No. 129695

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	On Appeal from the Appellate Court of Illinois, First Judicial
Plaintiff-Appellant,	)	District, No. 1-20-0903
v.	)	There on Appeal from the Circuit Court of Cook County, Illinois, No. 02 CR 13513
ANGEL CLASS,	)	The Honorable Angela Munari Petrone,
Defendant-Appellee.	)	Judge Presiding.

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT PEOPLE OF THE STATE OF ILLINOIS

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NATURE OF THE ACTION

Following a bench trial, petitioner was convicted of first degree murder and aggravated discharge of a firearm and sentenced to 45 years in prison. The circuit court later dismissed petitioner's successive postconviction petition at the second stage. The appellate court reversed the circuit court's judgment, remanded for an evidentiary hearing, and *sua sponte* directed that the case be reassigned to a different circuit court judge on remand. The People appeal the part of the appellate court's judgment directing substitution of the circuit court judge. No issue is raised on the charging instrument.

ISSUE PRESENTED FOR REVIEW

Whether the appellate court exceeded its authority when it *sua sponte* ordered the substitution of the circuit court judge where the record demonstrates that the judge was neither biased nor prejudiced against petitioner.

JURISDICTION

On November 29, 2023, this Court allowed the People's petition for leave to appeal. Accordingly, jurisdiction lies under Supreme Court Rules 315, 604(a)(2), and 612(b).

RULES INVOLVED

Article III. Civil Appeals Rules

* * *

Rule 366. Powers of Reviewing Court; Scope of Review and Procedure; Lien of Judgment

(a) Powers. In all appeals the reviewing court may, in its discretion, and on such terms as it deems just,

(1) exercise all or any of the powers of amendment of the trial court;

(2) allow substitution of parties by reason of marriage, death, bankruptcy, assignment, or any other cause, allow new parties to be added or parties to be dropped, or allow parties to be rearranged as appellants or appellees, on such reasonable notice as it may require;

(3) order or permit the record to be amended by correcting errors or by adding matters that should have been included;

(4) draw inferences of fact; and

(5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, a partial reversal, the order of a partial new trial, the entry of a remittitur, or the enforcement of a judgment, that the case may require. . . .

* * *

Article VI. Appeals in Criminal Cases, Post-Conviction Cases, and Juvenile Court Proceedings

* * *

Rule 615. The Cause on Appeal

(a) Insubstantial and Substantial Errors on Appeal. Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court.

(**b) Powers of the Reviewing Court.** On appeal the reviewing court may:

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

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

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

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

(5) order a new trial.

STATEMENT OF FACTS

I. Trial, Direct Appeal, and Initial Postconviction Petition

Petitioner was charged with first degree murder after he fatally shot Tony Koniewicz in October 2001, and he was tried in a bench trial before the Honorable Evelyn Clay.

Before trial, defense counsel tried to locate Christopher Stanley, whom counsel described as a "critical witness," R169-70, but he was unable to do so, *id.*; SUP3 R6.[2]

The evidence at trial showed that at the time of the shooting, petitioner and his cousin, Elijah Salazar, were members of the Satan Disciples street gang, R39, 41, and Koniewicz and his friend Gerard Racasi, were members of a rival gang, the Insane C-notes, R23-24. On the night of the shooting, as Koniewicz and Racasi sat in a red Corsica parked at corner of Ohio and Leavitt Streets in Chicago, R22-23, petitioner fired multiple shots at the car, R48-50. Racasi was not hurt, R26-27, but Koniewicz died from a bullet that entered his left shoulder and lacerated his heart and both lungs,

[2] Citations to the common law record appear as "C__," to the report of proceedings as "R__," to the secured record as "SEC C__," to the first supplement to the record as "SUP C__," to the second supplement to the record as "SUP2 C__," and to the third supplement to the record as "SUP3 R__."

R137-38. The Corsica's door had multiple bullet holes, and the street was littered with glass from the shattered driver's side window, fired bullets, and cartridge cases. R96-98, 107.

Heather Ambrose, a longtime friend of petitioner, R38-39, was driving petitioner in her gray Pontiac Grand Am on the night of the shooting, R45. She testified that at around 7 p.m. that night, petitioner and Salazar came to her home and asked her to drive them around. R44-45. She agreed; petitioner sat in the front passenger seat and Salazar sat in the back seat. R45. As they drove around, petitioner directed Ambrose to drive into C-notes territory, which made her uncomfortable because the Satan Disciples were "at war" with the C-notes. R46-47. Ambrose drove until petitioner told her to pull up next to a dark red four-door vehicle parked at a stop sign on Ohio Street; petitioner said the car belonged to his cousin. R47-48. After Ambrose pulled up next to the car, petitioner leaned out the window, pulled out a gun, and fired several shots at the red car. R48. As he shot, petitioner yelled, "SD bitch. Now I have got you" and "C-note Killer." R49-50. While Ambrose drove away, petitioner said, "we finally got them." R52. He also "mentioned his friend Alex going to the grave yard[,] and [said] that he promised him." *Id.* Ambrose drove petitioner and Salazar to petitioner's home. R52-53. Petitioner later threatened to blow up Ambrose's grandparents' house if she told anyone what happened. R58-59.

On cross-examination, Ambrose testified that although she has a Satan Disciples tattoo, she was never a gang member. R69-70. She had dated Salazar's brother but not Salazar. R70-71. Ambrose had a prior conviction for aiding and abetting aggravated criminal sexual abuse. R71. In addition, Ambrose initially lied to police when she claimed she knew nothing about the shooting because she was afraid that she might be charged with a crime. R73-75. She later cooperated with police and provided a statement. R110-11.

Police obtained an arrest warrant for petitioner. R123. When they arrived at a house to execute the warrant, petitioner made eye contact with the arresting officer, ran back inside the house, and tried to leave through the back door. R127-29.

Petitioner testified that he, Ambrose, and Salazar were members of the Satan Disciples, SUP3 R8-9, 20, and that Ambrose had dated both Salazar and Salazar's brother, SUP3 R19-20. Petitioner claimed that he was home with his family on the night of the shooting but did not state what time he was home that night. SUP3 R28.

The court found petitioner guilty, R212, and sentenced him to 45 years in prison, R254-55.

On direct appeal, the appellate court affirmed petitioner's convictions. C162. This Court denied leave to appeal, *People v. Class*, 219 Ill. 2d 572 (May

24, 2006) (table); and the United States Supreme Court denied certiorari, *Class v. Illinois*, 549 U.S. 870 (2006).

Petitioner filed a *pro se* postconviction petition, which alleged that (1) trial counsel was ineffective for failing to investigate and call certain witnesses, and (2) petitioner was denied his Sixth Amendment right to confront and cross-examine Salazar, who gave testimonial evidence against petitioner before the grand jury but was not present at trial. SEC C152-175. In support, petitioner attached six affidavits from family members, in which the affiants stated that petitioner was at home on the night of the shooting. C178-183, 254. The circuit court dismissed the petition at the first stage. C245-56.

Petitioner appealed, arguing that trial counsel was ineffective for failing to investigate and call certain witnesses and that the mittimus should be corrected. C277-85. The appellate court affirmed the judgment dismissing petitioner's postconviction petition and ordered the mittimus to be corrected. C285. This Court denied leave to appeal. *People v. Class*, 232 Ill. 2d 585 (May 28, 2009) (table).

II. Successive Postconviction Proceedings

In July 2016, Judge Clay granted petitioner leave to file a successive postconviction petition and appointed counsel. C409-15; R323, 327-28. The *pro se* petition alleged that (1) petitioner was actually innocent, (2) trial counsel was ineffective for incorrectly informing petitioner that he faced a

minimum sentence of 20 years in prison, and (3) trial counsel was ineffective for failing to call alibi witnesses. C286-323. In support, petitioner attached affidavits from Stanley, Eugene Horton, Onyx Santana, Robert Pasco, and William Sanchez. C313-23.

In his affidavit, Stanley averred that he was with Ambrose and Salazar on the night of the shooting, that Salazar was the shooter, and that he did not see petitioner that night. C355-56. Stanley did not come forward earlier because he was afraid. C356.

Horton averred that he had taken paralegal classes and arranged for signs to be posted seeking information on petitioner's case. C353.

Santana averred that Salazar lied to the police when he claimed that petitioner visited Santana on the night of the shooting.[3] C357. Instead, Ambrose and Salazar came over with a "dark black man," smoked pot, and said they wanted to shoot someone. *Id.*

Pasco averred that the day after the shooting, Salazar told him that he "finally got C-note Tuggie last night." C361. "Tuggie" was Koniewicz's nickname. C362.

Sanchez averred that he witnessed the shooting while walking down Ohio Street. C359. He recognized the grey car as belonging to either Ambrose or Salazar and saw the person in the grey car's front passenger seat fire out the window. *Id.* According to Sanchez, the shooter had "light skin"

[3] Salazar did not testify at petitioner's trial.

that was "almost white,"[4] and petitioner had nothing to do with the shooting. *Id.*

In September 2017, the Honorable Angela Munari-Petrone replaced Judge Clay as the judge presiding over petitioner's successive postconviction proceedings. *See* C36. In June 2019, postconviction counsel filed a Rule 651(c) certificate. C489. In relevant part, the certificate explained that counsel had been unable to locate Stanley. *Id.* Counsel also filed the affidavits of petitioner's family members — which petitioner had previously filed with his initial postconviction petition — to support petitioner's actual innocence claim. R397; C490-97.

The People moved to dismiss the successive postconviction petition. C505-10, 512-23. After briefing, SUP2 C6-8; C525-29, and while the motion was under advisement, R443, postconviction counsel notified the circuit court that she had located and interviewed Stanley, but his statement during the interview was inconsistent with his affidavit, R452-53. Specifically, Stanley acknowledged that he had signed the affidavit in which he averred that he was with Ambrose and Salazar on the night of the shooting, C355-56, but he told postconviction counsel that, contrary to what he had averred, "neither he nor [petitioner] were there during the incident," C567.

[4] Petitioner's presentence investigation report states that petitioner is Hispanic. SEC C61.

The circuit court dismissed the successive postconviction petition at the second stage. A35-47; C560-72. First, the court found that petitioner's claims that trial counsel was ineffective were waived, forfeited, and/or barred by *res judicata*. A43-44. Second, the court rejected petitioner's actual innocence claim after considering each of petitioner's affidavits. A44-47. Specifically, the circuit court found Horton's affidavit inconclusive because he had no personal knowledge of the events. A46. The court reasoned that Santana was not present during the shooting and was known to petitioner at the time of trial (because petitioner had testified that Santana lived with Salazar at the time of the shooting, SUP3 R11), and that her statement would be inadmissible at a new trial because it merely impeached Salazar, a potential witness who never testified at trial. *Id.* Similarly, the court stated, Correa's and Pasco's proposed testimony was inadmissible hearsay. A46. Finally, the court found that Stanley's statement to the investigator was not newly discovered evidence because petitioner knew about Stanley at the time of trial and could have located him with diligence, and Stanley's statement did not convincingly demonstrate innocence because it was not sufficiently detailed and contradicted his prior affidavit. A47. Accordingly, the court dismissed the successive postconviction petition. *Id.*

III. The Appellate Court's Decision on Petitioner's Successive Postconviction Appeal

The appellate court reversed the circuit court's judgment. A1-33. The court found that petitioner had made a substantial showing of actual

innocence and remanded for a third-stage evidentiary hearing. A2, ¶ 2. The court faulted the circuit court for not citing *People v. Robinson*, 2020 IL 123849, which had been filed a month before the circuit court's decision, A18-19, ¶ 59, and for relying on a case applying the cause-and-prejudice test, rather than precedent addressing the showing required for actual innocence, A19, ¶ 60. The appellate court agreed with the circuit court that Santana's and Horton's affidavits did not support petitioner's innocence claim, but the appellate court found that the circuit court's approach to evaluating the remaining evidence was flawed because "[r]ather than analyze all this evidence in the holistic manner that the law requires, the [circuit] court assessed these affidavits in isolation, combing each one for evidentiary infirmities and potential credibility issues and minimizing any probative value it might contain." A23, ¶ 74. As a result, the appellate court concluded, "[t]he evidentiary and credibility issues highlighted by the [circuit] court are significant and need to be adjudicated, but that is precisely what a third-stage evidentiary hearing is for." A26, ¶ 82. The appellate court also *sua sponte* ordered that the case be reassigned to a different judge on remand in "the interests of justice" pursuant to Rule 366(a)(5). A26, ¶ 83.

The People filed a petition for leave to appeal (PLA), which argued that the appellate court had exceeded its authority by *sua sponte* ordering that the case be reassigned to a different circuit court judge on remand. While the PLA was pending, this Court remanded the case to the appellate court "for

the limited purpose of explaining the basis and rationale for its decision to order reassignment to a different judge on remand." A50.

On remand, the appellate court issued a modified order expanding on its decision to order reassignment and responding to the People's arguments in their PLA. A26-33, ¶¶ 85-98. Relying on cases in which this Court has directed the substitution of a judge as well as federal decisions, the appellate court found that it had discretion under Rules 366 and 615 to order reassignment of a case on remand without a finding of bias or prejudice. A28-29, ¶¶ 88-90. The appellate court determined that reassignment was appropriate in petitioner's case to "preserve the appearance of justice," A30, ¶ 93, because the circuit court judge had committed "multiple errors," A29, ¶ 91, and had viewed the evidence "under such a flawed set of standards" that the appellate court "lack[ed] confidence that she would be able to view [petitioner's] petition as anything other than deficient," A30, ¶ 92. The appellate court alternately found that even if a showing of bias or prejudice were required, the record demonstrated bias because the circuit court judge "completely disregarded" petitioner's evidence. A32, ¶ 96. Finally, the appellate court found that it was appropriate to order reassignment *sua sponte* because "this was a very unusual case" and "federal courts . . . routinely exercise that power in criminal cases both upon request and *sua sponte* by the court on the defendant's behalf." A33, ¶ 97 (internal quotations omitted).

After the appellate court issues its modified order, this Court allowed the PLA.

STANDARD OF REVIEW

Questions concerning the scope and proper exercise of the appellate court's authority under this Court's rules are legal questions that the Court reviews *de novo*. *See People v. Webster*, 2023 IL 128428, ¶ 16; *People v. Gorss*, 2022 IL 126464, ¶ 10.

ARGUMENT

The Appellate Court Exceeded Its Authority When It *Sua Sponte* Ordered Substitution of the Circuit Court Judge.

A. The appellate court lacks authority to direct substitution of a circuit court judge in the absence of a finding of bias or prejudice.

As in civil cases, the appellate court lacks authority in criminal cases to order substitution of a circuit court judge absent a finding of bias or prejudice.

This Court has never addressed the source and scope of the appellate court's authority to order substitution of a circuit court judge in a criminal case. In civil cases, the appellate court has such authority under Rule 366(a)(5), which broadly "permits a reviewing court, in its discretion, to make any order or grant any relief that a particular case may require." *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002) (citing Ill. S. Ct. R. 366(a)(5)). Rule 615(b), "the operative rule" that "sets out the authority of reviewing courts in *criminal cases*," *Webster*, 2023 IL 128428, ¶ 27 (emphasis in original),

including postconviction appeals, *see* Ill. S. Ct. R. 651(d), is narrower, *see* *Webster*, 2023 IL 128428, ¶ 27; *People v. Young*, 124 Ill. 2d 147, 152 (1988). It provides that the appellate court may:

> (1) reverse, affirm, or modify the judgment or order from which the appeal is taken;
>
> (2) set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken;
>
> (3) reduce the degree of the offense of which the appellant was convicted;
>
> (4) reduce the punishment imposed by the trial court; or
>
> (5) order a new trial.

Ill. S. Ct. R. 615(b). To exercise its remedial powers under Rule 615(b), the appellate court must find an error in the appealed-from judgment or order, or in the proceedings subsequent to or dependent upon that judgment or order; and the relief provided must remedy that error. *See generally Webster*, 2023 IL 128428, ¶¶ 25-33; *People v. Young*, 2018 IL 122598, ¶¶ 28-29; *Young*, 124 Ill. 2d at 152.

