

No. 1-24-2105

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

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 92 CR 26928
	)	
ALFRED PORTER,	)	Honorable
	)	Pamela J. Stratigakis,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE QUISH delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

ORDER

¶ 1 *Held:* At the second stage of postconviction proceedings, the circuit court erred in dismissing defendant’s claim of ineffective assistance of counsel related to trial counsel’s failure to investigate two witnesses when defendant alleged that the disinterested eyewitnesses could have exonerated him and the record did not disclose a strategic reason for foregoing investigation. The court further erred in dismissing defendant’s actual innocence claim.

¶ 2 Defendant Alfred Porter appeals the second stage dismissal of his petition for postconviction relief filed under the Post-Conviction Hearing Act (“Act”) (725 ILCS 5/122-1 *et seq.* (West 2022)). In a supplement to the petition, defendant claimed, among other things, that his

trial counsel rendered ineffective assistance by failing to investigate and call two witnesses to testify at trial and that new evidence demonstrated his actual innocence. For the following reasons, we reverse the dismissal of both claims and remand for further proceedings.¹

¶ 3 At a joint bench trial held in October 1993, defendant and codefendant James Auston were each tried on two counts of first degree murder, four counts of attempted murder, and four counts of aggravated battery with a firearm. However, the State did not present any evidence against Auston at trial. The charges stemmed from the shooting of five Latin King gang members who were riding together in a car that approached a group of people including defendant. Jose M. Colon (“Jose M.”) was killed, and Jerry Davey, Ramon Figueroa, and Jose A. Colon (“Jose A.”) were wounded. The fifth vehicle occupant, David Ramos, was uninjured. The State’s indictment alleged that defendant discharged the firearm that killed Jose M. and wounded the other victims. The indictment did not allege that defendant was accountable for the actions of any another person.

¶ 4 At trial, Ramos, a member of the Latin Kings, testified that, on the evening of October 5, 1992, after 8:00 p.m., he was riding in a Chevrolet Blazer with Davey, Jose M., Figueroa, and Jose A. When their vehicle drove through the intersection of Diversey Avenue and Leavitt Street in Chicago, Ramos saw a group of about 25 people standing on the corner. Jose M. lowered his window and said to the group, “what’s up.” Ramos then heard a man he identified as defendant say, “get the shit.” Ramos estimated that defendant was 20 feet away. At that point, another man from the group, whom Ramos described as a “dark male,” went to a nearby parked car and retrieved a “big black gun.” The man then fired two or three shots at the Blazer. When he heard

¹ Although this appeal was fully briefed and ready for review and disposition on January 20, 2026, this appeal was not assigned to the current authoring justice for review and disposition until July 1, 2026.

the shots, Ramos ducked, and the Blazer then drove forward and crashed into a dumpster. After the crash, the gunshots stopped for three or four seconds before beginning again, coming from the same direction. Ramos was still ducking down and did not see who fired the second round of shots, but he was able to hear approximately 15 shots altogether.

¶ 5 Ramos admitted that on October 6, 1992, he told a detective that defendant fired the second round of shots. When asked at trial whether he had seen defendant shooting, Ramos explained: “Well, when the gun — when they stopped shooting, they like kept going, but I was already down in the car, you know. I couldn’t see. I didn’t see [defendant] shooting, but [defendant] told the other guy to get the gun.” Ramos denied telling the detective that it was defendant who walked over to the Blazer and fired the second round of shots or that defendant said, “get the shit.” However, he testified that he told a different officer who drove him to the police station that defendant said “get the shit.” When police showed him a series of black and white photos of suspects, Ramos identified defendant as “the one [who] told the guy to get the shit.” Ramos denied telling police that defendant shot at the Blazer after it crashed. Four days later, Ramos identified defendant in a lineup. Ramos testified that the person he believed to have been defendant was about 22 or 23 years old, between 5’8” and 6’1” tall and weighed about 180 or 190 pounds. Ramos stated that he had “a little mustache” on his “chin.” He did not recall what color clothing defendant was wearing at the time of the shooting. Although it was dark outside, he said the street corner was well lit.

¶ 6 Before October 5, 1992, Ramos had seen defendant once about a year earlier, but he did not know him. On that occasion, defendant was walking down the street with his girlfriend. On cross-examination, when asked about the photo that he identified at trial as defendant, Ramos

admitted that he told police that the person in the photo was named "Hodgey." Ramos knew a person named Hodgey who was a dark-skinned black male, about 5'5" or 5'6" tall and weighing about 140 to 145 pounds. Ramos met Hodgey with defendant, about a year before the shooting.

¶ 7 Jose A. testified that the group of people on the corner of Diversey and Leavitt were members of the Mickey Cobras gang, a rival of the Latin Kings. That corner was Latin King territory. He estimated that there were 10 to 12 people in the group, and he did not know any of them. At the time of the shooting, the gangs had a truce. Jose A. testified, "[a]s soon as we drove up and [Jose M.] asked them what was going on, [defendant] told this other guy to go get the shit." Jose A. identified defendant in court as that person. At that point, "[t]he other guy went to *** a maroon car, stuck his hand in the window of the car and came up with a gun, pointed the gun and shot several shots." Jose A. described the weapon as "[a] black gun, big gun." Jose A. testified that "[h]e was dark comple[cted] real dark." He testified that the shooter was standing next to defendant. No one in the Blazer had a gun or fired shots.

¶ 8 After the Blazer crashed into the dumpster, Jose A. looked back and saw defendant coming toward them with a gun. Jose A. tried to get the car moving but was unable to do so. He testified that he saw defendant shooting a black gun at the Blazer. Jose A. added, "I seen him shoot once, not actually shoot at the car, but I seen him coming towards the car, pointing the gun. He shot and I went down and then the shooting just kept coming about 10, 11 times." Jose A. was shot in the back.

¶ 9 Jose A. testified that, prior to the shooting, he had seen defendant several times. When police showed him four or five black and white photographs on October 6, 1992, Jose A. identified defendant as "the shooter." Jose A. viewed several lineups four days later and again identified

defendant. He testified that he told the first police officer on the scene that defendant was the shooter. On cross-examination, Jose A. admitted that he initially told police that he believed that the shooter was named “Hodgey.” However, he testified at trial that Hodgey was not present during the shooting. He further explained, “At first I thought because I was so confused, I was trying to mention his name because I know his face and his name didn’t come right away into my mind. I kept saying, ‘Niece’s boyfriend, Hodgey, Niece’s boyfriend, Hodgey.’ It wasn’t Hodgey that I was meaning. I told them before I went to the hospital. I told them no, it wasn’t Hodgey and [defendant] came into my mind.” Jose A. stated that defendant did not have facial hair, and he described Hodgey as having dark black skin. Defendant was “light skinned” and Hodgey was “darker.” Jose A. testified that the first shooter was “[s]ome black guy [he] never seen before,” and he was not the person he knows as Hodgey.

¶ 10 Jerry Davey testified that he was driving the Blazer when he saw a group of 15 to 20 people standing on the corner of Diversey and Leavitt. He recognized defendant among the crowd. He stopped the Blazer next to the crowd, and Jose M. lowered his window and asked what they were doing. Davey then heard defendant say, “Get the shit.” Another man then went to a nearby car, retrieved a gun, and fired three or four shots at the Blazer. The shooter was “about five to ten feet” from the Blazer when he started shooting, and defendant was two or three feet away from the shooter. The shooter was shorter than defendant and had darker skin. Davey was shot in the arm and then crashed the Blazer into the dumpster. He heard about 10 more shots fired from close to the vehicle and was shot three more times in the back.

¶ 11 Davey had seen defendant before and last saw him at defendant’s girlfriend’s house three weeks before the shooting. The day after the shooting, police showed Davey some photos. Davey

identified defendant “[a]s one of the shooters, he was out there when I got shot.” Davey acknowledged that he had a pending charge for delivery of a controlled substance and that an Assistant State’s Attorney (“ASA”) told him that, after he testified against defendant and pleaded guilty in his own case, the ASA would “send a letter to the Department of Corrections.” Davey did not know what the letter would say.

