on retrial.

Petitioner's second claim alleges a Brady violation against the State, specifically

petitioner alleges that the State failed to disclose exculpatory and impeaching evidence surrounding the testing on the alleged blood -- testing on the alleged blood on petitioner's shoes. Petitioner argues that this is because Chicago Police Department criminologist, Rick Roberts, testified improperly that a positive tolidine test proved that the blood was present on the petitioner's shoes but did not disclose to the jury and the Court that this was a presumptive test. In support of this claim, petitioner contends that Roberts is an agent of the State and therefore his knowledge is imputed to the State.

Petitioner further points to Deanna Lankford's affidavit and testimony for more support regarding the risk of false positive -- false positives from tolidine test methodology.

The standard for materiality under Brady is whether there is a reasonable probability that disclosure of the evidence to the defense would have altered the outcome of the proceeding.

A reasonable probability is a probability sufficient to determine -- I'm sorry. Let me say that again.

The reasonable probability is a probability sufficient to undermine the confidence in the outcome.

Petitioner failed -- Petitioner's failure to raise a Brady violation in prior pleadings results in the claim being forfeited. While this claim has been forfeited, the Court will continue its analysis.

Here, petitioner's claim the State failed to disclose exculpatory and impeaching evidence surrounding the forensic testing on petitioner's shoes fails. First, petitioner does not --

First, petitioner does not meet the standard required by Brady. He cannot show that the evidence he names was either suppressed or withheld by the State.

There is no evidence that the State suppressed or withheld the laboratory report dated April 25, 1986, prepared by the Chicago Police Department criminologist, Rick Roberts, of the Serology Unit of the Chicago Police Department's Crime Laboratory Division. In fact, Rick Roberts testified and was cross-examined at petitioner's

trial.

Rick Roberts reported that preliminary chemical test for blood conducted on the extracts from petitioner's gym shoes yielded positive reaction. However, serological tests were precluded due to insufficient amount of sample.

Further, Rick Roberts testified that he could not determine whether the blood was the victim's or was even human. Rick Roberts testified that the preliminary chemical test conducted indicated the presence of blood on the shoes; however, the sample is insufficient for further testing.

On April 14th of 2013, Forensic Scientist 1, Elizabeth Sisler (phonetic) of the Illinois State Police Division of Forensic Services prepared a laboratory report and found no blood indicated on petitioner's gym shoes. This 2013 test occurred more than 27 years after the gym shoes had been recovered and occurred more than 27 years after Rick Roberts concluded his test, which included swabbing the gym shoe with a cotton swab and lifting material off the gym shoe

and onto a cotton swab. The test also occurred 24 years after Rick Roberts testified at trial.

Clearly, this evidence from 2013 was not possessed by the State prior to or at the time of trial in 1989, making any disclosure possible.

Petitioner presented an affidavit and testimony of Deanna Lankford, who is currently employed as a Director of Forensic Case Work at the Bode Technology -- That's B-O-D-E.

Petitioner attempts to cast out or question the testimony of Rick Roberts.

Ms. Lankford stated that tolidine test method is a presumptive testing of blood. Ms. Lankford further states tolidine is a presumptive test for the presence of hemoglobin, which is a component of blood.

Mr. Roberts testified that he performed a tolidine test which is a preliminary chemical test for the presence of blood.

Ms. Lankford states the test is easy to use.

Mr. Roberts testified the test is a color test in which he use a cotton swab --

sterile cotton swab swabbing the evidence, add the reagents, it's a color test where the swab will turn a green color if there is blood present.

Ms. Lankford states that the test is not human-specific and can cause false positives with animal materials.

Mr. Roberts testified he could not tell whether the test -- he could not tell from the test whether or not the blood was human or animal form.

Ms. Lankford criticizes Mr. Roberts for failing to testify that he did not have enough sample to confirm the presence of blood.

Mr. Roberts did, in fact, testify that he was unable to conduct any further testing, explaining, quote, the amount of sample was insufficient for any further testing, end quote.

The State asked Mr. Roberts what further tests he could have done, but Mr. Roberts was barred from answering the question because defense counsel objected to the question as to what could have been done; and the objection was sustained.