Significantly, Rule 615(b) does not grant the appellate court the power to order a remand upon finding reversible error. *Young*, 124 Ill. 2d at 152. By contrast, Rule 366(a)(5) "is much broader" and expressly provides that authority. *Id.*; *see* Ill. S. Ct. R. 366(a)(5) (appellate court may "enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, . . . that the case may require"). As this Court has explained, however, Rule 366(a) generally does not apply to criminal cases, and it should

not "be used as a mechanism in criminal cases to provide relief that otherwise would not be appropriate under Rule 615(b)." *Webster*, 2023 IL 128428, ¶ 33. As a result, Rule 366(a) applies in criminal appeals only in the limited circumstances where "the authority for such an order . . . could also be found under Rule 615(b)." *People v. Enoch*, 122 Ill. 2d 176, 188-89 (1988). Therefore, although "[t]he authority to enter a remandment in criminal cases is not specifically granted in Rule 615(b)," the Court has held that "a reviewing court has such authority in criminal cases when used in connection with other authority specifically stated in Rule 615(b)." *Young*, 124 Ill. 2d at 152.

Applying these principles to this case, Rule 615(b)(1) authorized the appellate court to reverse the circuit court's judgment upon finding error in the judgment, Ill. S. Ct. R. 615(b)(1), and Rule 366(a)(5) authorized it to remand for further proceedings, *see Young*, 124 Ill. 2d at 152. To additionally direct the reassignment of the circuit court judge, however, the appellate court needed to find independent error that would support this additional relief. But this Court has interpreted Rule 366(a)(5) to require the appellate court to find bias or prejudice to direct the substitution of judge on remand in civil cases. *See Raintree Homes v. Vill. of Long Grove*, 209 Ill. 2d 262, 262-63 (2004); *Eychaner*, 202 Ill. 2d at 280. Given the narrower and less specific grant of authority in Rule 615(b), the appellate court's authority to direct substitution in a criminal case cannot be any broader than that provided in

Rule 366(a)(5). *See generally Enoch*, 122 Ill. 2d at 189; *Young*, 124 Ill. 2d at 152. Indeed, this is the same standard required for a defendant to obtain for-cause substitution of judge in the circuit court. *See People v. Steidl*, 177 Ill. 2d 239, 264 (1997); *People v. Hall*, 114 Ill. 2d 376, 405-06 (1986); *People v. Vance*, 76 Ill. 2d 171, 178-79 (1979); *see also In re Marriage of O'Brien*, 2011 IL 109039, ¶¶ 34-43; *People v. Jackson*, 205 Ill. 2d 247, 276-77 (2001). Contrary to the appellate court's suggestion, A31, ¶ 95, nothing in Rule 615 or Rule 366 indicates that the appellate court may order such substitution where a defendant would not be entitled to for-cause substitution.

Accordingly, this Court should hold that the appellate court has authority to order substitution of the circuit court judge in criminal cases only upon finding of bias or prejudice.

B. The appellate court was wrong to direct substitution of the circuit court judge because petitioner did not argue, much less establish, that the judge was biased or prejudiced.

Applying this standard here, the appellate court erred in removing the circuit court judge from petitioner's case because (1) petitioner did not argue, much less show, that the judge was biased or prejudiced, and (2) the judge's missteps in analyzing petitioner's postconviction petition amounted to routine legal errors that are insufficient to show bias or prejudice.

First, the appellate court improperly ordered the substitution *sua sponte*. "[E]ven though a reviewing court has the power to raise unbriefed issues, it should refrain from doing so when it would have the effect of

transforming the court's role from that of jurist to advocate." *People v. Givens*, 237 Ill. 2d 311, 328 (2010).[5]

The appellate court's error is particularly clear when considered in light of the governing legal standard and petitioner's burden of proof. A circuit court "judge is presumed to be impartial, and the burden of overcoming this presumption rests on the party making the charge of prejudice." *Eychaner*, 202 Ill. 2d at 280. To satisfy this burden, "the party making the charge of prejudice must present evidence of prejudicial trial conduct and evidence of the judge's personal bias." *Id.* An adverse ruling does not demonstrate prejudice. *Id.* Instead, the party seeking a different judge must demonstrate "something more," such as "animosity, hostility, ill will, or distrust towards this defendant." *Vance*, 76 Ill. 2d at 181. Moreover, "[t]o conclude that a judge is disqualified because of prejudice is not . . . a judgment to be lightly made." *Id.* at 179. Thus, when the issue is properly raised in the circuit court, a reviewing court defers to the circuit court judge's findings because the "judge is in the best position to determine whether he or she is prejudiced against the defendant." *People v. Kliner*, 185 Ill. 2d 81, 169 (1998); *see also Vance*, 76 Ill. 2d at 178.

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[5] The appellate court relied on a federal case to hold that it could order substitution *sua sponte*, A33, ¶ 97 (citing *United States v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006)), but that case is inapposite because whether the appellate court has that authority is a question of state law, *see People v. Flowers*, 208 Ill. 2d 291, 308 (2003).

Given these standards — including the presumption of impartiality, the advocate's burden of demonstrating bias or prejudice, that adverse legal rulings are not grounds for substitution, and the circuit court judge's unique position in determining whether she is biased — the appellate court should have refrained from *sua sponte* replacing the circuit court judge. Indeed, because petitioner never argued that the circuit court judge was biased or prejudiced, neither the parties nor the judge had the opportunity to address the issue and develop a factual record. *See Raintree Homes*, 209 Ill. 2d at 263 (declining to substitute judge in part because plaintiff did not request that relief). Thus, that the appellate court *sua sponte* directed substitution alone provides ground for reversal.

Second, even if petitioner had raised the issue, there was no basis for directing substitution. The appellate court reversed the circuit court's judgment dismissing petitioner's postconviction petition because the court had misidentified, and thus misapplied, the legal standard. *See* A18, ¶ 58 (reasoning that the "fundamental problem with the trial court's analysis . . . is that, rather than employing the comprehensive review" required, "it employed a piecemeal approach"). But the incorrect application of a legal standard does not evince bias or prejudice. Rather, it is a routine error, and correcting such errors is one of the main purposes of appellate review. Moreover, as the appellate court acknowledged, this Court had recently clarified the applicable standard. *Id.* ¶ 59 ("*Robinson* [2020 IL 123849]

changed the calculus of what is required to advance a colorable claim of actual innocence and that change is not reflected in the trial court's reasoning[.]"). Given the Court's recent clarification of the law and applying the presumption of impartiality, the appellate court should have assumed that the judge's errors, including its reliance on outdated citations, were the product of oversight rather than bias.

Similarly, and contrary to the appellate court's suggestion, A29-30, ¶¶ 91-92, the fact that the circuit court judge opined on the strength of the evidence or ruled adversely to petitioner was not a basis for disqualifying her. "A judge's rulings alone almost never constitute a valid basis for a claim of judicial bias or partiality." *Eychaner*, 202 Ill. 2d at 280. And "'opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias.'" *Id.* at 281 (quoting *Liteky v. United States,* 510 U.S. 540, 555 (1994)) (denying request to reassign case under Rule 366(a) because "erroneous findings and rulings" were insufficient basis for reassignment). As the United States Supreme Court has explained:

> The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to completion of the judge's task.

Liteky, 510 U.S. at 550-51. Thus, the appellate court may not reassign a case merely because it disagrees with the circuit court's rulings or assessment of the evidence. Indeed, to allow a reviewing court to order reassignment merely because the circuit court judge made an error would disqualify every judge from sitting on the case following a remand. *See Vance*, 76 Ill. 2d at 181. For these reasons, substitution based on a judge's rulings or opinions is warranted only where the rulings or opinions "'display a deep-seated favoritism or antagonism that would make fair judgment impossible.'" *Eychaner*, 202 Ill. 2d at 281 (quoting *Liteky*, 510 U.S. at 555).

But nothing in this record comes close to demonstrating that "a deep-seated favoritism or antagonism" on the part of the circuit court judge. As explained, the record shows merely that the judge misapprehended the applicable legal standard. For its part, the appellate court stated that the judge displayed "hostility to [petitioner's] claim" because she found credibility issues with the supporting affidavits. A32, ¶ 96. But the judge's error in considering the credibility of the affidavits at the second stage of postconviction proceedings rather than waiting for the third stage was nothing more than a mistake of law. And nothing suggests, much less demonstrates, that now that her mistake has been corrected, the circuit court judge will not "'make a conscientious effort to set . . . aside [her prior view of the case] and give dispassionate consideration to" the evidence presented at a third-stage evidentiary hearing. *Vance*, 76 Ill. 2d at 179-80.

Because the record does not demonstrate bias or prejudice, the Court should reverse the portion of the appellate court's judgment directing reassignment on remand.

C. The appellate court's ruling that it could reassign without finding bias or prejudice was incorrect.

As discussed, a showing of bias or prejudice is required before the appellate court may remove a circuit court judge from a criminal case. Nevertheless, the appellate court suggested that an appearance of impropriety should be enough to warrant removal. *See* A28-29, ¶¶ 88-90. But this Court rejected that lesser standard in *O'Brien*, where it explained that "the mere *appearance* of impropriety" is not sufficient "to force a judge's removal from a case." 2011 IL 109039, ¶ 43 (emphasis in original). And, more generally, the Court has held that the appellate court may not direct a remand based solely on "perceived principles of equity" untied to a specific finding of error. *Webster*, 2023 IL 128428, ¶¶ 21, 28. Thus, the appellate court was incorrect that it could order reassignment of the circuit court judge absent a showing of bias or prejudice.

The appellate court's attempt to distinguish *O'Brien*, A31, ¶ 95, is unpersuasive. According to the appellate court, *O'Brien*'s rejection of the appearance-of-impropriety standard applies only to for-cause substitution motions made in the circuit court because the appellate court purportedly has more information, and thus is in a better position than the circuit court judge to assess the judge's potential biases and prejudices and need not

"speculat[e]" about their impact on the judge's future rulings. A31, ¶ 95. But *O'Brien*'s holding — that a circuit court judge may not be removed from a case based on an appearance of impropriety — applies equally to proceedings in the circuit and appellate courts.

To start, an appellate court's decision to remove a circuit court judge from future proceedings on remand rests just as equally on speculation as does a circuit court judge's decision to grant for-cause substitution: in both scenarios, the question is whether the judge should be barred from making future rulings in the case, and the decision is made based on the information available at the time.

In addition, as *O'Brien* explained, the Code of Judicial Conduct provides the mechanism for preventing circuit court judges from presiding over cases where their "impartiality might reasonably be questioned[,] includ[ing] situations involving the appearance of impropriety." 2011 IL 109039, ¶ 43 (quotations and citations omitted). Under the Code, "[a]ll judges in Illinois are expected to consider, *sua sponte*, whether recusal is warranted as a matter of ethics," and the decision whether a judge should be removed based on an appearance of impropriety "rests *exclusively within the determination of the individual judge*." *Id.* ¶ 45 (emphasis in original). For these reasons, *O'Brien* emphasized, an appearance of impropriety may not "be used by a party or his lawyer as a means to force a judge to recuse [herself]." *Id.* Likewise, the appellate court cannot substitute its judgment

for that of the circuit court judge and remove the judge based on its view that the judge has an appearance of impropriety. In sum, whether substitution is sought in the circuit or the appellate court, an appearance of impropriety alone is not a basis for removing a circuit court judge.

Indeed, a litigant can seek for-cause substitution at any time based on the information available, 725 ILCS 5/114-5(d) — including when the case is initially in the circuit court before appeal *and* after it has returned to the circuit court following a finding of reversible error (when the circuit court would have all of the information available to it that the appellate court had). But the appellate court's rule would mean that to obtain substitution of the assigned circuit court judge, a litigant would need to show bias or prejudice when the case is initially in the circuit court, a mere appearance of impropriety when it is on appeal, and, if the issue was not raised on appeal, then bias or prejudice again when the case is on remand even if the record has not changed since the case was on appeal. There is no principled basis for shifting the standards in this way. Accordingly, the Court should reject the appellate court's attempt to avoid *O'Brien*.

The appellate court's reliance on cases in which this Court directed substitution of a circuit court judge without finding bias or prejudice, *see* A28, ¶ 88, is equally misguided. Unlike the appellate court, this Court has broad supervisory authority over the administration of the courts and may direct substitution of a circuit court judge pursuant to that authority. *See* Ill.

Const. art. VI, § 16 (vesting this Court with "[g]eneral administrative and supervisory authority over all courts"); *see also generally People v. Joseph*, 113 Ill. 2d 36, 47-48 (1986). But the appellate court does not have the same supervisory authority. *See People v. Flowers*, 208 Ill. 2d 291, 308 (2003) ("appellate court . . . does not possess the same inherent supervisory authority conferred on our court by. . . the Illinois Constitution"); *Marsh v. Illinois Racing Bd.*, 179 Ill. 2d 488, 498 (1997) (similar). Thus, the appellate court may not "issue[] a supervisory-type order to the circuit court" — even in an "attempt to reach a 'fair' outcome." *People v. Whitfield*, 228 Ill. 2d 502, 521 (2007) (appellate court lacked authority to remand for "the trial court to consider giving [defendant sentence] credit on grounds of fundamental fairness").

Moreover, in those cases where this Court exercised its supervisory authority to reassign a case to a different circuit court judge, it did so because the judge acted in a manner that demonstrated a potential for bias or prejudice, rather than merely misunderstood the applicable law. For example, in *People v. Dameron*, the judge improperly sought information from outside the record; this Court reassigned the case "to remove any suggestion of unfairness." 196 Ill. 2d 156 (2001). Similarly, in *People v. Jolly*, the judge heard adversarial argument at a *Krankel* hearing when the law prohibited it; the Court remanded for a new "inquiry before a different judge without the State's adversarial participation." 2014 IL 117142, ¶ 46. And in *People v.*

Heider, the Court directed reassignment upon remand "to remove any suggestion of unfairness" because the sentencing judge had made prejudicial comments about the defendant being a "sexual predator . . . who commits crimes against young people" that were not supported by the record. 231 Ill. 2d 1, 22-25 (2008). None of these circumstances is present here.

For similar reasons, the appellate court's reliance on federal cases to find that it has authority to direct substitution based solely on an appearance of impropriety, A28-29, ¶ 89-90, was misplaced. Unlike the appellate court, federal courts of appeal possess supervisory authority over the district courts and may reassign cases pursuant to that authority. *See*, *e.g.*, *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) ("We have the authority to order reassignment of a criminal case to another district judge as part of our supervisory authority over the district courts in this Circuit."); *United States v. Kennedy*, 682 F.3d 244, 258 (3d Cir. 2012) ("we may order reassignment of a judge pursuant to our supervisory powers"). As explained, under the Illinois Constitution, only this Court has such authority. Thus, the authority granted to the federal courts of appeal is irrelevant.

In any event, when exercising their supervisory authority, the federal courts of appeal, like this Court, reassign cases only in extraordinary circumstances, and not in cases of mere legal error like this one. "[R]eassignment is an exceptional remedy, one that [the courts] weigh seriously and order sparingly." *Kennedy*, 682 F.3d at 258; *see also Solomon v.*

United States, 467 F.3d 928, 935 (6th Cir. 2006) ("Reassignments should be made infrequently and with the greatest reluctance.") (internal quotations omitted). For example, in *Manley v. Rowley* — the decision upon which the appellate court primarily relied, A29, ¶ 89 — the Ninth Circuit granted Manley's request for reassignment because the district court judge had persisted in ruling in a way that "violated governing law" based on the judge's "personal matrix" and despite having been reversed under "similar circumstances." 847 F.3d 705, 713 (9th Cir. 2017). As the court explained, the judge's approach went "well beyond a mere legal error or offhand comment" to "strongly suggest[ ] that the district judge [would] 'have substantial difficulty in putting out of his . . . mind previously expressed views' when presiding over this matter on remand." *Id.*

In contrast, petitioner never sought substitution, and the record is devoid of evidence that the circuit court judge expressed any unwillingness to apply the appropriate legal standard. Rather, the judge made a mistake when identifying the applicable standard. In such circumstances, the federal courts routinely reject requests for reassignment. *See*, *e.g.*, *United States v. Barksdale*, 98 F.4th 86, 90 (3d Cir. 2024) (reassignment unwarranted where district court "seemed frustrated with [defendant]" after a long hearing); *Sagan*, 342 F.3d at 501 (reassignment unwarranted where district court mischaracterized expert medical testimony as "no more than conjecture or speculation"). As the Sixth Circuit observed: "If we reassigned the case every

time a district court judge misconstrued some evidence, reassignment would surely cease to be 'an extraordinary power . . . rarely invoked'"; rather, there would be no "limiting principle" to distinguish cases that justify reassignment from every other case in which the district court's judgment is reversed. *Sagan*, 342 F.3d at 501-02.