¶ 12 Davey testified that defendant had a mustache but could not otherwise describe his appearance or clothing. Davey was familiar with defendant from the neighborhood and knew defendant’s girlfriend, Niecy Williams. He had met defendant approximately three months before the shooting. Davey never saw defendant firing a gun on the day of the shooting. He viewed lineups but was unable to identify anyone. However, when shown photos, he identified defendant as being at the scene.

¶ 13 Ramon Figueroa testified that he saw “at least around 20” people standing on the corner of Diversey and Leavitt. Jose M. then rolled down his window and asked the group, “What’s up?” Defendant told someone to “[g]et the shit.” Figueroa identified defendant in court as the person who made that statement. Another black male then retrieved a black automatic gun from a maroon car and fired around four shots at the Blazer. After Davey crashed the car into the dumpster, the shooting stopped. Figueroa looked up and saw defendant “coming toward the car shooting.” Defendant was using a black firearm that looked like the one the first shooter had used, and he fired around nine shots. Figueroa was not shot.

¶ 14 Figueroa testified that he had seen defendant twice before the shooting, most recently “a couple of weeks” earlier. Figueroa thought that defendant’s name was Hodgey and only learned his real name after viewing a lineup. Figueroa initially testified that he did not identify anyone

from the photos the police showed him, but when shown the pack of photos at trial, he then testified that he identified a photo of defendant as “the person that [he] saw shooting at the Blazer.” Figueroa also identified defendant in a lineup “as the shooter.” He testified that, at the time of the shooting, defendant did not have any facial hair.

¶ 15 On cross-examination, Figueroa admitted that he gave a statement to an ASA on October 10, 1992, which did not include information that he provided in his trial testimony, including that the shooter’s gun was a black automatic, defendant used the first shooter’s weapon, and the number of shots fired in each of the two bursts of gunfire. Figueroa agreed that he initially told police that he thought the shooter’s name was Hodgey. Figueroa believed that the person he knew as Hodgey was between 23 and 27 years old, had dark skin, and was between 5’9” and 6’0” tall. Figueroa did not know Hodgey and had only “seen him a few times.”

¶ 16 Chicago Police Department (“CPD”) Officer Paul Bretz testified that he and his partner, Officer O’Keefe, responded to the scene of the shooting and then interviewed Davey and Jose A. at the hospital. Bretz stated that, after those conversations, he began looking for defendant. Davey told Bretz that “the shooter was a male black known only as Antoine.”² On cross-examination, Bretz testified that he learned from Davey that the shooters were members of the Vice Lords gang. The victims never mentioned the Mickey Cobras.

¶ 17 CPD Officer Ronald Ferrari testified that he assisted in processing the scene for the CPD crime lab. He located nine shell casings, and all were 9mm. He did not recover any firearms from the Blazer.

² The record reflects that defendant also went by his middle name, Antoine.

¶ 18 CPD Detective William Barron testified that he presented photo spreads to the four surviving victims, and all four identified defendant as “the man who shot [them].” Barron also confirmed that Figueroa believed the shooter’s name was Hodgy but identified defendant’s photo as the person who shot him.

¶ 19 CPD Detective Dennis Gray testified that he conducted a lineup that Jose A., Ramos, and Figueroa viewed separately. Each of them “immediately” identified defendant as “the shooter.”

¶ 20 Following the State’s case, codefendant Auston moved for a directed finding of not guilty on all charges against him. The State did not respond. The court granted his motion and found Auston not guilty. In response to defendant’s motion for a directed finding, the State argued that three of the witnesses identified defendant “as the shooter or one of the shooters.” The court denied defendant’s motion.

¶ 21 Defendant first called Joseph Myles, who testified that, on October 5, 1992, he was visiting a friend near the scene of the shooting. Around 8:30 p.m., he went down to the street and saw defendant, whom he knew from the neighborhood. Myles talked with defendant, and a crowd of people then appeared. Myles stated that some of the people “said, Vice Lord, Vice Lord, and showed us love.”

¶ 22 Myles then saw a white Blazer driving down Diversey. The Blazer slowed down and the driver looked at Myles “for about a minute.” The Blazer continued to the corner of Diversey and Hoyne Avenue, where the driver stopped the vehicle and spoke with the Latin Kings. Some of the Latin Kings got into a second Blazer, which was beige, and the crowd on Hoyne dispersed. The beige Blazer then drove down Leavitt, “turned out the lights, and they let down the passenger window.” The Blazer sat at the traffic light at Diversey and Leavitt for a minute or two, sitting

through a full light cycle without moving. The Blazer then drove across Diversey, and Myles began backing away when he saw the back window of the Blazer was up. Defendant had been standing next to Myles, but “started walking away” from him when the Blazer approached.

¶ 23 The Blazer pulled up to the crowd and a passenger asked, “what’s the crowd for, Homes?” When no one responded, the passenger said, “what’s the crowd for, Homes? King Love.” A person named “Paul” responded, “we’re just talking.” Myles was standing at the back of the Blazer and could see that inside the Blazer, one passenger had pulled his black-and-white hat down, a second had pulled his hood over his head, and a third had pulled up his shirt collar and was also wearing black. Myles believed that meant the occupants intended to perform a drive-by shooting. At that point, “the passenger of the Blazer went up under the seat” and “pulled a gun,” which “looked to be a .38 revolver.” Myles further testified that, “[a]s I noticed this, another person was coming from the bushes” wearing a black three-quarter-length jacket and black hat.

¶ 24 Myles testified that the person had a 9mm firearm and walked towards the Blazer. The passenger of the Blazer with the .38 was leaning out the window and fired one shot before the person with the 9mm began shooting into the back of the Blazer. When the shooting started, defendant and Quenton Jones were running down the street toward Clybourn Avenue. The Blazer then crashed into the dumpster, and the person with the 9mm walked over to it, resumed shooting, and “didn’t stop shooting until he emptied the clip.” Myles did not know the shooter’s name and was not able to pick him out of a lineup. Myles never heard defendant say, “get the shit,” or saw him retrieve a gun or shoot at the Blazer.

¶ 25 On cross-examination, Myles acknowledged that he used to be a member of the Mickey Cobras and he knew defendant from playing basketball. He met defendant about 15 to 20 times in

total. Defendant was not in a gang during the time that Myles knew him. When Myles learned that defendant had been arrested for Jose M.'s murder, he did not contact the police to tell them what happened. He only spoke to the police when they contacted him.

¶ 26 Faye Wallace testified that in October 1992, she lived at 2811 North Leavitt. She had seen defendant in the neighborhood several times before but did not know him and had never spoken to him. Around 8:30 p.m. on October 5, 1992, Wallace was walking back to her building from a nearby store when she saw a white Blazer driving down the street. She saw three people standing next to a courtyard in front of her building. When the Blazer slowed down to go over a speed bump on Leavitt, "two guys came out up toward the Blazer, reached under their jacket and pulled out two guns and ran up on the van and started shooting." Wallace then saw the Blazer reverse and back into a dumpster across the street. She did not see the vehicle move forward after the shooting. After being confronted with a photo showing the dumpster on the opposite side of the street from where she testified it had been, Wallace explained, "I guess the police may have moved it."

¶ 27 According to Wallace, one of the shooters was wearing a black leather jacket with a black hood, and the other was wearing a red and black jacket with a white hood. Wallace observed that defendant was wearing a black leather jacket as well. Defendant was not one of the shooters, and Wallace did not hear him say, "get the shit." Rather, Wallace stated, "I heard the other guy that was hollering back for him to get more shit. More shit he said, not the shit, more shit." During the shooting, defendant "just stood there." Wallace testified that she knew one of the shooters, a Vice Lord named "Jordan."

¶ 28 Wallace first learned defendant's name when she learned that he had been arrested. Wallace mentioned to defendant's girlfriend that he was not involved in the shooting, and

defendant's girlfriend told defendant's attorney, who sent an investigator to meet with Wallace. Wallace testified that she tried to talk to a detective on the night of the shooting, but "they told [her] that they would handle it."