Rather than undermine the trial

testimony of Mr. Roberts, the affidavit of Ms. Lankford corroborates the trial testimony.

The tolidine method of testing is a preliminary slash presumptive test for the presence of blood. The test is easy to use; the test is not human-specific; and the amount of sample was insufficient for any further testing.

Even if the opinions of Ms. Lankford stated in her 2020 affidavit, as well as her testimony at the hearing, and the results of Ms. Sisler's examination in 2013 had been presented at trial, they are not of such a conclusive nature that would have changed the result of petitioner's case resulting in prejudice due to the overwhelming evidence presented at petitioner's trial.

The petitioner was identified as the shooter by Hussain Awad, who had seen the petitioner on previous occasions, who heard a shot from the liquor section of the store and then saw petitioner holding a dark, long-barreled revolver pass within four or five feet of him. Awad later identified the petitioner in a line-up and in court.

Petitioner was also identified by Mohammad Gyrayyib and circumstantial -- eyewitness Mohammad Gyrayyib and circumstantial witness Achmaad Hussaan. Gyrayyib corroborated Awad's testimony and also identified petitioner from a photographic array from a line-up and in court. Hasaan identified petitioner as drinking inside the store prior to the homicide and identified him in court.

A description of the shooter was provided to the Police by the above eyewitnesses where the petitioner was arrested sitting in a car across the street from the scene of the homicide. He matches their description.

As stated earlier, the standard for materiality of an alleged suppression on withholding of evidence under Brady is whether there is a reasonable probability the disclosure of the evidence to the defense would have altered the outcome of the proceeding.

Petitioner cannot establish necessary elements as required by Brady v Maryland to establish suppression of evidence by the State. Petitioner is unable to demonstrate that the

evidence was even suppressed by the State, and is unable to demonstrate that he was prejudiced because the evidence (sic) immaterial to guilt or punishment.

Further, none of the quote -- none of the quote, unquote, new evidence is of such conclusive character that it would have changed the result -- petitioner's case resulting in prejudice; thus, the claim fails.

Alternatively, the petitioner claims that if the evidence is not a Brady violation, it's newly-discovered evidence. In view of the overwhelming evidence of guilt presented in the case, petitioner's claim of this newly-discovered evidence is such -- is of such a conclusive character that it would probably change the result on the retrial is rejected.

Petitioner's third claim alleges ineffective assistance of both trial counsel and appellate counsel.

Petitioner's claim of ineffective assistance against both trial and appellate counsel are without merit and are rejected. These alleged claims have been forfeited or barred by

res judicata based on the multiple filings throughout the years from the petitioner that have been ruled on by both the trial and appellate courts.

In his current successive filing, the petitioner fails to identify or articulate any specific evidence that have been discovered or argued by trial counsel and/or appellate counsel. Petitioner alleges no specific facts trial counsel -- I'm sorry --

Petitioner alleges no specific failure of trial counsel to investigate nor of the appellate counsel to raise issue -- issues on appeal.

The petitioner's third claim really isn't the claim; rather, it's conditional statement containing a hypothetical followed by an unsupported conclusion. Quote, if any of the evidence raised here could have been discovered or argued by trial counsel or appellate counsel, the trial counsel and/or appellate counsel was ineffective for failing to do.

Petitioner presents no instances or examples whether a trial or appellate counsel

failed to discover or argue a particular piece of evidence.

Petitioner has failed to demonstrate that trial counsels' strategies were unsound, irrational, unreasonable or not competent.

Petitioner has failed to establish that counsel's performance fell below an objective standard of reasonableness, the first prong of the Strickland test. Petitioner has also failed to establish the second prong of the Strickland test, that there is a reasonable probability that counsel's on professional errors that the result of the proceedings would have been different.

Further, ineffective assistance of counsel was not an issue raised in the original appeal decided November 4 of 1992 affirming petitioner's conviction.

On march 27th of 1997, Judge Dennis J. Porter written 19-page order dismissed petitioner's claim of ineffective assistance of trial counsel.

On March 6th of 1998, the First District of Illinois Appellate Court confirmed

Judge Porter's summary dismissal of petitioner's pro se conviction.