Finally, even if the appellate court had authority to order reassignment based on the appearance of impropriety — rather than bias or prejudice — the court erred when it considered the purported appearance of impropriety from petitioner's perspective. *See* A30, ¶¶ 92-93 ("it might well appear . . . *to [petitioner]*" that the judge "would [not] be able to view his petition as anything other than deficient" (emphasis added)). Federal courts consider the appearance of impropriety from the perspective of a neutral informed observer, not from the viewpoint of the party seeking substitution. *See Kennedy*, 682 F.3d at 260 (test is whether "reasonable observer, with knowledge of this case, could question the impartiality and neutrality of the proceedings"); *Torkington*, 874 F.2d at 1446 ("Reassignment is appropriate where the trial judge has engaged in conduct that gives rise to the appearance of impropriety or a lack of impartiality *in the mind of a reasonable member of the public*." (emphasis added)). Nothing in this record suggests that a reasonable member of the public would question the circuit court judge's ability to be impartial at a third-stage evidentiary hearing

merely because she misapplied the legal standard when deciding whether to advance petitioner's postconviction petition past the second stage.

In short, under Illinois law, the appellate court cannot order reassignment based on the appearance of impropriety, and, in any event, the appellate court misapplied even that lesser standard.

CONCLUSION

For these reasons, the People of the State of Illinois respectfully request that the Court reverse the part of the appellate court's judgment that ordered that the case be reassigned to another circuit court judge.

May 17, 2024

Respectfully submitted,

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing 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 27 pages.

/s/ Katherine Snitzer
KATHERINE SNITZER
Assistant Attorney General

CERTIFICATE OF FILING AND 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. On May 17, 2024, the foregoing **Brief and Appendix of Plaintiff-Appellant People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing system, which provided service to the following:

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2023 IL App (1st) 200903

FIFTH DIVISION
Opinion filed April 28, 2023
Modified opinion filed October 13, 2023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

No. 1-20-0903

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
v.	)	No. 02 CR 13513
ANGEL CLASS,	)	Honorable Angela Munari Petrone, Judge Presiding.
Defendant-Appellant.	)	

JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices C.A. Walker and Tailor concurred in the judgment and opinion.

OPINION

¶ 1 Following a bench trial, Angel Class was convicted of first degree murder with a firearm and aggravated discharge of a firearm and sentenced to 45 years in prison. The convictions stemmed from a drive-by shooting on October 22, 2001, that killed Tony Koniewicz. The State's case relied almost entirely on the testimony of a single eyewitness, who testified that she was driving the car from which Mr. Class fired upon Mr. Koniewicz. No other witnesses identified Mr. Class as Mr. Koniewicz's killer or could even provide circumstantial evidence suggesting his involvement in the crime. Nor was there any physical evidence connecting him to the shooting. Mr. Class has always maintained his innocence, claiming he was at home with his family on the

night of the shooting and that he had nothing to do with it.

¶ 2 This appeal concerns the dismissal of Mr. Class's successive petition for postconviction relief where, among other things, he advanced a claim of actual innocence. For the reasons that follow, we find that his petition was erroneously dismissed at the second stage. Taken cumulatively, Mr. Class's petition made a substantial showing of actual innocence, entitling him to a third-stage evidentiary hearing where the circuit court, serving as factfinder, must determine whether the evidence introduced demonstrates that Mr. Class is entitled to a new trial.

¶ 3 I. BACKGROUND

¶ 4 A. Trial

¶ 5 The only witness that identified Mr. Class at trial as the person who murdered Tony Koniewicz was Heather Ambrose. She testified that she was an associate of some Satan Disciples gang members and that on the day of the shooting, Mr. Class and a man named Elias (or Eli) Salazar—both members of the gang—arrived at her grandparents' house around 7 p.m. and had her drive them in her car (a gray 1991 Pontiac Grand Am) to territory controlled by the C-Notes, a rival gang. She knew Mr. Class from grammar school, and she knew Mr. Salazar because she used to date his brother.

¶ 6 According to Ms. Ambrose, Mr. Salazar sat in the back seat of her car and Mr. Class sat in the front. She testified that once they entered rival gang territory, Mr. Class instructed her to pull up next to a car parked near the intersection of Oakley Boulevard and Ohio Street. She testified that when they reached the parked car, Mr. Class hailed its occupants as if to greet them before pulling out a gun and firing numerous shots into the car while shouting gang slogans. The other car then attempted to make a U-turn, and Mr. Class told her to look straight ahead and drive to his house. When she dropped Mr. Class and Mr. Salazar off at Mr. Class's house, Mr. Class told her

to go straight home, and she did.

¶ 7 She testified that the following morning, Mr. Class returned to her house with Mr. Salazar and told her they had to clean the car. The three of them then went to pick up a woman named Pattie, a friend of Mr. Class's, and they all went to the car wash. Ms. Ambrose further testified that Mr. Class told her not to talk to the police. She claimed that three days later, Mr. Class gave her gas money to return to her home state of Kentucky and threatened to harm her grandparents if she told anyone anything about the shooting. She left for Kentucky the following day.

¶ 8 On cross-examination, Ms. Ambrose acknowledged that she had a Satan Disciples tattoo and that she had been convicted in federal court of aiding and abetting aggravated criminal sexual abuse. She also admitted that when detectives tracked her down in Kentucky and asked her about the shooting, she initially told them that she did not know anything. She then told them that someone had borrowed her car on the date of the shooting. She also stated during her cross-examination that she could not remember whether anyone besides Mr. Salazar and Mr. Class were in her car on the night of the shooting, and she said that, independent of the events surrounding the shooting, she had been planning to go to Kentucky to visit her pregnant sister.

¶ 9 Several other witnesses testified for the State, although they did not identify anyone as the murderer. These witnesses confirmed that Mr. Koniewicz was shot, but some of their testimony suggested this occurred later in the evening than Ms. Ambrose's testimony would indicate. Tammy Scatanese, Mr. Koniewicz's sister, testified that "just after 9:00" on the evening of the shooting "the phone rang" and the person on the other line "said that [Mr. Koniewicz] was in a car and had been shot." The State also called Gerard Recasi, who testified that he was a friend of Mr. Koniewicz, a fellow member of the C-Notes gang, and the person in the passenger seat of Mr. Koniewicz's four-door red Corsica during the shooting that killed Mr. Koniewicz.

¶ 10 Describing his experience during the shooting, Mr. Recasi testified that he instinctively ducked during the gunfire. He recalled hearing between 9 and 10 gunshots. When it was over and he got back up, apparently unscathed, he looked over at Mr. Koniewicz and noticed that Mr. Koniewicz was bleeding from the mouth and chest. He testified that Mr. Koniewicz, who was in the driver's seat, then attempted to turn the corner but was struggling from his injuries and "after I seen he couldn't take it no more," Mr. Recasi took control of the wheel and drove to the hospital.

¶ 11 Mr. Recasi testified that he was unable to see who fired the shots or describe the car from which they came. The only time frame that Mr. Recasi gave for the shooting was "evening hours." The State then presented Mr. Recasi with testimony he had given before the grand jury, where he had stated that the car that fired at them was gray and had pulled up to the left side of their car, next to Mr. Koniewicz. On redirect, Mr. Recasi reiterated that while he was in the car during the shooting, he did not actually see Mr. Koniewicz get shot.

¶ 12 The State also called several law enforcement witnesses. Officer Luis Arroyo of the Chicago Police Department (CPD) testified that at about 10 p.m. on the day of the shooting, he was told to go to St. Mary's Hospital at 2233 West Division Street, where a shooting victim had been taken. When he arrived, he spoke with Mr. Recasi and wrote an initial report. Mr. Recasi gave a description of the color of the car that had shot at them, but no description of the shooter. Officer Arroyo then visited the crime scene and Mr. Koniewicz's car and recorded his observations.

¶ 13 The State next called Robert J. Davie, a forensic investigator with CPD, who described visiting the crime scene, taking photographs, and collecting firearm evidence. Mr. Davie testified that he and his partner collected nine fired cartridges and two bullets, all from a 9-millimeter weapon. He testified that a third bullet was later recovered from a bullet hole in the driver's side

door of Mr. Koniewicz's vehicle. The parties then entered a stipulation that if called to testify, a witness from the Illinois State Police Forensic Science Laboratory would have testified that the two bullets collected from the scene were fired from the same 9-millimeter gun, as was the third bullet recovered from the door of the car. They also stipulated that none of the bullets contained impressions suitable for fingerprint analysis and that a fourth bullet recovered during Mr. Koniewicz's autopsy came from the same firearm as the other three bullets.

¶ 14 Detective Robert Rodriguez of the CPD testified that he was assigned to investigate the shooting at around 10:40 p.m. on the night of October 22, 2001. He and his partner first went to the scene, where he canvassed the area and noticed shell casings and broken glass. They then went to the hospital, where they spoke with Mr. Recasi and some of Mr. Koniewicz's family members. Detective Rodriguez testified that, initially, he had no leads or descriptions of the shooter, but that as he continued to investigate, he eventually received an anonymous tip that Heather Ambrose had been "talking about her participation in the drive-by shooting." He also learned that she had left Chicago and was living with her mother in Richmond, Kentucky. When he travelled to Kentucky to speak with Ms. Ambrose, she initially denied any firsthand knowledge of the shooting. After speaking with Ms. Ambrose, the detective then began to look for Eli Salazar.

¶ 15 Detective Rodriguez was unable to locate Mr. Salazar in Chicago, but he received information that Mr. Salazar may have fled to Texas. Eventually, Detective Rodriguez located him in Gainesville, Texas. Detective Rodriguez interviewed Mr. Salazar, who was uncooperative at first, but eventually gave a handwritten statement (which was not introduced at trial). He also agreed to come back to Chicago to testify before the grand jury. Detective Rodriguez also testified that another detective had interviewed someone named "Pattie." Detective Rodriguez then described trying to locate Mr. Class for several months and getting an arrest warrant. He was not

present at Mr. Class's arrest, but he stated that it took place at Mr. Class's mother's house in Chicago.

¶ 16 Officer Delatorrie of the CPD's Gang Tactical Team testified that he had been assigned the task of tracking down Mr. Class and arresting him. On April 27, 2002, he had received information that there was going to be a party for Mr. Class's daughter at a house and that Mr. Class might be there. Officer Delatorrie and five fellow officers went to the house to set up surveillance and saw Mr. Class standing there. Mr. Class made eye contact with the officers then ran into the house. Two of the officers chased Mr. Class into the house. Officer Delatorrie testified that Mr. Class was detained while trying to escape through the rear of the house. The State rested its case after entering a few more stipulations and calling one more law enforcement witness, an investigator for the Cook County State's Attorney's Office, who described how law enforcement had managed to track down Eli Salazar.

¶ 17 After unsuccessfully moving for a directed finding for a judgment of acquittal, Mr. Class called Milton Correa as his first witness. Defense counsel attempted to have Mr. Correa testify to a statement that he said Eli Salazar made to him, in which Mr. Salazar admitted to shooting Mr. Koniewicz. The State objected, arguing that counsel was eliciting hearsay. Counsel responded that the statement was nonetheless admissible as a statement against Mr. Salazar's penal interest. The State's objection was sustained. Defense counsel, seemingly unprepared for this ruling, asked the court to hold the case until the following day.

¶ 18 The following day, defense counsel asked for another continuance until the following week so he could put on the rest of the case "based upon what investigators have located." When that date came, Mr. Class was present, but his attorney was not, and the court continued the matter until the following day. Mr. Class's attorney missed that court date as well, claiming he had the flu and

needed a few days to recover. When the next trial date came, on January 26, 2004, defense counsel was present but asked for another continuance, claiming that a critical witness "decided to disappear on us." The State objected to any further delay, but the court granted one final continuance. On February 4, 2004, the date set for trial, defense counsel reported that this "critical witness" was a man named Christopher Stanley and that, despite diligent efforts, counsel had not been able to locate him. Defense counsel then called Mr. Class to the stand to testify.

¶ 19 In his trial testimony, Mr. Class admitted to being a member of the Satan Disciples. He said that he lived with his mother, his girlfriend, and his two children. He knew Heather Ambrose from school and said that she was also a member of the Satan Disciples and that she had a tattoo of a devil with two smoking guns, which is the sign for the gang. He testified that he also knew Eli Salazar as a member of the Satan Disciples. Mr. Class explained that both he and Mr. Salazar held rank within the gang. Mr. Salazar "controlled Texas," but, when in Chicago, Mr. Class held authority over Mr. Salazar.

¶ 20 According to Mr. Class, his gang's tensions with the C-Notes were the result of provocations by Mr. Salazar, who would drive through C-Notes territory and pull out his cellphone, "acting like he had a gun." Mr. Class stated that he had confronted Mr. Salazar the Saturday before the murder of Mr. Koniewicz about these provocations and told him to stop "messing with" the C-Notes. He explained that he was upset about Mr. Salazar's provocations because they had led to his friend Roberto Karsnetto being shot by the C-Notes.

¶ 21 Mr. Class testified that while Mr. Salazar went back and forth between Chicago and Texas, he had been living in Chicago with a woman named Onyx Santana for about a month before Mr. Koniewicz was shot. He further testified that, although there had been problems with the Satan Disciples and the C-Notes five years earlier, tensions had died down until Mr. Salazar came back

from one of his trips from Texas, with Heather Ambrose. Mr. Class blamed Mr. Salazar and Ms. Ambrose, who he described as boyfriend and girlfriend, for "starting confusion" with the C-Notes. According to Mr. Class, Ms. Ambrose had also previously been romantically involved with Mr. Salazar's brother, as well as with some C-Notes. When Mr. Class confronted Mr. Salazar that Saturday before the shooting about his behavior towards the C-Notes, he also told him that ever since he started to hang out with Ms. Ambrose, "a lot of my friends were getting hurt." Mr. Class claimed that he demanded that Mr. Salazar not bring Ms. Ambrose around anymore, and "Eli got a little upset, because I was, you know, making direct comments towards his girlfriend."

¶ 22 Mr. Class testified that, the following day, he had another confrontation with Mr. Salazar and Ms. Ambrose. When the couple showed up at a gang meeting, Mr. Class ordered Mr. Salazar not to "bring this girl around here." He testified that Ms. Ambrose then got upset and "said something wrong to me," so Mr. Class "muffed her in the face." Mr. Salazar and Ms. Ambrose then got into their car and angrily took off. Mr. Salazar then returned to the meeting a few minutes later, without Ms. Ambrose. This encounter took place the night before the murder of Tony Koniewicz.

¶ 23 Mr. Class testified that he had nothing to do with the murder of Tony Koniewicz and that he was home with his family at the time of the shooting. He also testified that after the murder of Mr. Koniewicz, when his mother told him the police had been by the house looking for him, he did not think much of it, as "they would always come question me on previous cases." He did not treat the matter with urgency, as he assumed they wanted to talk about a different incident from a few months before, in which he had been the one shot. He also testified that he did not see Ms. Ambrose or Mr. Salazar again after telling them off the day before the shooting. He denied ever going with them to a car wash. He also denied running away from the police when they eventually

came to arrest him at his mother's house.

¶ 24 Defense counsel called no additional witnesses, and Mr. Class was found guilty of first degree murder. On September 1, 2004, the court sentenced him to 45 years, 20 years for the underlying offense, plus a mandatory enhancement of 25 years for the finding of personal discharge of a firearm resulting in death, as well as 5 years to be served concurrently for the charge of aggravated discharge of a firearm.

¶ 25 B. Subsequent Procedural History

¶ 26 We affirmed Mr. Class's convictions on direct appeal (*People v. Class*, 363 Ill. App. 3d 1193 (2006) (table) (unpublished order under Supreme Court Rule 23)), rejecting his arguments that the trial court had improperly granted the State's petition to extend the trial term, improperly excluded Milton Correa's testimony about Mr. Salazar having admitted to shooting Tony Koniewicz, and improperly concluded that the State had proved his guilt beyond a reasonable doubt.