¶ 29 Quinton Jones testified that he had known defendant for about a year and played basketball with him. In the evening of October 5, 1992, Jones was visiting his girlfriend near Diversey and Leavitt. As he was walking to a phone to call her, he saw a beige Blazer sitting at a light on Leavitt facing south with its headlights off. He stopped walking and started watching because he saw a crowd of people on the corner and wanted to see what was going to happen. The Blazer missed its first green light and proceeded on the second. It then pulled up to a crowd of approximately 30 people on the corner. Someone from the Blazer said, "king love, why you guys standing out here," someone from the crowd responded, "we just standing here," then "some guy jumped off the curb and started shooting." Jones saw only one shooter, who fired 15 or 16 shots. Jones described him as about 15 or 16 years old with a dark complexion and "[a]bout five feet tall." The shooter was wearing a black jacket with a black hat. Jones testified that he hid behind a parked car and thought he saw a couple of guys get out of the Blazer and start shooting, at which point, he started to run away and the shooting stopped. The Blazer then coasted into a dumpster.

¶ 30 Jones saw defendant in the crowd talking to some girls prior to the shooting, but he did not see defendant shoot at the Blazer or hear him say, "get the shit." Rather, defendant had already started moving out of the way before the shooting started, and when it began, he ran away with the rest of the crowd. Jones testified that defendant ran past him while he was hiding. When he first learned that defendant had been arrested, Jones told defendant's mother that defendant had not

been involved. Jones testified that he also spoke with police on November 1, 1992, and told them that the shooter was a short, dark-skinned black male who was about 15 years old.

¶ 31 Defendant testified that he was around 6'1" or 6'2" tall, and at the time of the shooting, he weighed around 187 pounds. He knew Jose A. and Jerry Davey, having played basketball with Davey a few times. At one time he belonged to the Mickey Cobras gang, but was not in a gang at the time of the shooting. On October 5, 1992, defendant was going to visit his girlfriend and, at one point, joined a crowd of 24 to 30 people on the street. He spoke with Joseph "Ghost" Myles for 15 to 20 minutes. The pair then walked to Leavitt and saw a white Blazer. The driver of the Blazer looked at them and then drove away. A few minutes later, a beige Blazer appeared on Leavitt, stopped at the light, and sat through a full cycle. Defendant noticed that the Blazer's headlights were off and "there were a lot of guys in it." Defendant proceeded to walk north on Clybourn. When he was about a block or a block and a half from the crowd, he heard gunshots, prompting him to run. Defendant heard about "seven or nine" shots. He saw Jones taking cover behind a car. Defendant caught a bus to his girlfriend's house. Defendant never shot at the Blazer, ordered anybody else to shoot at the Blazer, or told anybody to "get the shit." He turned himself in when he heard that police were looking for him. On cross-examination, defendant admitted that he had an argument with "Red," the owner of the beige Blazer, sometime prior to the shooting.

¶ 32 The State called CPD Detective Steven Schorsch as a rebuttal witness. He testified that, during an interview on November 1, 1992, Jones gave answers that differed from his trial testimony, specifically regarding what car he was driving on the evening of the shooting and whether Myles was at the scene.

¶ 33 During closing argument, the State contended that defendant was “the shooter.” Specifically, the ASA first asserted, “what the State has presented in this case are three eyewitnesses who all identified the defendant as the person that walked up to that [B]lazer and began shooting.” The ASA then argued that there was no reason for the victims to falsely “come in here and say [defendant] was the shooter.” He then further noted that the victims had identified defendant “as the shooter” and had “picked out the photo of [defendant] as the person that they said did the shooting.” The State did not argue that defendant was guilty under an accountability theory.

¶ 34 The court found defendant guilty of one count of first degree murder and four counts of attempted first degree murder. In announcing its ruling, the court recounted that “[a]ll four of the surviving victims in this case identify [defendant] as the one who said get the shit. Several of them identified [defendant] as having come up behind the van and shooting after the first shots rang out.” The court also found that Wallace’s testimony was not consistent with the other evidence, particularly in regards to the number of people in the area and the movements of the Blazer. The court sentenced defendant to 50 years for first degree murder and 10 years for each count of attempted murder, all to be served consecutively.

¶ 35 On appeal, this court affirmed defendant’s convictions, but modified his sentences so that his 10-year terms for attempted first-degree murder as to Ramos and Figueroa ran concurrently with his other sentences, reducing the aggregate sentence from 90 to 70 years. See *People v. Porter*, 277 Ill. App. 3d 194, 199 (1995).

¶ 36 On October 24, 1996, defendant filed a petition for postconviction relief through private counsel, and on January 9, 1997, filed an amended petition. In relevant part, defendant alleged that

his trial counsel rendered ineffective assistance by failing to have his and codefendant Auston's trials severed. In support of his prejudice argument, defendant attached an unnotarized and unverified "statement" from Auston, which defendant referred to as an "affidavit," in which Auston stated that he was present at the scene and never saw defendant possess or use a weapon or order the shooting. Defendant alleged that Auston also prepared a supplemental affidavit averring that he would have testified on defendant's behalf if not for the contrary advice of his attorney, but no such supplemental affidavit is in the record.

¶ 37 On February 11, 1997, the court allowed defendant's private counsel to withdraw and appointed the Office of the Cook County Public Defender to represent him. Defendant's petition was advanced to the second stage and the State filed a motion to dismiss in July 1998. This motion was apparently never resolved.

¶ 38 At this point, progress on defendant's petition came to a standstill. As we recounted in detail in our previous opinion from the dismissal of defendant's petition, defendant's case was passed between several Assistant Public Defenders ("APD") before landing with APD Ronald Haze. See *People v. Porter*, 2014 IL App (1st) 112037-U, ¶ 9. "The case then sputtered along for 12 years with numerous continuances being granted, usually with precious little in the way of representations that any work had been done by counsel with respect to fleshing out the postconviction petition." *Id.* We "fully delineate[d] the many years of inaction" in our decision. *Id.* ¶¶ 10-15.

¶ 39 In June 2001, APD Haze filed a supplemental petition adding a claim relating to *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which never progressed. In February 2011, APD Haze filed a certificate pursuant to Illinois Supreme Court Rule 651(c) (eff. Dec. 1, 1984), stating that he was

unable to further supplement or amend the pleadings on file. As this court stated, “even after the innumerable continuances and investigations conducted over 12 years,” Haze merely rested on the amended petition filed in 1997. *Id.* ¶ 14. The State then filed an amended motion to dismiss in March 2011. In June 2011, the court granted the State’s motion, finding, among other things, that Auston’s statement was invalid because it was not properly notarized.

¶ 40 On appeal, this court reversed the dismissal of defendant’s petition. See *Porter*, 2014 IL App (1st) 112037-U, ¶ 32. We found that postconviction counsel failed to render reasonable assistance by not obtaining a notarized affidavit from Auston or an affidavit from defendant describing the evidence and witnesses who had knowledge of the evidence. See *id.* ¶ 28. We remanded the case and directed the circuit court to allow defendant to replead his petition with the assistance of new counsel. *Id.* ¶ 32.

¶ 41 On remand, defendant’s case was again beset by numerous delays and handled by three different APDs over the next seven years. On January 6, 2021, new private counsel entered his appearance for defendant, and on June 12, 2023, nearly 30 years after defendant’s conviction, counsel filed a supplemental petition for postconviction relief, which is the subject of the present appeal, and a Rule 651(c) certificate.

¶ 42 The supplemental petition raised four claims: (1) ineffective assistance of trial counsel for failing to investigate two eyewitnesses, Patricia Ellis and Antoinette Williams; (2) ineffective assistance of trial counsel for failing to challenge the identifications made by Jose A., Davey, Figueroa, and Ramos; (3) cumulative error from counsel’s deficiencies; and (4) actual innocence. Defendant supported his claims with affidavits from Ellis, Williams, Myles, a defense investigator,

and himself, as well as several police reports. Only the first and fourth claims are at issue in this appeal.