On April 21st of 2000, Judge Porter in his written six-page order dismissed petitioner's claim of ineffective assistance of appellate counsel in petitioner's second petition for post conviction relief.

On January 24th of 2002, the First District Illinois Appellate Court affirmed Judge Porter's summary dismissal of petitioner's successive post-conviction petition as proper. The appellate court found no merit to petitioner's claim that he was deprived of ineffective assistance of counsel.

The fourth claim that the defendant raises a due process violation resulting in cumulative error, Illinois case law states that the court must reach conclusion as to each individual claim and, therefore, cumulative error analysis is not necessary.

Petitioner's claim of actual innocence based on newly-discovered evidence, a Brady violation, and effective assistance of trial counsel and appellate counsel all fail

individually and collectively.

The affidavits of Thomas Shanklin and Jesse Branch have been disposed of and dismissed in prior court rulings and should be barred under the doctrine of res judicata.

In continuing in its analysis of these affidavits, the Court finds that they are not of such a conclusive o character that either would change the result on retrial.

In conclusion, the Court has considered all the claims, arguments, filings, trial transcripts, the facts contained within the record, as well as the testimony, exhibits presented at this third-stage evidentiary hearing. I find the evidence of actual innocence is not of such a conclusive character that it would probably change the results of the petitioner upon retrial. I find the evidence presented at this evidentiary hearing by the petitioner, when considered along with the trial evidence, failed to be of such a conclusive nature, it would probably change the result on retrial of petitioner.

I do not find that the new evidence was so conclusive, that it is more likely than not

that no reasonable jury would find the petitioner guilty beyond a reasonable doubt.

The petitioner's filings and evidence presented at this evidentiary hearing failed to establish by preponderance of the evidence denial of the constitutional right.

The successive post conviction petition of Michael McCoy is denied.

This case is taken off call.

MR. MCCOY: If I may, your Honor, the Court has returned the exhibits?

THE COURT: Yes.

MR. MCCOY: And we acknowledge that.

I don't think petitioner minds, but I can take their exhibits, write up an impound order and give that to the Court this week so we can get those impounded.

THE COURT: Counsel acknowledge that all the exhibits have been returned to each side; is that correct?

MS. MYERSCOUGH-MUELLER: That's right, Judge.

THE COURT: Okay.

And, as far as impounding, if you want it all on one impound order, that's fine.

You guys can coordinate how you want the evidence impounded -- how you want the exhibits impounded.

MR. MCCOY: Right. Correct.

THE COURT: Okay.

MS. MYERSCOUGH-MUELLER: And, Judge, can we do, if it's okay with your Honor, an appeal check date? We intend to do a Notice of Appeal within 30 days. Do you want to do just the last date at the status check on that?

THE COURT: I don't --

Whatever you prefer. I don't need a date. If you think you need a date to file a Notice of Appeal...

MR. MCCOY: February 1st will be the end date, if you want; otherwise just file it when you file it. It's up to you guys.

MS. MYERSCOUGH-MUELLER: If your Honor doesn't need an appeal check date, then we can file it on Odyssey.

THE COURT: Do you need the Court's involvement in it in any way, shape or form?

MS. MYERSCOUGH-MUELLER: I don't think we do at this point. If anything comes up for some reason we do, then we can motion the case up.

THE COURT: Very well.

The matter is taken off call.

WHICH WERE ALL THE PROCEEDINGS HELD.

STATE OF ILLINOIS)
) SS:
COUNTY of C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
MUNICIPAL DEPARTMENT - CRIMINAL DIVISION

I, Tonja R. Jennings Bowman, Official Court Reporter for the Circuit Court of Cook County, Illinois Criminal Division, do hereby certify that I reported in machine shorthand the proceedings had on the hearing in the above-entitled cause, and transcribed the same by Computer-Aided Transcription, which I hereby certify to be a true and accurate transcript of the proceedings had before the HONORABLE MICHAEL R. CLANCY., judge of said court.

Tonja R. Jennings Bowman, CSR.

Dated this 10th day
of APRIL, 2024.