¶ 27 Mr. Class filed his first petition for relief under the Post-Conviction Hearing Act (Act) (725 ILCS 5/122-1 *et seq.* (West 2006)), on August 18, 2006. In that petition, filed *pro se*, Mr. Class alleged his trial counsel was ineffective for failing to investigate, interview, and present alibi witnesses. To substantiate this allegation, he attached six affidavits from family members, all averring that he was home from 7:30 p.m. onwards on the night of the shooting. In addition to these family member alibi witnesses, Mr. Class also alleged the existence of two additional eyewitnesses, but did not identify them or provide affidavits from them.

¶ 28 The court dismissed Mr. Class's initial petition on November 16, 2006. It found that his allegation of ineffective assistance of counsel based on the unnamed eyewitnesses was conclusory and unsupported by any factual allegations. As to the six affidavits from family members, the court

found that nothing had prevented Mr. Class from raising arguments related to these witnesses on direct appeal and that he had thus forfeited such arguments. Additionally, the court noted that any failure to call family members as witnesses did not prejudice him, as they were all biased witnesses with a strong incentive to help him.

¶ 29 We affirmed the dismissal of Mr. Class's initial postconviction petition on December 12, 2008. *People v. Class*, 387 Ill. App. 3d 1177 (2008) (table) (unpublished opinion under Supreme Court Rule 23). We noted in that order that the supposed alibi established by the affidavits from his family members was that Mr. Class was at home from 7:30 p.m. onward on the night of the shooting. Ms. Ambrose had testified that she picked up Mr. Class at around 7 p.m. Given this half-hour discrepancy, we concluded that the affidavits did not establish a conclusive alibi, providing an additional reason why the trial attorney's decision not to call the family members did not amount to ineffective assistance.

¶ 30 Mr. Class filed his successive petition—the subject of this appeal—on May 16, 2016, asserting a claim of actual innocence as well as other constitutional claims that he has not pursued in this appeal. In support of his actual innocence claim, he attached to the petition five new affidavits. We will set out those affidavits in the order in which they were reviewed by the trial court in its decision dismissing this successive petition.

¶ 31 The first affidavit the court reviewed was from William Sanchez, dated November 20, 2012. In his affidavit, Mr. Sanchez said that "at 10:00 or 10:30 p.m. on October 22, 2001" he was walking east on Ohio Street and saw a gray Pontiac drive past. He knew this car belonged either to Heather Ambrose or to Eli Salazar, whom he referred to as her spouse. He also noticed a red car stopped on the corner of Ohio Street and Leavitt Street. He witnessed the gray car pull up next to the red one and saw a light-skinned, "almost white" individual fire from the gray car toward the

red one. He said in his affidavit that he did not come forward because he was on parole and was scared that the police might treat him as a suspect in the shooting investigation. He stated that he recently found out that Mr. Class had been convicted of this murder and that he knew that "Angel Class did not have anything to do with the shooting that took place on October 22, 2001."

¶ 32 The second affidavit was from Onyx Santana, dated December 23, 2015. At trial, Mr. Class briefly mentioned Ms. Santana as the person that Eli Salazar was staying with upon returning to Chicago about a month before the murder. In her affidavit, Ms. Santana stated that, in September 2015, she became aware of a statement Mr. Salazar had made to law enforcement shortly after the murder in which he claimed that he, Ms. Ambrose, and Mr. Class had visited Ms. Santana's house on October 22, 2001, the day of the murder. She described Mr. Salazar's statement as false. According to her, Mr. Class never visited her house that day, but she was visited by Mr. Salazar, Ms. Ambrose, and "an extremely dark black man," who she did not know. At her house, as Ms. Ambrose and Mr. Salazar smoked marijuana, they spoke openly about wanting to shoot someone, which caused her to immediately ask them to leave.

¶ 33 The third affidavit was from Eugene Horton, dated March 1, 2016. Mr. Horton described himself as a trained paralegal who had agreed to help Mr. Class find witnesses to the shooting. His assistance came in the form of posting notices on streetlamps in the community where the shooting occurred. In the affidavit, he stated that he agreed to help Mr. Class because he believed he was innocent.

¶ 34 The fourth affidavit was from Robert Pasco, dated March 13, 2016. Mr. Pasco said that, on October 23, 2001, Mr. Salazar told him that he "finally got C-note Tuggie" last night. Mr. Pasco explained that "C-note Tuggie" was a nickname for Tony Koniewicz. In his affidavit, Mr. Pasco wrote that Mr. Salazar also told him that he, Ms. Ambrose, and "Black Christopher" were at Onyx

Santana's house before they "drove up on Tuggie at a stop sign on Ohio & Levitt and started shooting his car up." Mr. Pasco further stated in his affidavit that Mr. Salazar threatened him, saying that if he told anyone else, he would be killed next. According to Mr. Pasco, on October 24, 2001, he was stopped by the police and asked about the shooting of Tony Koniewicz. He shared with them what Mr. Salazar had confessed to him. He said he had only recently learned that Angel Class had been convicted of the murder and that he did not want an innocent person to be incarcerated for a crime he did not commit.

¶ 35 The last affidavit the court reviewed was from Christopher Stanley, dated December 23, 2015. At trial, Christopher Stanley's name was briefly mentioned by defense counsel as the witness he had asked for a continuance to track down but had ultimately failed to locate despite diligent efforts. In his affidavit attached to this postconviction petition, Mr. Stanley said that, on October 22, 2001, he was "in the back seat of Heather Ambrose['s] car when she pulled up on the side of a red car. Elijah Salazar then lowered the window and started shooting at the red car." According to Mr. Stanley's affidavit, Angel Class was not in the car. Mr. Stanley also alleged that he "did not come forward with this information sooner because he was in fear of his life." He also noted that he first learned that Mr. Class was in jail for this offense in April 2015.

¶ 36 On July 29, 2016, the circuit court advanced the petition to second-stage proceedings, stating that it was doing so based on the affidavit of Christopher Stanley being newly discovered evidence of actual innocence. The court appointed counsel to work on Mr. Class's claim.

¶ 37 On September 29, 2016, Mr. Class, now represented by the Cook County public defender's office, moved for witness statements, grand jury testimony, and leave to subpoena police reports in compliance with Illinois Supreme Court Rule 651(c) (eff. July 1, 2017). Throughout the last months of 2017, Mr. Class's lawyer told the court she was still looking for witnesses and

investigating. In March and April 2018, she was still attempting to locate and interview Christopher Stanley, whom she referred to as the “principal affiant.”

¶ 38 On June 4, 2019, Mr. Class’s appointed attorney filed a Rule 651(c) affidavit, stating that she had consulted with Mr. Class and obtained and examined his trial transcripts. She declined to amend his petition and noted her inability to locate Mr. Stanley after diligent efforts. The attorney also supplemented Mr. Class’s *pro se* postconviction filing with the six affidavits of family members (which had been attached to his initial petition) that averred that Mr. Class had been home with them from 7:30 p.m. on October 22, 2001.

¶ 39 On June 24, 2019, the State moved to dismiss the petition, arguing that the affidavits from Onyx Santana and Christopher Stanley could not be considered new evidence because both individuals were known to Mr. Class at the time of his trial. Mr. Stanley was in fact named as a potential defense witness in an answer to discovery, and Ms. Santana’s name had come up during Mr. Class’s direct examination. Additionally, the State argued that Mr. Class’s new affiants provided inadmissible hearsay, the substance of their statements pertained to collateral matters, and, at most, their statements raised reasonable doubt, not proof of actual innocence. Additional briefing pertaining to whether Mr. Stanley was available to testify at trial was submitted by appointed counsel for Mr. Class and by the State.

¶ 40 The appellate record before us is not well organized, and many things appear to be out of order. It also appears that some of the pleadings in this case are missing. However, according to the trial court’s order dismissing this successive postconviction petition, on January 2, 2020, counsel for Mr. Class filed a motion to supplement the successive petition with an investigative report of an interview of Christopher Stanley that took place on November 8, 2019. According to the trial court order, in that interview, which was conducted by an investigator for the Cook County

public defender's office, Mr. Stanley acknowledged that he had signed the affidavit. However, he also stated that "neither he nor Angel Class were there during the incident." The court order also states that in response to the investigative report regarding Mr. Stanley, the State filed a supplemental motion to dismiss on January 15, 2020, arguing that the Stanley affidavit could no longer be presumed to be true where he rebutted his own claims with his subsequent statements. Mr. Class responded through counsel that due to the inconsistencies in the statements from Mr. Stanley, he should at least be allowed to testify at a third-stage hearing, so the court could assess his credibility.

¶ 41 On July 14, 2020, the trial court granted the State's motion to dismiss the petition. The trial court concluded that Mr. Class's "filings and supporting documentation fail under the cause and prejudice standard of review and fail to demonstrate actual innocence." The trial court retraced the trial evidence and procedural history. It then examined each of the five new affidavits separately under what appears to be a combination of the criteria for finding cause and prejudice and the criteria for finding a sufficient showing of actual innocence.

¶ 42 The court began with Mr. Sanchez's affidavit. The court found "cause" for not producing this witness earlier, since Mr. Sanchez was not known to have been a witness. However, the court found no prejudice because the affidavit failed to explain how Sanchez knew Ms. Ambrose, Mr. Salazar, or Mr. Class or what they looked like. The court found "nothing of a conclusive character that would probably change the result on retrial."

¶ 43 The court next addressed Onyx Santana's affidavit. The court found no cause for failure to present Ms. Santana earlier and concluded that even if there were cause, her affidavit failed to demonstrate actual innocence, since she did not aver that she was present at the time of the shooting.

¶ 44 The court found Mr. Horton's affidavit inadmissible, as it was not notarized and contained no personal knowledge about the case.

¶ 45 In reference to Robert Pasco's affidavit, the court found cause but no prejudice. The court noted that Mr. Class "seeks through Pasco to admit the same type of hearsay statements allegedly made by Elijah Salazar to Milton Correa, that the trial court did not allow, and which decision has been affirmed." The court concluded that "Pasco's affidavit fails to offer any admissible testimony."

¶ 46 Finally, in reference to Mr. Stanley's affidavit, the court concluded that he was not "newly discovered" as he "could have been produced earlier with due diligence." The court noted that "[t]he record is devoid of any efforts to find him and bring him to court except the phrase diligent efforts." The court concluded that the affidavit failed to demonstrate actual innocence because it did not say how long Mr. Stanley had known Mr. Class or how they were acquainted. The court also emphasized Mr. Stanley's subsequent statement to the public defender's investigator that neither he nor Mr. Class were present for the shooting. In the court's view, this statement contradicted his sworn affidavit and supported a finding that the affidavit "does not provide total vindication or exoneration of petitioner and does not warrant an evidentiary hearing."

¶ 47 After highlighting the infirmities of each of the affidavits, the circuit court dismissed Mr. Class's successive postconviction petition. This appeal followed.

¶ 48 II. JURISDICTION

¶ 49 The circuit court dismissed Mr. Class's postconviction petition on July 14, 2020, and Mr. Class timely filed his notice of appeal on July 15, 2020. We have jurisdiction over this appeal, pursuant to article VI, section 6 of the Illinois Constitution (Ill. Const. 1970, art. VI, § 6) and Illinois Supreme Court Rule 606 (eff. Jan. 1, 2023) and Rule 651(a) (eff. July 1, 2017), governing

appeals from final judgments in postconviction proceedings.

¶ 50 III. ANALYSIS

¶ 51 A. Mr. Class's Actual Innocence Claim

¶ 52 The Act provides a three-stage process for persons serving criminal sentences to "assert that their convictions were the result of a substantial denial of their rights under the United States Constitution or the Illinois Constitution or both." *People v. Hodges*, 234 Ill. 2d 1, 9-10 (2009). Generally, the Act contemplates the filing of only one postconviction petition, and section 122-3 of the Act provides that any claim of substantial denial of constitutional rights not raised in the original or an amended petition is waived. *People v. Orange*, 195 Ill. 2d 437, 449 (2001); 725 ILCS 5/122-3 (West 2014). However, the procedural bar against successive proceedings will be relaxed on either of two grounds: (1) "where the petitioner can establish cause and prejudice for the failure to assert a postconviction claim in an earlier proceeding" or (2) "where the petitioner asserts a fundamental miscarriage of justice based on actual innocence." *People v. Robinson*, 2020 IL 123849, ¶ 42. Where, as here, a request for leave to file a successive petition is granted, the petition is docketed for second-stage proceedings. *Id.* ¶ 43.

¶ 53 The second stage of postconviction review tests the legal sufficiency of the petition. *People v. Domagala*, 2013 IL 113688, ¶ 35. At this stage, "all well-pleaded facts that are not positively rebutted by the trial record are to be taken as true." *People v. Pendleton*, 223 Ill. 2d 458, 473 (2006). The State is permitted to file responsive pleadings, and the circuit court must determine "whether the petition and any accompanying documentation make a substantial showing of a constitutional violation." *People v. Edwards*, 197 Ill. 2d 239, 245-46 (2001). Such a showing exists when the petitioner's well-pleaded allegations of a constitutional violation would entitle them to relief *if proven* at a subsequent evidentiary hearing. *Domagala*, 2013 IL 113688, ¶ 35. "Where, as

here, the circuit court dismisses a defendant's postconviction petition at the second stage after finding no substantial showing of a constitutional deprivation has been made, review of the dismissal is *de novo*." *People v. Dupree*, 2018 IL 122307, ¶ 29.

¶ 54 For the reasons that follow, we agree with Mr. Class that he has made a substantial showing of actual innocence, and we therefore remand this case for a third-stage evidentiary hearing. This holding makes it unnecessary for us to consider Mr. Class's alternative claim that he received unreasonable assistance from postconviction counsel.

¶ 55 To establish an actual innocence claim, the supporting evidence must be (1) newly discovered, (2) material and not merely cumulative, and (3) "of such conclusive character that it would probably change the result on retrial." *People v. Edwards*, 2012 IL 111711, ¶ 32. Newly discovered means "the evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence." *People v. Coleman*, 2013 IL 113307, ¶ 96. Evidence is material if it is "relevant and probative of the petitioner's innocence"; it is noncumulative if it "adds to what the jury heard." *Id.* Evidence is conclusive if it "would probably lead to a different result" when considered along with the trial evidence. *Id.*

¶ 56 As our supreme court explained in *Robinson*, 2020 IL 123849, ¶ 48, "[u]ltimately, 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." To meet this standard, the new evidence "need not be entirely dispositive" (*id.*); it "need only be *conclusive* enough to *probably* change the result upon retrial" (emphases in original) (*People v. Davis*, 2012 IL App (4th) 110305, ¶ 62). In other words, "[p]robability, 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, ¶ 48. As we are dealing with

probabilities, the task of the court is essentially to make a prediction about "what another jury would likely do, considering all the evidence, both new and old, together." *Coleman*, 2013 IL 113307, ¶ 97.

¶ 57 Making such a prediction requires what our supreme court has referred to as a "comprehensive approach." *Id.* The purpose of this holistic analysis is not to "redecide the defendant's guilt," but to determine whether all the facts and surrounding circumstances should be " 'scrutinized more closely.' " *Id.* (quoting *People v. Molstad*, 101 Ill. 2d 128, 136 (1984)). This entails looking at all of the new evidence cumulatively and then weighing it against the strength of the evidence at trial. See, *e.g.*, *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 150 (concluding that "[a]ffidavits from over half a dozen witnesses who contradict[ed] elements of [the State's witness's] account [were] sufficiently conclusive to alter the result on retrial, particularly given the weakness of the State's case at trial"); *People v. Serrano*, 2016 IL App (1st) 133493, ¶¶ 37-41 (petitioner's new evidence, which demonstrated some "consistency on key details" weighed against "flimsy" trial evidence.").

¶ 58 The fundamental problem with the trial court's analysis in its order granting the State's motion to dismiss Mr. Class's petition is that, rather than employing the comprehensive review described above—an analysis that considers *all* of the evidence, "both new and old together"—it employed a piecemeal approach, assessing each of the affidavits individually and finding that none of them, standing alone, was sufficient to make the necessary showing of actual innocence.

¶ 59 We also note that the trial court entered its order on July 14, 2020, less than a month after our supreme court issued its decision in *Robinson*, 2020 IL 123849, ¶¶ 55-56, where it endorsed the standard elaborated above (*supra*, ¶ 55) and explicitly disavowed the more demanding "total vindication or exoneration" standard some circuit and appellate courts had relied on when

weighing the sufficiency of evidence in support of claims of actual innocence. *Robinson* changed the calculus of what is required to advance a colorable claim of actual innocence and that change is not reflected in the trial court's reasoning.