¶ 43 In her affidavit, which was sworn and notarized, Ellis testified that she witnessed the shooting. As she looked out the window of her third-floor apartment at Diversey and Leavitt, Ellis saw a burgundy car pull up and park across the street. Several black males exited and walked to the courtyard of her building. Soon thereafter, an SUV with several Hispanic males pulled up. Ellis saw “one of the black males *** approach the SUV and begin shooting into the SUV from the side. That same person then walked around to the back of the SUV and continued shooting into the vehicle.” The SUV then moved forward and crashed into a dumpster, and men exited the vehicle. Ellis only saw one person shoot at the SUV. She “did not get a good look at the shooter’s face” and was unable to identify that person, but described him as a “black male whose complexion was on the darker side” and not “light skinned,” less than 5’10” tall, with short hair and no facial hair. The shooter was wearing a dark-colored jacket that might have been leather. Ellis was interviewed by police who canvassed the building on the day of the shooting, and Ellis believed that she told them “substantially the same thing” as in her affidavit. That initial questioning was the last time she was interviewed regarding the shooting until defendant’s postconviction counsel and investigator spoke with her in May 2021.

¶ 44 Williams averred in her affidavit that she witnessed the shooting. She was on the corner of Diversey and Leavitt waiting for her daughter when four or five cars pulled up in front of the apartment buildings on Leavitt, north of Diversey. “Numerous younger black males” exited the vehicles, and Williams “had a clear view of the group of young men” from where she was standing. The men began hanging out and talking with a few women outside of their vehicles. Williams then

saw a beige Blazer on Leavitt sitting at the stop light on the south side of Diversey. She recognized the Blazer as belonging to a Latin King gang member named “Red.” The Blazer sat through the light for “at least two cycles.” After seeing the Blazer sit at the light, Williams became concerned that “something bad was going to happen” because she knew that the black males were not Latin Kings, but were in Latin King territory.

¶ 45 Williams then saw the Blazer drive up to the group of men, and a Latin King from the Blazer yelled, “King Love.” “At some point after the people in the Blazer exchanged words with the young black men,” Williams “heard a gunshot.” She did not see anyone from the Blazer shoot, but she believed that the initial shot came from the Blazer. Williams dropped to the ground and then saw one of the black males reach into the trunk of a parked car and pull out a gun. The person was “a darker complected black male” who was approximately 5’8” tall. He immediately began shooting at the Blazer, and Williams recalled hearing “a lot” of shots. After the shooting stopped, the Blazer rolled forward and crashed into “the curb or grass area” on the other side of Leavitt. All of the occupants of the Blazer, except one, exited the car. Williams recognized one of the occupants as Figueroa, a Latin King gang member. After the Blazer crashed, the black men “entered their vehicles and immediately drove away.”

¶ 46 Williams was interviewed by private investigator Sergio Serritella, who showed her “a photograph of a line-up that contained a person who was a light-skinned black male,” who was the third from the left. The photograph said “Porter 1” in the lower right-hand corner. Williams averred “with certainty that the light-skinned black male in the photograph was not the individual who committed the shooting.” Williams also did not hear anyone say, “Get the shit,” prior to the

shooting. The first time she ever saw defendant was when “someone” came to interview her in 2019 and showed her a photo of him.

¶ 47 Williams recalled that, “sometime not long after the shooting,” she was “contacted about going to court.” She told the person that she would not go to court and did not want to get involved because she lived in Latin Kings territory and feared retaliation. Williams stated in her sworn and notarized affidavit that she would be willing to testify to the facts contained therein.

¶ 48 Myles averred in his affidavit that he did not testify truthfully at trial when he said the shooter was not defendant, but he did not know who the person was. However, he did know that the shooter was codefendant Auston but did not want to identify him at trial because he and Auston were both members of the Mickey Cobras gang and he feared retaliation. Myles further stated that he no longer belonged to the gang and was a devout Jehovah’s Witness and employed as a truck driver. Myles’ affidavit was sworn and notarized.

¶ 49 Also attached to defendant’s supplemental petition were several police reports. Defendant’s Exhibit 4 was a canvass report recording Ellis’ account of the shooting as:

“Heard about five shots. Went to the window and saw an unknown male black with a dark jacket and pants go up to the victims [sic] vehicle and fire at the rear part. Then went around to the passengers [sic] front side and fired a gun again. There were about ten shots. Then everybody ran in different directions. Says she can’t I.D. the offender.”

¶ 50 Defendant’s Exhibit 5 was a report authored by detectives Schorsch and Johnson detailing a line-up that was presented to Jose A., Figueroa, Davey, Jones, and Williams. The report noted that the first four witnesses “stated that they could not be 100 percent sure if any of the subjects participating in the line-up were in fact involved in the shooting.” However, the report stated that

Williams, “upon viewing the line-up immediately pointed out James Auston as the person who she saw shoot and kill Jose M. Colon and wound Jose A. Colon and Jerry Davey.” Auston was one of five people in the line-up, and defendant was not. The report listed Auston as being a 15-year-old black male, 5’6” tall and weighing 135 pounds.

¶ 51 Defendant also attached an affidavit from private detective Serritella confirming that he interviewed Williams and Ellis in 2021. When shown a photo of defendant, Williams stated that he “did not look like the shooter,” whose complexion was “much darker.” When shown a photo of Auston, Williams “immediately sat up straight, gave an audible gasp, and appeared to be taken aback in a visceral way.” Williams then told Serritella that “when she visualized the events of October 5, 1992, the person she visualizes as the shooter looks like [Auston].” Serritella attached a police photo of Auston to his affidavit, which shows Auston to be a dark-complected black male with short hair. Serritella averred that, during his interview of Ellis, when shown a photo of defendant and asked whether he was the person shooting at the SUV, Ellis “very quickly stated ‘No, no, no, no.’” Ellis told Serritella that the shooter had a darker complexion, like the actor Chadwick Boseman.

¶ 52 Finally, defendant provided his own affidavit averring that his trial counsel never interviewed Williams or Ellis and that the facts contained in his petition were true and correct to the best of his knowledge.

¶ 53 Defendant raised four claims in the supplemental petition, only two of which are at issue in this appeal. First, defendant asserted that trial counsel rendered ineffective assistance by failing to investigate Ellis and Williams. Defendant alleged that both were identified in police reports as witnesses, but neither was interviewed by counsel or subpoenaed to testify at trial. Defendant

argued that counsel performed deficiently by failing to investigate known witnesses whose testimony could have exonerated him, and he contended that he was prejudiced, both individually and cumulatively, by the omission of their testimony at trial. Second, defendant asserted that he was actually innocent, specifically citing Myles' affidavit identifying Auston as the shooter and Williams' and Ellis' affidavits averring that he was not the shooter.

¶ 54 In March 2024, the State filed a motion to dismiss defendant's 1997 amended petition, 2001 supplemental petition, 2014 successive petition, and 2023 supplemental petition. Regarding the 2023 supplemental petition, which contains the only claims addressed in this appeal, the State argued in relevant part that trial counsel made a strategic decision not to call Williams and Ellis and that their affidavits were insufficient to establish defendant's actual innocence because the witnesses were not newly discovered. The State also argued that it was not permissible for defendant to use the same evidence to support an actual innocence claim and a claim for ineffective assistance of counsel. Defendant then withdrew the claims raised in his 2001 supplemental petition and his 2014 successive petition.

¶ 55 At a hearing, defendant presented the same arguments from his 2023 supplemental petition. For its part, the State presented a theory of the case that differed substantially from what it had presented at defendant's trial. The State argued that defendant was convicted on an accountability theory, specifically that defendant's statement, "get the shit," ordered Auston to shoot at the Blazer. The State also argued that its witnesses "testified that [defendant] was not the shooter. He was the person that ordered the co-defendant to shoot." The State therefore argued that witness statements identifying Auston or someone other than defendant as the shooter were cumulative. In particular, the ASA arguing the motion to dismiss stated,

“The jury as the finder of fact and finder of credibility back in 1994 when this occurred made the determination that petitioner was there and was guilty.³ There’s nothing that indicates that the defendant was the shooter. We’re not saying that the defendant was the shooter. *** The defendant was tried on as [sic] an accountability of the person that said, Get the shit, which basically orders Auston to get the gun and to shoot. So what these witnesses say now is cumulative to what the jury heard back then.”