Sheet #	CRIMINAL DISPOSITION SHEET	Branch/Room/Location	Court Interpreter
1	Defendant Sheet #1	Criminal Division, Courtroom 308 2650 South California Avenue, Chicago, IL, 60608	

Case Number	Defendant Name	Attorney Name	Session Date	Session Time
86CR1040402	MC COY, MICHAEL	Myerscough-Mueller, Lauren Elizabeth 6317618	1/8/2024	09:00 AM -

CB/DCN#	IR #	EM	Case Flag	Bond #	Bond Type	Bond Amt
	0558989		APP			

CHARGES	** IN CUSTODY 2/11/1997 ** COURT ORDER ENTERED	CODES
C001 38-9-1-A(1) MURDER 10/31/1989 DEFT. SENTENCED TO Life	(C) I/C ATTY MYERSCOUGH-MUELLER ATTY LEONARD ASA DOMBROWSKI ORAL RULING AFTER 3RD STAGE EVIDENTIARY HEARING THE SUCCESSIVE POST-CONVICTION PETITION OF MICHAEL MCCOY IS DENIED CASE IS TAKEN OFF CALL	
C002 38-9-1-A(2) MURDER 10/31/1989 DEFT. SENTENCED TO Life		
C003 38-9-1-A(3) MURDER 10/31/1989 DEFT. SENTENCED TO Life		
C004 38-33A-2/I ARMED VIOL (CAT I WPN) 9/12/1989 Nolle Prosequi		
C005 38-18-2-A ARMED ROBBERY 10/31/1989 DEFT. SENTENCED TO IDOC		

JUDGE: Clancy, Michael R.	JUDGE'S NO: 2058	RESPONSIBLE FOR CODING AND COMPLETION BY DEPUTY CLERK:	VERIFIED BY:

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

MICHAEL MCCOY,	)	
	)	
Petitioner-Defendant,	)	Case No. 86 CR 10404-02
	)	
v.	)	
	)	
PEOPLE OF THE STATE OF ILLINOIS,	)	The Honorable Michael Clancy,
	)	Judge Presiding.
Respondent-Plaintiff.	)	

NOTICE OF APPEAL

(1) Court to which appeal is taken: Illinois Appellate Court, First Judicial District

(2) Name of appellant and address to which notices shall be sent:

Mr. Michael McCoy
c/o The Exoneration Project
at the University of Chicago Law School
311 N. Aberdeen St., 3rd Floor
Chicago, Illinois 60607

(3) Name and address of appellant's attorneys on appeal

Lauren Myerscough-Mueller
Karl Leonard
THE EXONERATION PROJECT
at the University of Chicago Law School
311 N. Aberdeen Street, 3rd Floor
Chicago, IL 60607
(312) 789-4955
laurenm@exonerationproject.org

(4) Dates of judgment or order: January 8, 2024

(5) Offenses of which convicted: Murder, Armed Robbery

(6) Sentence: Life

(7) If appeal is not from conviction, nature of orders appealed from:

Petitioner Michael McCoy appeals from the Court's denial of his post-conviction claims in an oral ruling on January 8, 2024, following a third-stage evidentiary hearing.

DATED: January 19, 2024

Respectfully submitted,

/s/ Lauren Myerscough-Mueller
Attorney for Petitioner

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Karl Leonard
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Attorney ID: 44407

(725 ILCS 5/122-6) (from Ch. 38, par. 122-6)

Sec. 122-6. Disposition in trial court. The court may receive proof by affidavits, depositions, oral testimony, or other evidence. In its discretion the court may order the petitioner brought before the court for the hearing. If the court finds in favor of the petitioner, it shall enter an appropriate order with respect to the judgment or sentence in the former proceedings and such supplementary orders as to rearraignment, retrial, custody, conditions of pretrial release or discharge as may be necessary and proper.

(Source: P.A. 101-652, eff. 1-1-23.)

1-24-0198 Common Law Record Vol. 1 of 1

1-24-0198 Supplemental Record Vol. 1 of 1

1-24-0198 Impounded Record Vol. 2 of 3

1-24-0198 Impounded Record Vol. 3 of 3