¶ 60 In support of this piecemeal approach the trial court cited *People v. Jones*, 211 Ill. 2d 140, 149, *as modified on denial of reh'g* (May 24, 2004) for the proposition that the cause and prejudice test must be applied to individual claims, not to the petition as a whole. *Jones* is simply not instructive here. As our supreme court has made clear, where a petitioner "sets forth a claim of actual innocence in a successive postconviction petition, the defendant is excused from showing cause and prejudice." *People v. Ortiz*, 235 Ill. 2d 319, 330 (2009). Thus, Mr. Class did not need to show cause and prejudice on his actual innocence claim.

¶ 61 More importantly, while each claim in a successive petition must be analyzed separately, and the petitioner must make a showing of cause and prejudice on every non-innocence claim they advance, actual innocence is but *one* claim and it is a claim that our supreme court has made clear requires a comprehensive approach. *Coleman*, 2013 IL 113307, ¶ 97. Thus, there was no basis for the trial court to analyze each of the affidavits in isolation and dismiss the petition based on its view that none of the affidavits, standing alone, could make a substantial showing of actual innocence.

¶ 62 We recognize that on appeal Mr. Class also appears to have taken a piecemeal approach, focusing his argument primarily on the affidavit of William Sanchez, while neglecting to discuss in significant detail the other affidavits he attached to his successive petition, or the ways in which those affidavits corroborate each other and some of the trial testimony. To the extent that the State might suggest forfeiture in this approach, we reject such an argument.

¶ 63 Parties must preserve issues or claims for appeal, not arguments. *Brunton v. Kruger*, 2015

IL 117663, ¶ 76. Mr. Class has consistently presented his *claim* of actual innocence and consistently contended that he has made a sufficient showing to warrant a third-stage hearing. While the specific arguments he has marshalled in support of his claim have relied on different affidavits at different procedural junctures, the claim itself has remained constant.

¶ 64 Furthermore, forfeiture and waiver are limitations on the parties, not on the court, and we have long recognized that "we may address an otherwise waived [forfeited] issue to ensure a just result." *People v. Mosley*, 2023 IL App (1st) 200309, ¶ 30. Thus, we need not limit our analysis to the Sanchez affidavit, and, in assessing Mr. Class's claim, we will address the evidence presented by his petition in the comprehensive manner that the law requires.

¶ 65 Upon reviewing all of the evidence, "new and old together," we are struck by the fact that Heather Ambrose was the *sole* witness that tied Mr. Class to this murder. There was no physical evidence inculpating Mr. Class, and while several other witnesses testified as to a general sequence of events the night of the murder, none identified Mr. Class as the shooter or placed him anywhere near the scene of the crime at the approximate time of the shooting. Mr. Class came onto the radar of law enforcement as a potential suspect only after they had spoken with Ms. Ambrose and Mr. Salazar. Furthermore, unlike Ms. Ambrose or Mr. Salazar, who had left Chicago by the time police tracked them down as persons of interest in the homicide investigation, there is no indication that Mr. Class ever went into hiding after the shooting or attempted to flee to another jurisdiction. The most that can be said is that the officers testified that Mr. Class tried to leave through a back door, when the officers came to arrest him at his daughter's birthday party—a charge that Mr. Class denied at trial.

¶ 66 It appears undisputed that Mr. Class never made any out-of-court statements acknowledging involvement in this shooting to the police, and there is no evidence in this record

that he made any such statement to anyone else. He has maintained his innocence from the outset, testifying that he was not present at the shooting. He also provided a plausible explanation as to why Heather Ambrose might have named him as the shooter, considering their confrontation the day before the shooting.

¶ 67 As for his new evidence, Mr. Class attached to his successive petition five affidavits (from William Sanchez, Onyx Santana, Eugene Horton, Robert Pasco, and Christopher Stanley). He also supplemented his petition to include the affidavits from alibi witnesses that he had attached to his initial petition. We note at the outset that some of this evidence was correctly discounted by the trial court because it was not newly discovered.

¶ 68 The affidavit from Onyx Santana, for example, while certainly material to the question of Mr. Class's innocence, does not meet the criteria for newly discovered evidence because Mr. Class could have discovered her before trial with the exercise of due diligence. The record shows that she was known to him at trial—her name came up during his direct examination and she was mentioned in a discoverable, handwritten statement from Eli Salazar that the State possessed. Mr. Class provides no explanation for why he failed to call her to testify on his behalf at trial. The affidavits from his alibi witnesses—which the court did not mention in its order dismissing his successive petition—fail for the same reason. Mr. Class was obviously aware of these witnesses at trial (they are his family members), but his trial attorney made the decision not to call them to testify on his behalf. He cannot now say that they are newly discovered.

¶ 69 The court was also correct in its assessment of the Eugene Horton affidavit. While Mr. Horton's affidavit may have met the criteria for newly discovered, it lacks any probative value on the question of Mr. Class's innocence, and thus does not support Mr. Class's claim.

¶ 70 However, the remaining affidavits (from Mr. Stanley, Mr. Pasco, and Mr. Sanchez) are all

newly discovered, material, and, taken as true, support Mr. Class's claim of innocence. When read together and weighed against the unusually scant trial evidence, these affidavits raise serious questions about Mr. Class's guilt that undermine this court's confidence in his conviction.

¶ 71 Two of these affidavits are from witnesses who saw Tony Koniewicz get shot and affirmatively say that Mr. Class was not the shooter. One of those witnesses, Mr. Stanley, claimed to have been with the shooters when they shot Mr. Koniewicz, although he backpedaled in a subsequent statement and told the public defender's investigator that neither he, nor Mr. Class, were in the car. Mr. Sanchez said, in his affidavit, that the person who shot at the red car and killed Mr. Koniewicz was light-skinned and "almost white." He also says that he knows that Mr. Class did not have anything to do with the shooting.

¶ 72 The third of these new witnesses to provide an affidavit was Mr. Pasco, who averred that, on the day after the murder, Eli Salazar admitted to him that he was the one who killed Mr. Koniewicz and boasted to him that he "finally got C-note Tuggie last night." We are aware that at his original trial, Mr. Class's attorney attempted to put on another witness—Milton Correa—who would have testified to a very similar admission by Mr. Salazar soon after the shooting.

¶ 73 Certain details from the Stanley and Pasco affidavits are internally consistent with and lend support to each other. For example, Mr. Pasco claimed in his affidavit that when Mr. Salazar admitted to him the day after the murder that he was the shooter, he also mentioned that he had been at Onyx Santana's house before the shooting, with Ms. Ambrose and "Black Christopher." Mr. Stanley, in his own affidavit, does not mention Onyx Santana, but he does admit to being in the car with Ms. Ambrose and Mr. Salazar during the shooting. Reading these two statements together, it is not unreasonable to presume that "Black Christopher" is a nickname for Christopher Stanley. Further, both of these affidavits support an inference that there were three individuals in

the car who fired upon Mr. Koniewicz and that Mr. Class was not one of them.

¶ 74 Rather than analyze all this evidence in the holistic manner that the law requires, the trial court assessed these affidavits in isolation, combing each one for evidentiary infirmities and potential credibility issues and minimizing any probative value it might contain. For example, the court dismissed Mr. Pasco's statement as "the same kind of hearsay statement" that the court had refused to admit at trial (alluding to the Correa testimony). But even if Mr. Pasco's affidavit contained hearsay, the court nonetheless had an obligation to consider the substance of the statement in evaluating Mr. Class's claim. At the second stage, the court cannot disregard evidence merely because it is hearsay. See *People v. Velasco*, 2018 IL App (1st) 161683, ¶¶ 117-19 (explaining that unlike a third-stage evidentiary hearing, where a defendant no longer enjoys the presumption that the allegations in their petition and accompanying affidavit are true, at the second-stage, hearsay evidence is admissible and "must be taken as true"); see also *People v. Shaw*, 2019 IL App (1st) 152994, ¶¶ 64-67 (noting that while historically, there was a general rule that "hearsay is insufficient to support a petition under the Act," that rule was undermined by a 2013 amendment to Illinois Rule of Evidence 1101(b)(3) (eff. Apr. 8, 2013) (where our supreme court added "postconviction hearings" to the list of "[m]iscellaneous [p]roceedings" to which the rules of evidence "do not apply" (emphasis omitted))).

¶ 75 Relatedly, the court completely disregarded the testimony of Christopher Stanley on the basis of what amounted to a credibility determination. In the court's view, Mr. Stanley's subsequent statement to a Public Defender's investigator, although Mr. Stanley acknowledged that he had signed the affidavit, "was a direct contradiction of his sworn affidavit" where he had stated that "he was present, saw the shooting, and that Elijah Salazar was the shooter." At this stage of the postconviction process, however, prior to a third-stage evidentiary hearing, the court does not

consider credibility. See *Domagala*, 2013 IL 113688, ¶¶ 34-35 (explaining that the third stage, not the second stage, is when the court must "determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts.").

¶ 76 The court also rejected Mr. Stanley's testimony on the separate basis that, in its view, it was not technically newly discovered evidence because he was known to Mr. Class at trial and could have been produced with due diligence. The court noted that "[t]he record is devoid of any efforts to find him and bring him to court except the phrase 'diligent efforts.' " We do not think, however, that the record supports this determination. In advancing an actual innocence claim, it is the *evidence* in support of the claim that must be "newly discovered," not necessarily the source. *People v. Fields*, 2020 IL App (1st) 151735, ¶ 48. Thus, "an affidavit from a witness may be newly discovered, even when the defense knew of the witness prior to trial." *Id.* (citing *People v. White*, 2014 IL App (1st) 130007, ¶ 20). Further, "[n]ewly discovered evidence" includes testimony from a witness who essentially made himself unavailable as a witness out of fear of retaliation. *Ayala*, 2022 IL App (1st) 192484, ¶ 137 (citing *Ortiz*, 235 Ill. 2d at 334).

¶ 77 Here, in contrast to Onyx Santana, where the record is seemingly devoid of any efforts to have her testify at Mr. Class's trial, the record contains several references to Mr. Class's trial counsel trying, but ultimately failing, to produce Mr. Stanley at trial. Trial counsel asked for several continuances, repeatedly delaying the start of his case-in-chief and claiming his investigators needed more time to locate a witness. This witness later turned out to be Mr. Stanley, who trial counsel referred to as a "crucial witness" without whom he did not want to continue presenting his case. At one appearance, counsel stated that Mr. Stanley had "decided to disappear on us." For his part, Mr. Stanley stated in his affidavit that he did not come forward sooner because he was scared for his life, a statement which, taken as true, explains his evasiveness leading up to

Mr. Class's trial and suggests that he effectively "made himself unavailable." In our view, there is enough in the record to support Mr. Class's claim that Mr. Stanley could not be produced to testify at trial, despite defense counsel's diligent efforts. We therefore find that Mr. Stanley's affidavit meets the criteria for newly discovered evidence.

¶ 78 As for the Sanchez affidavit, the court disregarded it on the basis that it "did not state that the shooter, who he described as light-skinned, was not a person who fit petitioner's description." However, Mr. Sanchez's affidavit does clearly state that he observed the shooting and that he knew "that Angel Class did not have anything to do with the shooting that took place on October 22, 2001."

¶ 79 Mr. Sanchez does not explain how he came to know Angel Class or why he remembers this incident so many years after the fact. It is also confusing that he never expressly says that the shooter was not Angel Class or that Angel Class is not "light-skinned" or "almost white."

¶ 80 The Sanchez affidavit also presents a time for this shooting that may be at odds with some of the trial testimony, but that testimony offers a broad spectrum of times that this shooting could have occurred. No witness at trial provided an exact time for the shooting. Heather Ambrose testified that Mr. Class and Mr. Salazar knocked on her door after 7:00 p.m. and that they then drove around the neighborhood in her car for some unspecified amount of time before the shooting occurred; Tammy Scatanese testified that she got a call from the hospital about her brother just after 9:00 p.m.; Gerard Recasi, who was in the vehicle that was shot at, testified that the shooting occurred during "evening hours" and that he got to the hospital approximately six minutes after the shooting; Officer Arroyo testified that at "about 10:00 o'clock" he received an assignment to go to St. Mary's hospital; Robert Davie, the forensic investigator, was assigned to go to the crime scene to begin the homicide investigation at "about 11:00 o'clock"; and Detective Rodriguez, the

lead detective on the case, received an assignment to investigate "a man shot at Ohio and Leavitt" at approximately 10:40 p.m. Thus, the trial evidence never pinned down a precise time for the shooting and the 10:00 to 10:30 time frame averred to by Mr. Sanchez is in keeping with some, but not all, of the trial testimony.

¶ 81 Although there are issues with the Sanchez affidavit, and Mr. Sanchez ultimately fails to connect all of the dots in his testimony, this affidavit from another person who purports to be an eyewitness, adds to the testimony of the other two affidavits that the court should have considered.

¶ 82 The evidentiary and credibility issues highlighted by the trial court are significant and need to be adjudicated, but that is precisely what a third-stage evidentiary hearing is for. At the second stage, where the court must accept as true all well-pleaded allegations not positively rebutted by the record, the existence of such issues is not enough to justify dismissal, particularly where, as here, the cumulative weight of the evidence presented by Mr. Class "places the trial evidence in a different light and undermines the court's confidence in the judgment of guilt." *Robinson*, 2020 IL 123849, ¶ 56.

¶ 83 While Mr. Class has not conclusively established his innocence, he has made a substantial showing that his case merits further scrutiny, which is what is demanded of him at this stage. We therefore reverse the circuit court's judgment dismissing Mr. Class's postconviction claim of actual innocence and remand for a third-stage evidentiary hearing on that claim.

¶ 84 B. Assignment to a New Judge on Remand

¶ 85 The State filed a petition for leave to appeal this opinion to the Illinois Supreme Court, its sole argument being that this court lacks authority to reassign this matter to a new judge on remand. With that petition still pending, our supreme court has entered an order remanding the case to us for the limited purpose of explaining the basis and rationale for our decision to order reassignment

in this case. We do so now in this modified opinion.

¶ 86 Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994) provides that this court may, "in its discretion, and on such terms as it deems just, *** (5) enter any judgment and make any order that ought to have been given or made, and make any other and further orders and grant any relief, including a remandment, *** that the case may require." This has been interpreted to include the power to order that a case be reassigned on remand. *Eychaner v. Gross*, 202 Ill. 2d 228, 279 (2002). The State argues in its petition that Rule 366 applies only in civil cases, and that it is Rule 615 that establishes our powers in criminal cases. It acknowledges, however, that subsection (b)(2) of that rule, which provides that we may "set aside, affirm, or modify any or all of the proceedings subsequent to or dependent upon the judgment or order from which the appeal is taken," gives us the authority to reassign criminal cases on remand. Ill. S. Ct. R. 615(b)(2) (eff. Jan. 1, 1967). The State is correct that our supreme court has yet to set forth the parameters of our authority under this rule or the standards that should be applied when reassignment is considered.

¶ 87 The State's position is that the only valid basis for reassignment on remand in a criminal case is a finding of bias or actual prejudice on the part of the trial judge. This is clearly one important basis for reassignment, and our supreme court has discussed what is required to establish bias where it was the only basis argued by the party seeking reassignment. The plaintiffs in *Eychaner*, for example, put forth several circumstances that they felt called into question the trial court's impartiality, and the court went on to thoroughly discuss what is required to meet the burden of proving such a serious allegation. *Id.* at 279-81. In *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 263 (2004), an opinion issued two years later, the court reversed our decision to order reassignment, noting both that the plaintiff "did not request this relief" and that we had made our ruling "without discussing any bias on the part of the trial judge." This decision

could be read to suggest that a finding of overt bias on the part of the trial judge is a prerequisite for the exercise of our power to reassign. The State takes this view, insisting that our reassignment powers under Rules 366(a)(5) and 615(b)(2) extend no further than circumstances that would have justified a for-cause substitution of judge in the circuit court.