¶ 56 The circuit court dismissed defendant’s petition on September 20, 2024, finding that defendant failed to make a substantial showing of ineffective assistance for failing to investigate Williams and Ellis because counsel presented other witnesses identifying someone else as the shooter and because Williams stated that she would not have testified at trial. The court also found that defendant failed to demonstrate prejudice from the omission of Williams’ and Ellis’ potential testimony because defendant “was not alleged to have been the shooter himself but rather the one who ordered the shooting; he was convicted on an accountability theory.”

¶ 57 As for defendant’s actual innocence claim, the court found that Williams and Ellis were previously discoverable and it therefore did not consider their affidavits as evidence of defendant’s innocence. The court further found that Myles’ affidavit was not newly discovered because Myles actually testified at trial and it would be cumulative because he and other witnesses had already testified at trial that defendant was not the shooter. The court also found that Myles’ new information would not be material because defendant “was not accused as the shooter but rather

³ Although the ASA suggested that defendant was convicted by a jury, the record shows that he was tried at a bench trial.

was the person who ordered the shooting.” Finally, for the same reasons, the court also found that Myles’ testimony would not be conclusive.

¶ 58 Defendant filed a motion for reconsideration, arguing that the court erred by conducting its analysis based on the premise that he had been convicted under an accountability theory when the State never made that argument at trial. Defendant also argued that an accountability theory based solely on the statement, “get the shit,” would have been extremely weak and would have been undercut by Williams’ account that she did not hear anyone say that prior to the shooting. The court denied defendant’s motion. This appeal follows.

¶ 59 The Act allows defendants convicted of criminal offenses to challenge their convictions on grounds of constitutional violations and sets forth a three-stage process for presenting such claims. *People v. Domagala*, 2013 IL 113688, ¶ 32. A petition may be dismissed at the first stage if it is frivolous or patently without merit. *Id.* If it survives to the second stage, counsel may be appointed to represent the defendant, and the State may either answer the petition or file a motion to dismiss. *Id.* ¶ 33. “At this stage, the circuit court must determine whether the petition and any accompanying documentation make a ‘substantial showing of a constitutional violation.’” *Id.* (quoting *People v. Edwards*, 197 Ill. 2d 239, 246 (2001)). If the defendant meets that threshold, he or she is entitled to a third stage evidentiary hearing, where “it is the court’s function to determine witness credibility, decide the weight to be given testimony and evidence, and resolve any evidentiary conflicts.” *Id.* ¶ 34.

¶ 60 Defendant’s petition was dismissed at the second stage. When evaluating a petition at the second stage, the question is “whether the allegations in the petition, liberally construed in favor of the petitioner and taken as true, are sufficient to invoke relief under the Act.” *People v. Sanders*,

2016 IL 118123, ¶ 31. “Since there are no factual issues at the dismissal stage of the proceedings, the question is essentially a legal one, which requires the reviewing court to make its own independent assessment of the allegations of the petition and supporting documentation.” *Id.* (citing *People v. Coleman*, 183 Ill. 2d 366, 388-89 (1998)). Accordingly, our review is *de novo*. *Id.*

¶ 61 Defendant first challenges the dismissal of his claim that counsel rendered ineffective assistance by not investigating Williams and Ellis or calling them to testify at trial. Ineffective assistance of counsel claims are governed by the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Domagala*, 2013 IL 113688, ¶ 36. To prevail on such a claim, a defendant must show both deficient performance and resulting prejudice. *Id.* Specifically, “a defendant must show that counsel’s performance was objectively unreasonable under prevailing professional norms and that there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* (citing *Strickland*, 466 U.S. at 694).

¶ 62 “Trial counsel has a professional duty to conduct ‘reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.’” *Id.* ¶ 38 (quoting *Strickland*, 466 U.S. at 691). This includes the responsibility to “independently investigate any possible defenses.” *Id.* (citing *People v. Kokoraleis*, 159 Ill. 2d 325, 329 (1994)). When it is apparent from the record that counsel had reason to know, from an objective standpoint, that a possible defense was available, the failure to fully investigate that defense can constitute ineffective assistance. *Id.* (citing *Brown v. Sternes*, 304 F.3d 677, 692 (7th Cir. 2002)). “Lack of investigation is to be judged against a standard of reasonableness given all of the circumstances,

‘applying a heavy measure of deference to counsel’s judgments.’” *Id.* (quoting *Kokoraleis*, 159 Ill. 2d at 330).

¶ 63 Defendant argues that he sufficiently alleged that trial counsel performed deficiently by not investigating Williams and Ellis because it was apparent from police reports that they witnessed the shooting and their accounts might have benefitted his defense. Starting first with Williams, defendant notes that the police reports available to counsel revealed that Williams viewed a lineup and “immediately” identified Auston as the shooter. He argues the counsel’s failure to investigate a witness who could have provided such beneficial testimony was unreasonable and violated counsel’s duty to “‘explore all readily available sources of evidence that might benefit their clients.’” *People v. Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42 (quoting *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002)).

¶ 64 The State responds that counsel’s determination of whether to call a witness is a matter of trial strategy that receives substantial deference and it was reasonable for counsel not to investigate Williams because “[t]he trial court found defendant guilty based on his accountability for the shooting” and testimony implicating codefendant Auston would not have undermined the accountability aspect of the case. The State also asserts that Williams’ testimony identifying someone other than defendant as a shooter would have been cumulative of the testimony of Myles, Wallace, and Jones, who each also testified that defendant was not a shooter. See *People v. Dupree*, 2018 IL 122307, ¶ 51 (“Trial counsel’s performance cannot be considered deficient because of a failure to present cumulative evidence.”). The State further contends that Williams’ statement in her affidavit that she feared retaliation if she had become a witness supported counsel’s decision

not to investigate her because “uncooperative witnesses do not always make the best witnesses.”

People v. Saleh, 2020 IL App (1st) 172979, ¶ 61.

¶ 65 We agree with defendant that he made a substantial showing of a constitutional violation. Beginning with the State’s arguments, we first note that, while the decision to *call* a witness might be a matter of trial strategy, the *investigation* of a witness may not be. See *People v. Upshaw*, 2017 IL App (1st) 151405, ¶ 39. Indeed, “an attorney who fails to fully investigate cannot make a sound strategic decision about whom to call.” *Ramirez-Lucas*, 2017 IL App (2d) 150156, ¶ 42. “[S]trategic decisions may be made only after there has been a ‘thorough investigation of law and facts relevant to plausible options’” (*Upshaw*, 2017 IL App (1st) 151405, ¶ 39 (quoting *People v. Gibson*, 244 Ill. App. 3d 700, 703-04 (1993))), and “the failure to interview witnesses may indicate actual incompetence, particularly when the witnesses are known to trial counsel and their testimony may be exonerating” (*id.* (quoting *People v. Davis*, 203 Ill. App. 3d 129, 140-41 (1990))).

¶ 66 Further, although “[t]rial counsel’s performance cannot be considered deficient because of a failure to present cumulative evidence” (*Dupree*, 2018 IL 122307, ¶ 51), Williams’ testimony identifying Auston as the shooter would not have been cumulative. “Evidence is considered cumulative when it adds nothing to what was already before the jury.” *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). First, although Auston was tried with defendant, inexplicably, the State presented no evidence Auston was even at the scene, let alone a shooter. Thus, this is not cumulative.

¶ 67 Second, evidence is not cumulative when it goes to the ultimate issue in the case, such as the identity of the perpetrator. See *id.* at 335-36 (holding that new testimony that “conflicted with the State’s main witnesses on the central issue of who” killed the victim was not cumulative);

People v. Molstad, 101 Ill. 2d 128, 135 (1984) (holding that new testimony contradicting the State's witness placing the defendant at the scene was not cumulative of defendant's alibi testimony because it went to the ultimate issue of who was present at the time of the attack); see also *People v. Coats*, 2021 IL App (1st) 181731, ¶ 34 (applying *Molstad*'s ultimate issue principle to a postconviction claim of ineffective assistance of counsel). Williams' testimony contradicting the State's witnesses regarding who committed the shooting would not have been cumulative because it went to the ultimate issue in the case: the identity of the shooter or shooters.