¶ 88 In other cases, however, the supreme court has itself concluded that reassignment on remand was proper for reasons other than judicial bias. In *People v. Heider*, 231 Ill. 2d 1, 25 (2008), for example, where the sentencing judge improperly considered a defendant's mental impairment as an aggravating factor, the court vacated the sentence and remanded for resentencing before a new judge "in order to remove any suggestion of unfairness." *Id.* The court ordered reassignment on remand for the same reason in *People v. Dameron*, 196 Ill. 2d 156, 179 (2001), where the sentencing judge made an improper independent investigation into what he believed were relevant aggravating factors. And in *People v. Jolly*, 2014 IL 117142, ¶ 46, the court believed reassignment on remand was the appropriate remedy where the State's improper adversarial participation at a preliminary inquiry into allegations of ineffective assistance of counsel made under *People v. Krankel*, 102 Ill. 2d 181 (1984), had prevented the defendant's claims from being heard by a neutral trier of fact on a purely objective record. We acknowledge that these cases involve reassignment by our supreme court, rather than by this court, and that the supreme court has broad supervisory authority that is not tied, as ours is, to the specific grants of authority set out in Rules 366 and 615. But these cases suggest to us our supreme court's recognition that factors other than bias may, in rare cases, require reassignment at the trial level.

¶ 89 Federal courts have long considered the factors that these cases suggest should be weighed when an intermediate appellate court reassigns a case to a new trial judge, in criminal as well as civil cases. See, *e.g., United States v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006)). As the Ninth

Circuit explained in *Manley v. Rowley*, 847 F.3d 705, 712 (2017):

> "We will reassign a case to a new judge on remand only under 'unusual circumstances' or when required to preserve the interests of justice.' [Citation.] We need not find actual bias on the part of the district court prior to reassignment. [Citation.] Rather, we consider:
>
> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously expressed views or findings determined to be erroneous or based on evidence that must be rejected,
>
> (2) whether reassignment is advisable to preserve the appearance of justice, and
>
> (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving [the] appearance of fairness. [Citations.]"

The *Manley* court noted that the first two of these factors are equally important and "a finding of either is sufficient to support reassignment on remand." (Internal quotation marks omitted.) *Manley*, 847 F.3d at 713.

¶ 90 These are factors the federal appellate courts apply when they exercise their reassignment powers under section 2106 of the United States Code (28 USCA § 2106 (West 2022)), which, much as Rules 366(a)(5) and 615(b)(2) afford us, gives those courts the power to direct the entry on remand of such orders "as may be just under the circumstances." We believe these considerations are equally applicable under Rules 366(a)(5) and 615(b)(2) and that they weigh in favor of reassignment in this case.

¶ 91 The confidence we generally have that on remand a judge will be able to set aside any previously expressed views or findings is diminished here. Although error alone is almost never a sufficient basis for reassignment, the multiple errors committed here compounded each other in a way that undermines our confidence that this judge would be able to put out of her mind the

findings that she made and that we found to be improper. This is a murder case that is more than twenty years old and in which we have serious concerns that the wrong person may be in prison. There was no physical evidence tying Mr. Class to this crime, and the only witness against him was the girlfriend of someone who was an obvious suspect but was never charged.

¶ 92 The postconviction judge in this case failed to view the new evidence supporting Mr. Class's actual innocence claim cumulatively, which we hold on appeal was required here. Instead, she examined each new witness in an isolated way, searching for flaws and insufficiencies. As part of this analysis, she discounted certain evidence as not credible, a determination reserved for third-stage proceedings. She also refused to consider some of the evidence because she was using the cause and prejudice standard, which plainly did not apply to Mr. Class's claim of actual innocence. The net result was that the key issue—whether Mr. Class made a substantial showing of actual innocence in his petition—was considered under a framework far different from that required by the Act. Because this judge has examined Mr. Class's petition and supporting evidence under such a flawed set of standards, we lack confidence that she would be able to view his petition as anything other than deficient. But she would be the one charged with making that decision following the evidentiary hearing that we conclude Mr. Class is entitled to.

¶ 93 Even if that were not the case, it might well appear so to Mr. Class upon reading this court's analysis of these errors. This goes to the heart of the second factor: whether reassignment is advisable to preserve the appearance of justice. It is rare for a postconviction petition to advance to the third stage. Mr. Class, who has consistently maintained his innocence, would be back before the very judge who failed to fully consider, in our view, the substantial showing that he made of that innocence. This evidentiary hearing is his last chance to gain a new trial and a return to this trial judge for that decision would create serious doubt as to whether that chance was genuine. The

appearance of justice would best be served by preventing such doubt from hanging over further proceedings on Mr. Class's petition.

¶ 94 Nor does the third factor—whether inefficiencies would outstrip the benefits of reassignment—weigh against reassignment here. A third-stage evidentiary hearing is a relatively discrete proceeding, and the judge who dismissed Mr. Class's petition was not the judge who presided over his trial and thus has no special familiarity with the evidence in this case.

¶ 95 Reassigning a case on remand based on the concerns expressed in these factors does not, as the State argues in its petition, conflict with *In re Marriage of O'Brien*, 2011 IL 109039. The plaintiff in that case unsuccessfully moved for a substitution of judge for cause in the trial court, and argued on appeal that our supreme court should abandon its requirement of a showing of prejudice in favor of a lower "appearance of impropriety" standard for such motions. *Id.* ¶ 35. The *O'Brien* court declined to do so, noting that the easier-to-meet standard would encourage judge-shopping. *Id.* ¶ 44. But a party's motion seeking substitution for cause in the trial court and a reviewing court's exercise of its power to reassign a case on remand are two very different things. As our supreme court has made clear, a defendant who seeks a substitution of judge for cause bears the burden of establishing "actual prejudice" which means that the defendant must establish "animosity, hostility, ill will, or distrust towards this defendant." (Internal quotation marks omitted.) *People v. Patterson*, 192 Ill. 2d 93, 131, (2000). A for-cause substitution necessarily involves a certain degree of speculation as to what kinds of rulings the trial judge will make going forward. Absent some express animosity or hostility, any court would be disinclined to conclude that the trial judge could not fairly make those rulings. In a remand decision, in contrast, the appellate court has a full record to make a far more nuanced decision and to weigh whether application of the three factors set out by the federal courts leads to a conclusion that this is an

unusual situation in which a new judge should be assigned on remand.

¶ 96 Even if our supreme court concludes that judicial bias is the only basis on which we may order reassignment to a new judge on remand, reassignment here would still be supported by the record. In *People v. Serrano*, 2016 IL App (1st) 133493, ¶ 1—which, along with our authority under the Illinois Supreme Court Rules, we cited in support of reassignment in our original opinion—the sufficiency of a postconviction petition asserting a claim of actual innocence was also at issue. The *Serrano* court found that the judge in that case had "turned a blind eye to much of the evidence" presented at the third-stage hearing and also "refused to admit probative, admissible evidence," giving "the impression that [the judge] was flatly unwilling to consider the evidence offered by [the] petitioner." *Id.* ¶ 46. A similar hostility to Mr. Class's claim was expressed here, where we have concluded that the postconviction judge "completely disregarded the testimony of [actual-innocence affiant] Christopher Stanley on the basis of what amounted to a credibility determination" (*supra* ¶ 75) and "comb[ed] each one [of the petitioner's affidavits] for evidentiary infirmities and potential credibility issues" while "minimizing any probative value [they] might contain" (*supra* ¶ 74). Here, as in *Serrano*, we conclude that "the interests of justice would be best and most efficiently served by the case being assigned to a different judge on remand." *Serrano*, 2016 IL App (1st) 133493, ¶ 45.

¶ 97 Finally, we address the State's argument that we were wrong to order reassignment *sua sponte*. It cites *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012, IL 111928, ¶¶ 33-34, and *People v. Givens*, 237 Ill. 2d 311, 323-24 (2010), for the proposition that a reviewing court should exercise its power to raise unbriefed issues only sparingly, to avoid assuming a role of advocacy and being forced to speculate as to arguments the parties might have presented had the issues been raised. We agree fully with these principles, However, as noted

above, this was a very unusual case and while reassignment was not briefed by the parties, the record before us made it necessary, in our view, for us to consider it on our own. We note that federal courts, whose ability to order reassignment on remand we believe parallels our own, routinely exercise that power in criminal cases both upon request and "*sua sponte* by the court on the defendant's behalf." *Awadallah*, 436 F.3d at 135.

¶ 98 Pursuant to the discretion conferred upon us by Rules 366(a)(5) and 615(b)(2), we find that assignment of this case to a different judge on remand is warranted.

¶ 99 IV. CONCLUSION

¶ 100 For the foregoing reasons, we reverse the dismissal of Mr. Class's petition, remand for a third-stage evidentiary hearing, and direct the presiding judge of the criminal division of the circuit court to assign this case to a new judge for further proceedings.

¶ 101 Reversed and remanded.

No. 1-20-0903

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

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 02-CR-13513; the Hon. Angela Munari Petrone, Judge, presiding.
Attorneys for Appellant:	James E. Chadd, Douglas R. Hoff, and Michael H. Orenstein (Kara Kurland, law student), of State Appellate Defender's Office, of Chicago, for appellant.
Attorneys for Appellee:	Kimberly M. Foxx, State's Attorney, of Chicago (Enrique Abraham, John E. Nowak, and Andrew D. Yassan, Assistant State's Attorneys, of counsel), for the People.

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Respondent/Plaintiff	)	No. 02CR-13513 (01)
versus	)	Leave to File Successive Post-Conviction Petition and to File Petitioner's Investigative Report as Supplement
ANGEL CLASS, Petitioner/Defendant.	)	

ORDER

FACTS

Heather Ambrose testified that petitioner, known as Capone, who she had known since 3rd grade, and Elijah Salazar, known as Eli, who she had known about 5½ years, came to her home after 7:00 p.m. on October 22, 2001. Petitioner and Eli were members of the Satan Disciples street gang, who were at war with the C-Notes. Petitioner asked her to go riding around. She drove them in her gray Grand Am; petitioner in the front passenger seat; Eli in the back. Petitioner directed her to drive into C-Notes territory, which made her uncomfortable, and to pull alongside another vehicle at a stop sign. She did. Petitioner shot an automatic handgun into that vehicle and kept shooting until the cartridge was empty, yelling things like: "SD Bitch. Now I have got you. C-Note Killer." As she drove away, petitioner mentioned about his friend, Alex, going to the graveyard, that he promised Alex, and said: "We finally got them." Petitioner was the only person with a gun. Heather dropped petitioner and Eli at petitioner's house at Grand and Lorel. Petitioner told her to go straight home and not to talk to police.

The next morning, Heather, petitioner, Eli and a Patty Petrey drove to a car wash and cleaned Heather's vehicle. Heather heard petitioner tell Patty: "We shot that bitch. We finally got him." That day, petitioner gave Heather money to go to Kentucky and said if police spoke to her, she was to say she'd been home all day and not seen him. If she said anything, he would personally come after her, kill her, and blow up her grandparents' house. Since then, Heather had been convicted in federal court of aiding and abetting aggravated sexual abuse.

Gerard Racasi testified that he was in the car with Tony Konewicz, known as Tuggi, at a stop sign at Ohio and Leavitt on October 22, 2001. They were C-Notes. Gerard heard 9, 10 shots, ducked and looked up. Blood was coming out of Tony's mouth and chest. After 4 to 5 seconds, Gerard took the wheel, make a wide U-turn and went to St. Mary of Nazareth Hospital. Tony looked dead. Blood was all over his left side. His eyes were open. Gerard testified to the Grand Jury that shots came from a gray car that pulled next to the driver's side of Tony's car.

Firearms evidence showed that nine .9 mm cartridge cases were recovered from the scene and were all fired from the same firearm. Two bullets recovered from the scene were .9

c) For not delving into the facts of Heather Ambrose's conviction.

The issue of credibility of Heather Ambrose, based in part, on being convicted in federal court of aiding and abetting aggravated sexual abuse, was raised in an amended motion for new trial/judgment of acquittal, and on direct appeal, and was denied. Conviction was affirmed on direct appeal. No. 1-04-2930 (3-3-06). The issue of going into the facts of the case leading to Ambrose's conviction could have been raised on direct appeal and was not, so is forfeited. Also, no legal basis has been presented for allowing impeachment by the facts which led to a prior conviction, rather than the fact of the conviction itself. A defendant suffers no prejudice from appellate counsel's failure to raise an issue on direct appeal where the underlying issue is not meritorious. *People v. Enis*, 194 Ill. 2d 361 (2000).

3. Request to file a successive post-conviction petition based on five new affidavits.

There are two bases upon which the bar against successive post-conviction proceedings will be relaxed. A petitioner who failed to include an issue in his original petition is precluded from raising the issue on appeal from the petition's dismissal but may raise the issue in a successive petition if he can show cause-and-prejudice. The second basis is the fundamental miscarriage of justice exception. Petitioner must show actual innocence. These bases must be applied to individual claims, not the petition as a whole. *People v. Jones*, 211 Ill. 2d 140 (2004).

Petitioner must show cause for failing to raise the error in prior proceedings and actual prejudice from the error. Cause is an objective factor external to the defense that impeded counsel's efforts to raise the claim in the initial post-conviction proceeding. A fundamental deficiency in the proceeding may be cause for consideration of issues raised in a subsequent petition. Only if the first proceeding was deficient will a successive petition be considered. Prejudice would occur if defendant were denied consideration of an error that so infected the entire trial, the conviction violates due process. *People v. Pitsonbarger*, 205 Ill. 2d 444 (2002).

Evidence in support of a claim of actual innocence must be newly discovered, material, not merely cumulative, and of such conclusive character it would probably change the result on retrial. *People v. Edwards*, 2012 IL 111711, *People v. Ortiz*, 235 Ill. 2d 319 (2009). The U.S. Supreme Court has emphasized such claims must be supported with new reliable evidence – exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – not presented at trial. Because such evidence is obviously unavailable in the vast majority of cases, claims of actual innocence are rarely successful. Schlup v. Delo 513 U.S. 298 (1995).

Under either basis, petitioner has the burden to obtain leave of court and must submit enough documentation to allow a circuit court to make that determination. Regarding those seeking to relax the bar against successive post-conviction petitions on the basis of actual innocence, leave of court should be denied only where it is clear, from a review of the successive petition and documentation provided by petitioner that, as a matter of law, petitioner cannot set forth a colorable claim of actual innocence. *People v. Edwards*, 2012 IL 111711.

mm, .38 caliber bullets and were fired from the same firearm as a bullet recovered from the tire/rim area of Tony's vehicle and as a bullet that was recovered from his body at the morgue.

A deputy medical examiner performed an autopsy on the body of 20-year-old Tony Konewicz. He corroborated both witnesses as to the shooter being in a vehicle on the driver's side of Tony's vehicle as he drove. A bullet entered below Tony's left shoulder, passed through his left chest, left lung, left atrium of the heart, and lodged in his right lung, killing him.

Police corroborated Heather Ambrose's testimony of a rivalry between Satan Disciples and C-Notes, and territories of each gang. Police located Heather Ambrose in Kentucky and spoke with her. Police and an Assistant State's Attorney located Elijah Salazar in Texas and spoke with him. The ASA took a handwritten statement from Salazar. The next day, Salazar testified to the Grand Jury in Chicago. Salazar did not testify at trial. No contents of any of his statements were admitted as evidence at trial.

Police looked for petitioner and made several trips to his mother's house in Chicago. An arrest warrant issued for him. Police subsequently received information that he would be at a party at his mother's home, and set up surveillance on April 27, 2002. When petitioner walked outside, police pulled up in front. Petitioner looked at them, ran into the house and tried to flee through the back. Petitioner was apprehended because officers were also in back of the house.

Milton Correa testified for petitioner. Petitioner tried to elicit testimony from Milton that Elijah Salazar told Milton that Elijah was the shooter. A State hearsay objection was sustained because Salazar had not testified at trial and was not available to be cross-examined.

Petitioner requested to hold the case until the following date. His attorney did not appear and missed three court dates, saying he had the flu. The attorney then appeared, requested and was granted a final continuance (over the State's objection, since petitioner had demanded trial) to bring in a "critical" witness. On that date, petitioner's attorney stated that "diligent efforts" had been made, unsuccessfully, to find a Christopher Stanley.

Petitioner testified that he and Eli (Elijah Salazar) were Satan Disciples. Petitioner had rank. Eli was messing with the C-Notes "and got that poor kid shot." Petitioner had told Eli he and Heather were causing problems, and not to bring her around anymore. Petitioner testified he had nothing to do with Tony Konewicz being shot and killed. Petitioner's mother told him police had been by her house. He thought it was because he had been shot 53 days prior to this shooting. When police approached his mother's house, petitioner did not run from them into the house. Petitioner had two felony convictions for possession of controlled substance.