¶ 68 The State's remaining arguments, that counsel acted reasonably in not investigating Williams because she might not have been a good witness and because her identification of Auston as the shooter would not have negated defendant's guilt on an accountability basis, both suffer from the same flaw: they require us to speculate as to the reasons for counsel's decision not to investigate Williams. "[J]ust as a reviewing court should not second-guess the strategic decisions of counsel with the benefit of hindsight, it should also not construct strategic defenses which counsel does not offer." *People v. Popoca*, 245 Ill. App. 3d 948, 959 (1993). The State does not point to any evidence in the record suggesting that counsel chose not to investigate Williams for these reasons, and we do not see any. In such a situation, dismissal at the second stage is inappropriate; rather, the actual reasons for counsel's decision not to investigate the witness should be uncovered at a third-stage evidentiary hearing, after which the court can make a better determination of the reasonableness of counsel's actions. See *People v. Willingham*, 2020 IL App (1st) 162250, ¶ 48 (holding that, when "counsel did not call witnesses who claim they would have supported [the defendant's] self-defense narrative, and the record does not reflect any rationale for this failure," an evidentiary hearing was necessary to uncover any tactical explanation for

counsel's actions); *People v. Johnson*, 2019 IL App (1st) 153204, ¶ 46 (remanding for a third-stage evidentiary hearing when the record did not show a strategic reason for counsel's decision not to investigate a potentially exculpatory witness); see also *People v. Cabrera*, 326 Ill. App. 3d 555, 564-65 (2001) ("When the record is unclear concerning whether trial counsel's decision not to call exculpatory witnesses was a matter of counsel's trial strategy or counsel's incompetence, the defendant is entitled to a postconviction evidentiary hearing on that issue.").

¶ 69 The State also speculates that counsel consciously chose not to pursue Williams as a witness because she implicated a codefendant and the court found defendant guilty on an accountability basis. However, the State did not try him under such an accountability theory. Additionally, there is no evidence that the court found him guilty under such a theory. The court never mentions accountability in its ruling. Rather, the court explained that the witnesses testified that defendant was at the scene and said "get the shit" and several witnesses identified defendant as having been one of the shooters. The court further stated: "There is no question that you were at the scene on the time and place in question. The question is did you say the words that were said to have been said and did you subsequently have a gun and approach the vehicle from behind and fire additional shots into that vehicle. The testimony is that you did." Thus, we reject the State's argument.

¶ 70 Further, at the time counsel was investigating the case, there was no indication that the State would try defendant on an accountability theory. Indeed, the State's indictment alleged that defendant actually discharged a firearm causing or attempting to cause the death of the Blazer's occupants, without any accountability language or citation to section 5-2 of the Criminal Code of 1961 (Ill. Rev. Stat. 1992, ch. 38, ¶ 5-2), which sets forth the circumstances in which a person

becomes legally accountable for the actions of another. While the State was not required to allege an accountability theory in the indictment to allow it to pursue that theory at trial (see *People v. Ceja*, 204 Ill. 2d 332, 361 (2003)), the absence of such allegations left counsel with no basis to assume the State would proceed on an accountability theory. To the contrary, the indictment specifically identified defendant as a shooter, making evidence potentially countering that allegation material and worth pursuing.

¶ 71 The State cites *People v. Evans*, 2017 IL App (1st) 143268, and *People v. Henry*, 2016 IL App (1st) 150640, as supporting its position that it was reasonable for counsel to decline to investigate Williams, but we find both distinguishable. The defendant in *Evans* argued that counsel rendered ineffective assistance by not investigating two witnesses who would have testified that they saw people fleeing the scene of a shooting and that the defendant was not among them. *Id.* ¶¶ 14, 17. But both witnesses “would have been of little value to the defense” because neither saw the shooting and their accounts did not materially conflict with the testimony of the State’s witnesses. *Id.* ¶ 48. In other words, the testimony would have been either immaterial or cumulative. *Id.* ¶¶ 48-49. Here, by contrast, Williams would offer noncumulative, directly exculpatory testimony that defendant was not the shooter.

¶ 72 *Henry* involved a similar claim, but the court found that the record indicated that counsel did investigate the alibi witnesses, thereby failing to establish a failure to investigate. *Henry*, 2016 IL App (1st) 150640, ¶ 59. Further, the proffered accounts could have been consistent with defendant having committed the crime, making it reasonable for counsel to forego offering them as witnesses. *Id.* at ¶ 64. Here, on the other hand, defendant’s petition and Williams’ affidavit

present firsthand observations from a neutral witness directly negating defendant's identity as the shooter, and nothing in the record contradicts it.

¶ 73 We instead find that this case aligns better with *People v. Makiel*, 358 Ill. App. 3d 102 (2005), and *People v. Bolden*, 2014 IL App (1st) 123527. In *Makiel*, the court found defendant's allegation that trial counsel failed to interview or subpoena a potential alibi witness was un rebutted and "raised factual questions as to the nature and extent of the investigation undertaken by defense counsel prior to trial." *Makiel*, 358 Ill. App. 3d at 108. *Bolden* similarly held that the defendant made a substantial showing of deficient performance when he alleged that counsel failed to investigate potentially exculpatory witnesses and counsel's rationale for not investigating those witnesses was not apparent from the record. See *Bolden*, 2014 IL App (1st) 123527, ¶¶ 46-47.

¶ 74 In this case, a police report in the record reflected that Williams witnessed the shooting and immediately identified Auston as the shooter. Defendant further averred in his affidavit that his trial counsel never investigated Williams prior to trial. Given the absence of evidence in the record revealing a reasonable explanation for counsel's decision not to investigate her, we conclude that defendant sufficiently alleged deficient performance as to Williams to proceed to the third stage. See *Bolden*, 2014 IL App (1st) 123527, ¶ 46; *Makiel*, 358 Ill. App. 3d at 108.

¶ 75 Similarly, although the canvass report recording Ellis' account of the shooting reflected that she "can't I.D. the offender," the fact remains that she was a disinterested witness who observed the shooting. There was nothing in her statement indicating that her story would not have been helpful, and, as evidenced by her affidavit, she might have provided beneficial information. Indeed, she averred that the shooter was a black male who was less than 5'10" tall, with short hair and no facial hair, "whose complexion was on the darker side." Defendant is 6'1" or 6'2" and has

light-colored skin, and photos of the line-up also show that defendant had facial hair at that time. Further, according to Serritella, when shown a photo of defendant and asked if he was the shooter, Ellis quickly stated, “No, no, no, no.”

¶ 76 The State argues that it was reasonable for counsel not to investigate Ellis and to instead focus on other witnesses because Ellis was further from the shooting and only saw the second shooter, as evidenced by her statement in the canvass report that she heard shooting and then went to window, where she saw someone firing into the Blazer. The State further contends that, as with Williams, Ellis’ testimony that someone other than defendant was the shooter would have been cumulative of the testimony of Myles, Wallace, and Jones. This latter argument fails for the same reason as it did with Williams: Ellis could have provided testimony regarding the identity of the shooter, the ultimate issue in the case, thereby rendering her account non-cumulative. See *Ortiz*, 235 Ill. 2d at 335-36. Further, the argument that Ellis only saw the second shooter does nothing to support the State’s argument because the State’s witnesses at trial testified that defendant was the second shooter. Thus, Ellis’ testimony on that issue would have been particularly relevant. Accordingly, as with Williams, we conclude that defendant made a substantial showing that counsel performed deficiently in not investigating Ellis, a disinterested witness who would have testified that defendant was not a shooter. See *Makiel*, 358 Ill. App. 3d at 108.

¶ 77 As for prejudice, defendant argues that we should consider the cumulative effect of counsel’s failure to investigate Williams and Ellis, and we agree that such an approach is appropriate in this case. See *People v. Hill*, 2025 IL App (1st) 230604, ¶ 67 (considering the cumulative prejudicial effect from multiple deficiencies). When conducting this analysis, we focus

on “the value of the evidence that was not presented at trial and the closeness of the evidence that was presented.” *People v. Morris*, 335 Ill. App. 3d 70, 79 (2002).