Petitioner was convicted of first-degree murder and aggravated discharge of a firearm.

PROCEDURAL HISTORY

In a motion for judgment of acquittal/new trial, petitioner argued the State failed to prove guilt beyond a reasonable doubt, Heather Ambrose was not credible, and trial court error in not allowing Milton Correa to testify as to what Eli Salazar told him. The motion was denied.

In an amended motion for judgment of acquittal/new trial, petitioner repeated the same arguments, and added trial court error in not permitting testimony about the specific nature of Heather Ambrose's conviction; and in permitting a detective to testify that Eli Salazar signed a handwritten statement and testified in the Grand Jury, and the detective heard that Patricia Petrey had a nervous breakdown. Also, when arguing against permitting testimony from Milton Correa about what Eli Salazar told him, the State commented that Salazar gave a handwritten statement and Grand Jury testimony that petitioner was the shooter, but the State could not get into that because Salazar was not present. This denied him a fair trial. Petitioner attached an affidavit from Milton Correa, saying: Correa met Eli Salazar about 4 days after the shooting near Ohio and Marshfield about 9 p.m. to purchase marijuana from him. Eli told Milton: "Man, I did that for your brother." Milton knew Eli was referring to shooting and killing Tuggi as revenge for Tuggi shooting Milton's brother, Benito Correa, in June, 2001. Amended motion was denied.

New counsel, Timothy Joyce, asked for a continuance, arguing petitioner's family told him the trial court and prior trial counsel told petitioner, in error, that he faced a minimum 20-year sentence. If petitioner knew the minimum sentence was 45 years, he would have elected to be tried by a jury. The trial court denied the request, saying this was not a sentencing issue and counsel could raise it in a future filing. Petitioner was sentenced to a minimum sentence of 45 years (20 years for first-degree murder plus 25 years enhancement for being the shooter) and a concurrent 5 years for aggravated discharge of a firearm.

In a supplemental motion for new trial, petitioner argued he "believes" he was advised by trial counsel, Marc D. Berlin, that he faced a minimum 20-year sentence. Under this misapprehension, he waived his right to trial by jury. In a motion to reduce sentence, he argued the 25-year sentencing enhancement was unconstitutional. Both motions were denied.

Attorney Joyce represented petitioner on direct appeal. Convictions and sentence were affirmed. No. 1-04-2930 (3-3-06). Petitioner had argued the State failed to prove guilt beyond a reasonable doubt, Heather Ambrose was not credible, and trial court error in excluding testimony from Milton Correa that Eli Salazar told Correa that Salazar killed the victim, and in granting the State a 30-day extension of the term to locate Eli Salazar. The appellate court ruled that Heather Ambrose's testimony was corroborated by other evidence and there were not sufficient indicia of reliability to admit Salazar's supposed admission to Correa. The issue of the 30-day extension was not raised in any of three post-trial motions, so was waived, and failed on its merits because testimony of Investigator Gustavo Munoz supported the State's request.

On May 24, 2006, the Illinois Supreme Court denied petitioner's leave to appeal.

On August 14, 2006, petitioner filed a *pro se* post-conviction petition, application to sue or defend as a poor person and motion for appointment of counsel. He alleged ineffective assistance of trial counsel for failure to present alibi witnesses from his family, two additional witnesses, and to cross-examine Eli Salazar at the Grand Jury. He attached affidavits from his mother, step-father, brother, two sisters and mother of his children that he was with them from 7:30 p.m. on October 22, 2001 until 8:30 a.m. the next morning, at 2241 N. Lorel in Chicago. He attached a one-page GPR from Det. Rodriguez of an interview with a Clara Rivera on 10-23-01, who said a girl told her the victim shot a Satan Disciple 3 mo. ago, so a "Rey" shot him.

On Sept. 26, 2006, petitioner filed a *pro se* supplemental post-conviction petition, asking for trial transcripts, alleging his attorney would not give him transcripts, which he needs to seek "a full review of his constitutional issues." He attached Grand Jury testimony of Elijah Salazar.

On Oct. 6, 2006, the U.S. Supreme Court denied a *pro se* writ of *certiorari* filed 6-7-06.

On November 16, 2006, the trial court denied the petitions filed August 14, 2006 and September 26, 2006, holding the claim of alibi witnesses was not filed on direct appeal and was waived. Also, there was no evidence that trial counsel knew of alibi witnesses, all related to petitioner. There were no affidavits from two supposed eyewitnesses. A statement purportedly made to Clara Rivera was from an unnamed girl. Elijah Salazar's Grand Jury testimony was not used at trial, so the transcript was not relevant. Petitioner's counsel had filed a direct appeal. Petitioner did not have a constitutional right to trial transcripts, which are in the record.

On December 5, 2006, petitioner filed a *pro se* notice of appeal, request for trial transcripts and motion for appointment of counsel.

On December 22, 2006, Presiding Judge Paul P. Biebel, Jr. appointed the State Appellate Defender and allowed a free report of proceedings.

On December 12, 2008, the appellate court affirmed denial of the petitions filed August 14, 2006 and September 26, 2006. No. 1-06-3721. The court held the *two* affidavits did not establish an alibi for the time victim was killed, and dovetail Heather Ambrose's testimony that she met with petitioner and Salazar around 7 p.m. and, immediately after the shooting, drove them to petitioner's home on Lorel. (Judge Petrone's note: Petitioner had filed six affidavits, which are in the court file. The clerk included only two affidavits in the appellate record. On June 4, 2019, defense counsel Suzanne Isaacson filed a Supplemental Exhibit consisting of all six affidavits). The appellate court ruled petitioner had not identified either alleged eyewitness and provided a secondhand account from an unidentified girl to Clara Rivera. It is mere speculation that an investigation would have located eyewitnesses whose testimony would favor petitioner. That an unidentified girl said the shooter was known as "Rey" does not exonerate petitioner; there is no assertion that "Rey" was not a nickname attributable to petitioner.

The appellate court ordered the mittimus corrected to give 858, rather than 847 days credit, a conviction on count 1 of first-degree murder with a 45-year sentence and a concurrent sentence of 5 years on count 13, aggravated discharge of a firearm. The court ordered count 14 "deleted from the mittimus because the indictment does not contain a count 14." (Judge Petrone's note: The indictment *does* contain a count 14, aggravated discharge of a firearm, which is in the court file. The clerk did not include this in the appellate record). Count 14 is attached to this order.

On May 28, 2010, the Illinois Supreme Court denied petitioner's leave to appeal.

On August 19, 2010, the U.S. District Court for the Northern District of Illinois denied petitioner's *pro se* petition for a writ of *habeas corpus* and did not certify any issues for appeal. The court rejected petitioner's claims of ineffective assistance of trial counsel for failure to call alibi witnesses and eyewitnesses who would have cast reasonable doubt on the State's case, and trial error in not allowing Milton Correa to testify to a hearsay statement that Eli Salazar said he was the shooter and in granting an extension of the speedy-trial term by 30 days.

CURRENT FILINGS

On May 16, 2016, petitioner filed a *pro se* motion for leave to file Successive Second Post-Conviction Petition, Sworn Successive Second Post-Conviction Petition pursuant to 725 ILCS 5/122-1, motion for appointment of counsel and application to sue or defend as a poor person. Petitioner alleged ineffective assistance of trial counsel for telling him the minimum sentence was 20 years; had he known he faced a minimum 45 years upon conviction, he would have chosen a jury, rather than a bench, trial. Counsel failed to present testimony of Martha Castillo, Margarita Castillo, Danny Castillo, Mario Class, Priscilla Class, and Diana Leal, that petitioner was home with them on the night of the murder. Petitioner was prejudiced by the trial court not allowing his attorney to go into the details of Heather Ambrose's conviction. He alleged he is innocent and attached newly discovered evidence:

Affidavit of William Sanchez dated 11-20-12:

On October 22, 2001, 10:00 p.m., he was walking east on Ohio Street and saw a gray late '90 2-door Pontiac Grand Am drive past him going east on Ohio, driven by either Heather Ambrose or Elijah Salazar. A red car occupied by two individuals stopped on the corner of Ohio and Leavitt, also facing east. The gray Pontiac pulled up next to the red car. The passenger window of the Pontiac rolled down "as to speak with the two individuals of the red car but pointed a gun instead. I notice that H was a light skin almost white individual fire upon the red vehicle". Sanchez did not come forward to police because he was on parole and scared police might involve him in the shooting. He recently found out Angel Class was convicted of murder "not a shooting case that I described here within this affidavit that accured on Ohio at Leavit St Oct. 22, 2001." Class had nothing to do with the shooting that took place on Oct. 22, 2001.

Affidavit of Christopher Stanley dated 12-23-15:

He was in the back seat of Heather Ambrose's car on October 22, 2001 at 2201 W. Ohio Street. Heather was driving. Elijah Salazar was in the vehicle. Heather pulled up next to a red car that two men were in. Elijah lowered the window and started shooting at the red car. Stanley was acquainted with Angel Class, can recall Class' physical appearance at that time, and did not see or have contact with Class then. Stanley first learned Class was jailed for the shooting in April, 2015 but did not come forward sooner because he feared for his life.

Affidavit of Onyx Santana dated 12-23-15:

In September, 2015, she learned Elijah Salazar told Detectives Rodriguez and Hennigan on July 15, 2012 that Heather Ambrose, Salazar and petitioner visited her on Rockwell & 66th on October 22, 2001. That is false. They visited her "with an extremely dark black man" she didn't know, smoked marijuana and said they wanted to shoot somebody. She asked them to leave.

Affidavit of Eugene Horton dated 3-1-16:

He is a graduate of paralegal courses. In Jan., 2015, he "agreed to assist Angel Class in challenging a murder conviction." He designed a notice, arranged to have it posted "on poles of street lights in a relevant community." In March, 2016, he received responses and instructed responders to give affidavits to Class' parents or sister. Signed: Eugene Horton, C-01581. (not notarized). Exhibit A: "NOTICE. An innocent man was convicted of murder that occured (sp.) on Oct. 22, 2001 at 7:00 p.m. at a stop sign on Ohio St., in Chicago, IL. I am attempting to prove the innocence of the wrongfully convicted man. If you have any information...contact me at the following address: Eugene Horton, C-01581." (Exhibit submitted without return address).

Affidavit of Robert Pasco dated 3-13-16:

On October 23, 2001, he was standing at Huron and Ada and saw "Heather and Elijah 2-door gray car" on Huron. "Elijah Salazar opened the passenger door...told me to get in...said... Bobby, what I'm about to tell you better stay between me and you... I finally got him... I finally got C-Note Tuggie last night ... If I told anyone else, he'll kill me next ... Elijah Salazar, Heather Ambros and Black Christopher were at Onyx House on 66th Rockwell chilling. On the way back they came down Ohio off of Western, drove up on Tuggie at a stop sign on Ohio and Levit and started shooting his car up... Black Christopher didn't know nothing into the last minute... They drop me off at my sister's house...Bobby if you tell anyone... I'll do you next." On Oct. 24, police told Pasco they heard he knew about a shooting on Ohio St. a few days ago. Pasco said he didn't know what they were talking about. They said if he didn't help, they'd violate his parole. Pasco said "Elijah Salazar told me he and Heather killed Tony Konewicz, Tuggie." He never said petitioner was involved. He was in fear for his life, did not want to be a snitch or violate parole. Recently, an old friend told Pasco Class had been arrested for Tuggie's murder. Signs "were hung up on store fronts and city trees by... Eugene Horton...I told what I knew... he told me...send it to the courts and Angel Class ...I'm older and not as scared as I was before... don't want innocent person to be in jail for a shooting he didn't do...weigh on my conscious."

On July 29, 2016, the trial court advanced the May 16, 2016 Successive Second Post-Conviction Petition to the second stage and appointed counsel to represent petitioner.

On August 14, 2018, petitioner filed a *pro se* "Supplement Post-Conviction Petition" motion for appointment of counsel and application to sue or defend as a poor person, alleging ineffective assistance of trial counsel for forfeiting his right to a jury trial by "factual misrepresentation...failure to call multiple witness that made statements contrary to testimony." Marc D. Berlin has been disbarred. An 8-4-05 ARDC report is attached. The State maliciously put Elijah Salazar to the Grand Jury to give perjured testimony different than his handwritten statement.

On June 4, 2019, Counsel Suzanne Isaacson filed a Rule 651 Certificate and prior alibi affidavits. She stated she will not be adopting the *pro se* motion filed on August 14, 2018.

On June 24, 2019, the State filed a Motion to Dismiss, arguing that petitioner failed to state a cognizable claim under the Post-Conviction Hearing Act. He failed to allege a substantial constitutional violation, to show actual innocence or to show cause re. Christopher Stanley, who is not newly discovered, was known at time of trial, is in petitioner's answer to discovery, and could have been raised in the first petition. Petitioner has not shown prejudice: neither he nor Stanley aver Stanley has new information not known at the time of trial. His affidavit does not show actual innocence or have well-pled allegations which, taken as true, are not positively rebutted by the trial record. It fails to state that petitioner's appearance was on October 22, 2001, or that Stanley knew the differences between petitioner's and Eli Salazar's appearance on that date. Without commenting on his credibility, his affidavit is legally insufficient.

The State argued that petitioner has not shown cause re. Onyx Santana, who is not newly discovered, was in Elijah Salazar's statement to police and in his handwritten statement. He fails to show prejudice: his affidavit is an attempt to rebut Salazar's statement to police that Salazar and Heather Ambrose went to Santana's house on October 22, 2001. However, there is nothing to rebut because Salazar did not testify. A State objection to Milton Correa testifying as to Salazar's hearsay statements was sustained; this was affirmed by the Illinois Appellate and Supreme Courts and the United States 7th District Court. Santana's affidavit contains nothing admissible; it fails to state that he was present at the time of the shooting or that petitioner was not the shooter. It is legally insufficient: it does not show cause-and-prejudice or exonerate petitioner, contains inadmissible hearsay and inappropriately raises reasonable doubt.

The State argued that William Sanchez's affidavit fails to show actual innocence or exoneration. Sanchez fails to aver how he knew of petitioner, or that he knew petitioner and how petitioner looked on October 22, 2001. It is inappropriately solely reasonable doubt and descriptive information about the shooting.

The State argued Robert Pasco's affidavit fails to show actual innocence. He avers the wrong date, and provides hearsay from Elijah Salazar, which was denied at trial. He cannot testify to inadmissible hearsay at trial; there is no purpose to cross-examine him at a hearing.

On July 24, 2019, petitioner filed a Response to the State's Motion to Dismiss, arguing it is immaterial if he knew of Christopher Stanley if Stanley could not be found for trial. Efforts to find him are unknown; attorney Berlin may be deceased. On June 10, 2003, Stanley was in prison when listed in defense answer to discovery. On June 19, 2003, he was released on MSR. On February. 4, 2004, attorney Berlin told the court: We "asked for a continuance to find Christopher Stanley...have not been able to.... You indicated...no further continuances. Based on that we call... Angel Class to the stand." On January 26, 2014, Berlin said: "... A critical witness has decided to disappear... requesting one final continuance to get him in." Stanley signed an affidavit on December 23, 2015, that Salazar fired the shot when Stanley, Salazar, and Heather Ambrose were in the car and petitioner was not. If taken as true, this shows actual innocence. Robert Pasco's affidavit does not go to the wrong date of the incident; he talks about a statement made by Elijah Salazar the next day, October 23. Onyx Santana avers Eli Salazar went to Onyx's home and said he wants to shoot somebody, corroborating Stanley.

On July 29, 2019, the State filed a Reply to Petitioner's July 24, 2019 Response. Due diligence would have discovered Christopher Stanley. Petitioner's attorney could have writ him in. *Molstad* is inapplicable. An evidentiary hearing is not a discovery deposition by a different name. Illinois is a fact-pleading state: petitioner must present facts to support his claim, not mere conjecture. Re. Robert Pasco, petitioner fails to allege facts of such conclusive character they would probably change the result at retrial. He tried to get Salazar's statements in through Milton Correa. This was denied by the trial court, affirmed by the appellate court, PLA denied. The issue is *res judicata*. In a post-conviction petition, reasonable doubt is not properly raised. Petitioner has not shown actual innocence. *Edwards* standards are not met.