¶ 78 Defendant contends that his allegations that counsel failed to investigate two disinterested witnesses who could have contradicted the State’s witnesses and testified that he did not shoot the victims were sufficient to demonstrate prejudice under *Strickland*, relying on *People v. Brown*, 2022 IL App (1st) 191628-U, and *People v. Butcher*, 240 Ill. App. 3d 507 (1992). We agree.

¶ 79 In *Brown*, the defendant alleged that counsel unreasonably failed to investigate two witnesses who would have testified that he was not the shooter and that the shooter’s physical characteristics did not match his own. *Brown*, 2022 IL App (1st) 191628-U, ¶ 80. The only evidence of the defendant’s guilt was the testimony of three witnesses: one stated that he “wasn’t too for sure” when he viewed the defendant in a lineup; another told police on the night of the shooting that he had not seen the shooter; and the third, according to the new witnesses, was the actual shooter. *Id.* ¶ 82. This court held that a third-stage evidentiary hearing was warranted because the new witnesses’ “affidavits suggest that they would have offered first-hand eyewitness testimony of the incident that would have directly contradicted the testimony of the State witnesses.” *Id.*

¶ 80 *Butcher* presented a similar scenario in which the State’s witnesses provided inconsistent descriptions of the alleged assailant that also conflicted with the physical characteristics of the defendant. *Butcher*, 240 Ill. App. 3d at 509. In his defense, the defendant presented a witness who testified that the defendant was not one of the two assailants and that both robbers’ skin complexions and hair colors differed from the defendant’s. *Id.* at 510. On direct appeal, the defendant argued that trial counsel should have subpoenaed and secured the testimony of two

additional witnesses who could have corroborated the defense witness' account of the robbery. *Id.* This court agreed and granted a new trial, finding that there was no conceivable strategic reason for not producing the witnesses and that there was a reasonable probability that the testimony of the new witnesses could have resulted in a different outcome when the State's case hinged entirely on the witness identifications. *Id.*

¶ 81 The State attempts to distinguish *Brown* and *Butcher* on the grounds that trial counsel in those cases had presented less evidence than defendant's counsel did in this case, with counsel in *Brown* presenting only a single witness who did not see the crime and counsel in *Butcher* presenting one eyewitness but without further corroboration. The State notes that defendant's counsel here called three witnesses who testified that defendant did not shoot at the victims. However, these arguments go to deficiency, rather than prejudice, and we have already recognized that counsel may perform deficiently by not investigating witnesses who could refute the testimony of the State's witnesses regarding the perpetrator's identity, even if similar evidence was presented at trial. See *Ortiz*, 235 Ill. 2d at 335; *Bolden*, 2014 IL App (1st) 123527, ¶ 46; *Makiel*, 358 Ill. App. 3d at 108.

¶ 82 We find that defendant made a substantial showing that he was prejudiced by counsel's alleged deficient performance. The evidence against defendant consisted solely of the testimony of the four surviving victims. All four testified that they heard defendant tell another person to "get the shit," but only Jose A. and Figueroa testified that defendant had a firearm, and only Figueroa testified that he saw defendant actually shoot at the Blazer's occupants. Further, the witnesses' descriptions of the person whom they identified as defendant differed. Jose A. and Figueroa testified that defendant did not have any facial hair, Davey claimed that defendant had a mustache,

and Ramos likewise testified that defendant had a mustache, but confusingly explained that it was on defendant's chin. Additionally, Ramos, Jose A., and Figueroa each acknowledged that they initially identified a person named "Hodgey" as the second shooter, whom they claimed at trial was defendant. They all described Hodgey as a dark-skinned black male, and Ramos added that Hodgey was around 5'5" or 5'6" tall and weighed around 140 or 145 pounds, attributes that much more closely matched codefendant Auston than defendant. The witnesses' accounts also differed as to the number of people standing on the corner, ranging from 10 to 25.

¶ 83 Defendant presented three witnesses who testified that he did not shoot the victims. While the testimony of Wallace differed from all of the other witnesses' testimony in several key respects that diminish her reliability, most notably regarding the number of shooters and the movement of the Blazer, the accounts of Myles, Jones, and defendant were remarkably consistent in their description of the sequence of events and defendant's actions. Regarding the approach of the vehicle, Myles, Jones, and defendant all recounted that the suspicious beige Blazer sat through a full light cycle at the intersection of Diversey and Leavitt with its headlights turned off before pulling up to the crowd. Myles and defendant both also recalled an earlier sighting of a white Blazer in the area whose driver surveyed the scene before departing, and Jones and defendant estimated the crowd at roughly 24 to 30 people. Furthermore, Myles and Jones provided matching accounts of the brief verbal exchange immediately preceding the shooting, noting that an occupant of the Blazer issued a gang-related greeting involving "King love" and questioned why the group was gathered, to which a bystander responded that they were "just talking" or "just standing here."

¶ 84 The accounts are equally consistent concerning the shooter's appearance, the mechanics of the shooting, and the ultimate exculpation of defendant. Myles and Jones independently described

the primary shooter as wearing a black jacket and black hat and established that he approached from outside the main group, with Myles noting that he emerged “from the bushes” and Jones recalling that he “jumped off the curb.” Both witnesses also described a similar volume of fire, with Jones estimating 15 to 16 rounds and Myles stating the shooter emptied his 9mm clip, and both observed the Blazer coast into the dumpster as the shooting stopped. Both also testified that defendant never possessed or fired a weapon, never ordered anyone to “get the shit,” and actively moved away as the threat materialized. Myles also observed defendant walking away as the Blazer pulled up and running toward Clybourn Avenue once shooting began, which directly matched Jones’ testimony that defendant ran past his hiding spot behind a parked car—a detail defendant explicitly confirmed from his own vantage point while fleeing.

¶ 85 As for Wallace, her testimony contained undeniable physical and factual discrepancies—most notably, her claim that the Blazer reversed into the dumpster rather than rolled forward, her flawed explanation that police relocated the dumpster, her description of two shooters rather than one, and her assertion that defendant “just stood there” rather than fleeing—but it was consistent with the other defense witnesses on key exculpatory facts. Notably, Wallace corroborated that defendant was not a shooter, never possessed a weapon, and did not command anyone to “get the shit.” Her account further aligns with the other witnesses by describing a gunman in a black jacket and hood and identifying another individual, specifically a Vice Lord named “Jordan,” as a shooter. Wallace’s identification of a Vice Lord as one of the shooters was consistent with Davey’s statement to Officer Bretz that the shooters were Vice Lords.

¶ 86 As set forth in their respective affidavits, Williams’ and Ellis’ accounts of the shooting were generally consistent with those of the defense witnesses. Ellis and Williams directly

corroborate that the Blazer sat through multiple light cycles before approaching the group on the corner of Diversey and Leavitt, a single gunman fired multiple rounds into the Blazer, and the vehicle rolled forward into a dumpster or curb area after the shooting began. Most importantly, both affiants describe the shooter as a darker-complected black male under 5'10" tall—a description that matches Jones' trial testimony of a short, dark-skinned 15- or 16-year-old shooter, while explicitly ruling out defendant, who testified to being 6'1" or 6'2" tall and light-skinned. Furthermore, neither Ellis nor Williams heard the command "get the shit," Williams corroborated Myles' testimony that someone from the Blazer fired a single shot at the start of the shooting, and Williams confirmed that the defendant was not the gunman and told investigator Serritella that she remembered the shooter looking like Auston, who was listed as 5'6" and 135 pounds. As noted earlier, Auston's height, weight, and skin complexion match the victims' description of Hodgey, whom three of the surviving victims initially identified as the shooter they later claimed was defendant.

¶ 87 Thus, we agree with defendant that he made a substantial showing of prejudice from counsel's allegedly deficient performance in failing to investigate Williams and Ellis to advance this claim to the third stage.