On August 8, 2019, petitioner filed a Response to the State's July 29, 2019 Reply: Christopher Stanley was not in prison at time of trial in January, 2004, but was when the defense answer to discovery was filed on June 10, 2003. Defense counsel tried to find Stanley for trial. He was discharged on parole on June 19, 2003, arrested in Chicago on a misdemeanor on September 25, 2003 and signed an I-Bond on September 26, 2003. The case was SOL on October 29, 2003. The address report and I-Bond have Stanley's address as 750 N. Dearborn, Apt. 702, Chicago, 60610. Stanley may be found for an evidentiary hearing.

On January 2, 2020, petitioner filed a Motion to Supplement Second Successive Post-Conviction Petition with an investigative report of an interview of Christopher Stanley conducted on November 8, 2019. The report was prepared by Cook County Public Defender Investigator Sanford Brantley on January 3, 2020 and consists of three and a half lines: "Reporting Investigator accompanied and assisted APD Suzanne Isaacson with an interview of affiant Christopher Stanley on November 8, 2019 at the Skokie Courthouse. Mr. Stanley related that he did sign his affidavit and also that neither he nor Angel Class were there during the incident."

On January 15, 2020, the State filed a Supplemental Motion to Dismiss the investigative report, arguing the statement attributable to Stanley in the report contradicts the statement that Stanley made in his affidavit. In either aspect, the affidavit no longer maintains the legal sufficiency required by the Post-Conviction Act; it can no longer be presumed to be true where Stanley rebuts his own affidavit. Stanley avers in his affidavit that he was present in the car with Heather Ambrose and Elijah Salazar when the shooting occurred on October 22, 2001 at 2201 W. Ohio in Chicago, he did not see or have contact with Angel Class while in the car, and Elijah Salazar was the shooter. Yet, petitioner's own investigative report contains a statement attributable to Stanley that "neither he nor Angel Class were there during the incident." Petitioner has failed to meet the cause and prejudice test and should not be allowed to file the affidavit. Alternately, any claim regarding Stanley must be dismissed at the second stage.

On January 28, 2020, petitioner filed a Response to the State's Supplemental Motion to Dismiss, arguing that it is because of the inconsistencies in statements from Stanley that he should be allowed to testify at a third-stage hearing so the court can assess his credibility.

ANALYSIS/APPLICABLE CASE LAW

1. Claim of reasonable doubt as to petitioner's guilt; that he was "wrongfully convicted."

Petitioner contends he was wrongfully convicted upon testimony of Heather Ambrose, whose testimony was insufficient to convict, and who was impeached by a federal conviction.

Issues that were decided on direct appeal are *res judicata*. *People v. Enis*, 194 Ill. 2d 361 (2000). This issue was raised at trial, in a motion for new trial/judgment of acquittal, and in an amended motion for new trial/judgment of acquittal, and denied. It was rejected on direct appeal. 1-04-2930 (3-3-06). It is *res judicata* and not properly raised in a successive petition.

2. Claims of ineffective assistance of trial counsel.

a) For not telling petitioner he faced a minimum 45-year sentence upon conviction.

Defense counsel Timothy Joyce raised this issue when he asked for a continuance at sentencing, and in a supplemental motion for new trial, which was denied. Conviction and sentence were affirmed on direct appeal. 1-04-2930 (3-3-06).

Issues that could have been raised on direct appeal, but were not, are deemed waived. *People v. Enis*, 194 Ill. 2d 361 (2000). This issue is in the record, could have been raised on direct appeal, is waived and not properly raised in this successive post-conviction petition.

b) For not presenting six family members of petitioner as alibi witnesses.

This claim was raised in the first *pro se* post-conviction petition filed in August 2006 and dismissed by the trial court in November, 2006. Defense counsel is correct that the clerk's office only included two of the six alibi affidavits in the appellate record. However, the trial court had all six affidavits when making her ruling, and the alibis are exactly the same, as noted above. The appellate court ruled the affidavits did not establish an alibi for the time that victim was killed, and dovetail Heather Ambrose's testimony that she met with petitioner and Salazar around 7 p.m. and, immediately after the shooting, drove them to petitioner's home on Lorel. Reading six, rather than two, affidavits, does not change the reasoning for their rejection.

Dismissal of the petition was affirmed on direct appeal. No. 1-06-3721 (12-12-08). The Illinois Supreme Court denied a petition for leave to appeal on May 28, 2010. The same issue was raised in a *pro se* federal *habeas corpus* petition which was denied by the United States District Court for the Northern District of Illinois on August 19, 2010. This issue is *res judicata* and not properly raised in this successive post-conviction petition.

a) Affidavit of William Sanchez (11-20-12)

Sanchez avers that on Oct. 22, 2001, 10:00 p.m., he saw a gray car drive east on Ohio St. The driver was Heather Ambrose or Elijah Salazar. A red car with two persons stopped at Ohio and Leavitt, facing east. The gray car pulled next to the red car. The gray car's passenger window rolled down. A "light skin almost white" person pointed a gun, fired on the red car. Angel Class had nothing to do with this. Sanchez recently learned Class was convicted of murder. He did not come forward sooner; he was on parole, scared of police involving him.

This court finds cause has been shown for not bringing this affidavit sooner; Sanchez did not come forward sooner because he was scared. Prejudice has not been shown. The affidavit is devoid of any connection to petitioner except a baseless conclusion that petitioner was not involved in the shooting. It fails to explain if Sanchez knew Heather Ambrose, Elijah Salazar or petitioner, what they looked like, or if they looked similar to each other on October 22, 2001. He could not distinguish between Salazar and Ambrose as to who was driving the gray car. He did not state that the shooter, who he described as light-skinned, was not a person who fit petitioner's description. It contains no material facts and nothing of a conclusive character that would probably change the result on retrial. It fails to establish actual innocence or exoneration.

b) Affidavit of Onyx Santana (12-23-15)

Santana avers that in September, 2015, she learned Elijah Salazar told detectives on July 15, 2012, that Heather Ambrose, Salazar and Angel Class visited her on 66th and Rockwell on October 22, 2001. That is false – they visited her "with an extremely dark black man" she did not know, smoked marijuana, and said they wanted to shoot somebody. She immediately asked them to leave.

This court finds that this affidavit does not meet the cause-and-prejudice test. Cause is not shown for failure to call Onyx Santana at trial. She was known to petitioner, having been mentioned by Elijah Salazar to police and in the handwritten statement Salazar signed. The affidavit fails to show prejudice, because none of its contents would be admissible at trial – it impeaches a statement by Elijah Salazar as to who was with Salazar when he visited Santana's house on October 22, 2001. Salazar did not testify at trial; there is nothing to impeach. Attempt impeachment of Santana's statements by a Milton Correa was denied at trial, judgment was affirmed on direct appeal, PLA was denied, and a federal writ of *habeas corpus* was denied.

Even if admissible, Santana's affidavit fails to demonstrate actual innocence. Its contents are of a collateral issue – who went to Santana's house on October 22, 2001, and are not of such conclusive character they would probably change the result on retrial. Santana does not aver she was present at the time of the shooting or saw the shooting, or knew petitioner or what his appearance was on October 22, 2001.

c) Statement of Eugene Horton (3-1-16)

This statement does not contain a notarized signature. It does not meet the cause-and-prejudice test or show actual innocence because it merely states that Horton had a notice put up on poles, sometime in 2015 or 2016, soliciting people to come forward with information about this shooting, which occurred in 2001. Horton has no personal knowledge about this case. His opinion that petitioner is "innocent" and "wrongfully convicted" is inadmissible.

d) Affidavit of Robert Pasco (3-13-16)

Pasco avers that on October 23, 2001, he had a chance encounter with Elijah Salazar, during which Salazar said that the night before, Salazar "finally got C-Note Tuggie" by "shooting his car up" at a "stop sign on Ohio and Leavitt" on the way back from "chilling at Onyx house on 66th Rockwell" with "Heather Ambros and Black Christopher" in the car. On October 24, police stopped Pasco and threatened to violate his parole unless he helped them with this case. Pasco told police that Elijah Salazar told Pasco that "he and Heather killed Tony Konewicz, Tuggie." Pasco never said Angel Class was involved. Pasco came forward after he saw Horton's signs posted and did not do so earlier because he was scared.

This court finds that cause has been shown for not producing Robert Pasco at trial – he had not come forward because he was scared. Prejudice has not been shown. Petitioner seeks through Pasco to admit the same type of hearsay statements allegedly made by Elijah Salazar to Milton Correa, that the trial court did not allow, and which decision has been affirmed. Elijah Salazar did not testify at trial. There was no testimony to impeach. Pasco's affidavit fails to offer any admissible testimony, and he did not witness the shooting. The affidavit fails to set forth a colorable claim of actual innocence and does not exonerate petitioner.

e) Affidavit of Christopher Stanley (12-23-15)

Stanley avers he was in the back seat of Heather Ambrose's car on October 22, 2001 at 2201 W. Ohio Street. Heather was driving. Elijah Salazar was in the vehicle. Heather pulled up next to a red car that two men were in. Elijah lowered the window and started shooting at the red car. Stanley was acquainted with Angel Class, can recall Class' physical appearance at that time, and did not see or have contact with Class then. Stanley first learned Class was jailed for the shooting in April, 2015, but did not come forward sooner; he feared for his life.

f) Statement of Christopher Stanley (statement made 11-8-19, report prepared 1-3-20)

Public Defender Investigator Sanford Brantley assisted APD Suzanne Isaacson with an interview of Christopher Stanley on November 8, 2019 at the Skokie Courthouse. Stanley "related that he did sign his affidavit and also that neither he nor Angel Class were there during the incident." That is the full extent of the report. This court is granting petitioner's request to supplement his successive post-conviction petition with this report.

This court finds that Stanley's affidavit fails to meet the cause-and-prejudice test. Cause has not been shown for failure to produce Stanley at trial. He is not newly discovered and could have been produced earlier with due diligence. He was in custody in IDOC when the defense answer to discovery was filed. Although he had been paroled before trial, he easily could have been writ to court and served with a subpoena. The record is devoid of any efforts to find him and bring him to court except the phrase "diligent efforts". Stanley was arrested after being paroled, in Chicago, and gave a Chicago address as his residence. He was subsequently located to sign an affidavit and to give a statement to a defense investigator.

Stanley's affidavit fails to demonstrate actual innocence. He avers he was "acquainted with" Angel Class, but does not state for how long or how they were acquainted. He does not aver that he knew what Elijah Salazar looked like on Oct. 22, 2001, or that he knew any difference in appearance between petitioner and Salazar.

To a public defender investigator, Stanley said he signed the affidavit – but - neither he nor petitioner were present when the shooting occurred. To say that he was not present is a direct contradiction of his sworn affidavit that he was present, saw the shooting, and that Elijah Salazar was the shooter. That Stanley himself, to petitioner's attorney and investigator, contradicts his own sworn affidavit, supports the finding that the affidavit does not provide total vindication or exoneration of petitioner and does not warrant an evidentiary hearing.

CONCLUSION

Petitioner's request for appointment of counsel and to sue or defend as a poor person are denied. Petitioner's *pro se* filing of August 14, 2018 will not be considered. Counsel for petitioner has been appointed and is not adopting that filing.

Petitioner's claim of reasonable doubt as to his guilt is *res judicata* and not properly brought forth in a successive post-conviction petition.

Petitioner's claims of ineffective assistance of trial counsel are *res judicata*.

Petitioner's filings and supporting documentation fail under the cause-and-prejudice standard of review and fail to demonstrate actual innocence.

Based on the above, petitioner's request for leave to file a successive post-conviction petition is denied. The State's motion to dismiss is granted.

Angela M Petrone #1963

Angela M. Petrone
Circuit Court of Cook County, Criminal Division

Date 7-14-20

ENTERED
Judge Angela Munari Petrone-1963
JUL 14 2020
DOROTHY BROWN
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL
DEPUTY CLERK

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CYNTHIA A. GRANT
Clerk of the Court

(217) 782-2035
TDD: (217) 524-8132

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

September 21, 2023

Thomas Palella
Clerk of the Appellate Court, First District
160 N. LaSalle Street, Room S1400
Chicago, Illinois 60601

In re: People v. Class
129695

Dear Clerk of the Appellate Court:

Enclosed is a certified order entered September 21, 2023, by the Supreme Court of Illinois in the above-captioned cause.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

cc: Andrew David Yassan
Appellate Court, First District
Attorney General of Illinois - Criminal Division
Cook County Circuit Court
Michael H. Orenstein
State's Attorney Cook County

State of Illinois
Supreme Court

I, Cynthia A. Grant, Clerk of the Supreme Court of the State of Illinois, and keeper of the records, files and Seal thereof do hereby certify the following to be a true copy of an order entered September 21, 2023, in a certain cause entitled:

129695	)	
	)	
	)	
	)	
People State of Illinois,	)	
	)	
Petitioner	)	Petition for Leave to Appeal from
	)	Appellate Court
v.	)	First District
	)	1-20-0903
Angel Class,	)	02CR13513
	)	
Respondent	)	
	)	
	)	

Filed in this office on the 23rd day of May A.D. 2023.

SEAL OF THE SUPREME COURT
STATE OF ILLINOIS
AUG. 26, 1818

IN TESTIMONY WHEREOF, I have set my hand and affixed the seal of said Supreme Court, in Springfield, in said State, this September 21, 2023.

Cynthia A. Grant

Clerk,
Supreme Court of the State of Illinois

129695

IN THE

SUPREME COURT OF ILLINOIS

People State of Illinois,	)	
	)	
Petitioner	)	
	)	Petition for Leave to Appeal from
v.	)	Appellate Court
	)	First District
Angel Class,	)	1-20-0903
	)	02CR13513
Respondent	)	
	)	
	)	
	)	
	)	
	)	
	)	

O R D E R

On the Court's own motion; IT IS ORDERED as follows:

This Court retains jurisdiction of the case. The cause is remanded to the Appellate Court, First District, for the limited purpose of explaining the basis and rationale for its decision to order reassignment to a different judge on remand. The appellate court is directed to set forth its explanation in a modified opinion and file the order with the Clerk of this Court on or before October 23, 2023.

Order entered by the Court.

Neville, J., took no part.

FILED
September 21, 2023
SUPREME COURT
CLERK

TO THE APPELLATE COURT OF ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY
CRIMINAL DIVISION

ANGEL CLASS, Petitioner,	)	
	)	
v.	)	No. 02 CR 13513
	)	Honorable Angela Petrone,
PEOPLE OF THE STATE OF ILLINOIS.	)	Judge Presiding.

NOTICE OF APPEAL

An appeal is taken from the order or judgment described below:

Appellant's Name:	Angel Class
Appellant's Address:	c/o Virginia Department of Corrections
Appellant's Attorney:	Office of the State Appellate Defender 203 N. LaSalle St., Chicago IL 60601
Offense:	Murder
Judgment:	Denial of Successive Post-Conviction Petition Denial of Leave to File Successive Petition
Date of Judgment:	July 14, 2020 (State's motion to dismiss granted)

VERIFIED PETITION FOR REPORT OF PROCEEDINGS, COMMON LAW RECORD, AND FOR APPOINTMENT OF COUNSEL ON APPEAL FOR INDIGENT DEFENDANT

Under Supreme Court Rules 605-608, Appellant asks the Court to order the Official Court Reporter to transcribe an original and copy of the proceedings, file the original with the Clerk and deliver a copy to Appellant; order the Clerk to prepare the record on appeal; and to appoint counsel on appeal. Appellant (or attorney) certifies that, on information and belief, at the time of this filing Appellant is unable to pay for the record or to retain counsel for appeal.

Suzanne Hoaesen for Angel Class

ORDER

IT IS ORDERED THAT the State Appellate Defender is appointed as counsel on appeal and that the common law record and report of proceedings be furnished to appellant without cost within 45 days of receipt of this order. Dates to be transcribed: September 12, 2019; Nov. 6, 2019; 1/8/2020; 1/15/20; 1/28/2020; July 14, 2020

Entered: angela M. Petrone
Date: July 14, 2020 #1963

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Common Law Record (C)

Report of Proceedings (R)

Supplemental Record, Volume 1 (SUP C)

Supplemental Record, Volume 2 (SUP2 C)

Supplemental Record, Volume 3 (SUP3 R)

Secured Record (SEC C)