¶ 88 We must address the State's argument that, even if we were to find a sufficient showing of prejudice, the testimony from Williams and Ellis would not refute defendant's guilt on an accountability theory based on his statement, "get the shit." Setting aside the fact that Williams did indeed dispute that anyone made such a statement, the State did not present an accountability theory at trial and instead exclusively argued that defendant was guilty because he actually shot the victims. Because it did not argue accountability at trial, it cannot do so now. See *People v.*

Robinson, 2020 IL 123849, ¶ 75 (refusing to consider, in the context of an actual innocence claim, the State’s argument that a witness affidavit would not counter an accountability theory when the “State never introduced an accountability theory into the case” and defendant “was not charged or indicted under such a theory, and accountability was not argued at trial”); *People v. Rosalez*, 2021 IL App (2d) 200086, ¶ 149 (same); *People v. Vargas*, 2022 IL App (1st) 220106-U, ¶ 43 (same, and stating, when “the State never wavered from the theory that defendant was the shooter [at trial], *** factoring in an accountability theory to determine how a hypothetical jury would weigh the new evidence alongside the existing trial evidence is improper”). Thus, we reject the State’s argument.

¶ 89 In his second issue, defendant contends that the circuit court erred in dismissing his actual innocence claim. To establish such a claim, a defendant must present evidence that is “(1) newly discovered, (2) material and not cumulative, and (3) of such conclusive character that it would probably change the result on retrial.” *Robinson*, 2020 IL 123849, ¶ 47 (citing *People v. Edwards*, 2012 IL 111711, ¶ 32). Evidence is considered newly discovered if it was discovered after trial and the defendant could not have discovered it earlier through the exercise of due diligence. *Id.* (citing *People v. Coleman*, 2013 IL 113307, ¶ 96). Evidence is material if it is both relevant and probative of the defendant’s innocence. *Id.* (citing *Coleman*, 2013 IL 113307, ¶ 96). “Noncumulative evidence adds to the information that the fact finder heard at trial.” *Id.* (citing *Coleman*, 2013 IL 113307, ¶ 96). The conclusive character element is the most important element of an actual innocence claim (*id.* (citing *Coleman*, 2013 IL 113307, ¶ 96)) and “refers to evidence that, when considered along with the trial evidence, would probably lead to a different result” (*id.* (citing *People v. Washington*, 171 Ill. 2d 475, 489 (1996))). “Ultimately, 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." *Id.* ¶ 48 (citing *Coleman*, 2013 IL 113307, ¶ 97). "Probability, rather than certainty, is the key in considering whether the fact finder would reach a different result after considering the prior evidence along with the new evidence." *Id.*

¶ 90 In his supplemental petition, defendant primarily based his actual innocence claim on Myles' statement in his affidavit that he is now willing to identify the shooter as Auston. Defendant also argued that, should we find that Williams' and Ellis' accounts were not available to counsel prior to trial and were instead newly discovered, we should consider their affidavits as further evidence of his actual innocence. He also argues on appeal that, within this claim, we should consider Auston's "statement" from 1997 claiming that he was not involved in the shooting.

¶ 91 First, Auston's 1997 statement cannot be a basis for defendant's actual innocence claim. Even if we overlooked the fact that it was not properly notarized, Auston's statement was insufficient because he did not state that he would have testified to these facts. The absence of such a statement renders an affidavit insufficient to support an actual innocence claim. See *People v. Jones*, 399 Ill. App. 3d 341, 366 (2010). Additionally, neither defendant's 1997 amended petition nor his 2023 supplemental petition argued that Auston's statement demonstrated defendant's actual innocence. Instead, defendant cited the statement as support for his claim that he was prejudiced by trial counsel's failure to sever his and Auston's trials, and his actual innocence claim was based solely on the affidavits from Myles, Williams, and Ellis. Accordingly, we find that defendant also forfeited this argument. See *People v. Garcia*, 2022 IL App (1st) 210040, ¶ 31 ("We cannot excuse forfeiture caused by a defendant's failure to include an issue in his postconviction

petition.”); see also *People v. Williams*, 2020 IL App (1st) 162512, ¶ 84 (“[A] reviewing court may affirm on any basis found in the record.”).

¶ 92 We also find that Ellis was not newly discovered, as her account was present in a police canvas report prepared at the outset of the case, demonstrating that she was discoverable. See *People v. Flournoy*, 2024 IL 129353, ¶ 83 (concluding that a witness’ proffered testimony was not new when, among other things, “[p]olice reports appended to petitioner’s successive postconviction petition make clear that [the witness] was known to police and spoke with police early in the investigation”); *People v. Jackson*, 2021 IL 124818, ¶ 42 (same); see also *Robinson*, 2020 IL 123849, ¶ 47.

¶ 93 With regard to Williams, defendant argues that the relevant question is not whether he could have learned of her account, but rather, when he could have presented it at trial. He contends that her statement that, at the time of trial, she “would not go to court” or get involved in the case due to a fear of retaliation renders her account new. For support, he relies on a variety of cases, including cases in which witnesses were discoverable prior to trial and either testified at trial or provided statements but then later recanted and offered a different account in postconviction proceedings (see, e.g., *People v. Morgan*, 212 Ill. 2d 148, 154-55 (2004), *People v. Ramos*, 2024 IL App (1st) 230961-U, ¶ 42), and cases in which a witness refused to testify due to fear of retaliation (see, e.g., *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 137).

¶ 94 However, our supreme court has held that, even when a witness informed the defendant prior to trial that they would have refused to testify if called, the witness is not considered to have been unavailable or newly discovered unless the defendant made an attempt to subpoena the witness to testify. In *Edwards*, 2012 IL 111711, ¶ 12, the defendant raised an actual innocence

claim based on affidavits from two alibi witnesses, a mother and daughter. The mother averred in her affidavit that, “although defense counsel contacted her numerous times to try to convince her to testify on petitioner’s behalf, she refused to do so and refused to allow her daughter to do so.” *Id.* The supreme court held, despite the witnesses’ refusal to testify, “where there was no attempt to subpoena [them], and no explanation as to why subpoenas were not issued, the efforts expended were insufficient to satisfy the due diligence requirement” of the newly discovered element of the defendant’s actual innocence claim. *Id.* ¶ 37; see also *Rosalez*, 2021 IL App (2d) 200086, ¶ 120 (reading *Edwards* as requiring a defendant “to respond to the witnesses’ refusal to testify in an obvious manner, *i.e.*, with a subpoena”).

¶ 95 Thus, although Williams stated that she would not have testified at defendant’s trial, we find that she was not unavailable and therefore, not newly discovered because she was present in police reports (see *Flournoy*, 2024 IL 129353, ¶ 83) and defendant did not make an effort to compel her to testify. This conclusion that Williams was discoverable in the context of defendant’s ineffective assistance claim and not newly discovered for his actual innocence claim is consistent with the principle that evidence cannot be the basis of both an actual innocence claim and a claim of constitutional error, such as ineffective assistance of counsel, because it cannot be simultaneously “new” for the actual innocence claim and discoverable for the ineffective assistance claim. See *Flournoy*, 2024 IL 129353, ¶ 73.

¶ 96 Defendant’s actual innocence claim therefore rests solely on Myles’ affidavit averring that he did not testify truthfully at defendant’s trial when he stated that he did not know the identity of the shooter and instead, knew that Auston was the shooter, but did not want to identify him because he and Auston were both members of the Mickey Cobras gang and he feared retaliation. Myles

further averred that he no longer belongs to the gang and knows with certainty that defendant was not involved in the shooting and would be willing to testify.

¶ 97 The State argues that this evidence is not newly discovered because Myles testified at trial and there similarly exonerated defendant. However, Myles' new account is essentially a recantation of his prior testimony that he could not identify the shooter, and recantations generally qualify as newly discovered evidence when the defendant did not have evidence available at the time of trial to demonstrate that the witness was lying. See *People v. Ayala*, 2022 IL App (1st) 192484, ¶ 138. There is nothing in the record suggesting that defendant could have known at the time of trial that Myles could specifically identify Auston as the shooter. Thus, Myles' new information is newly discovered.

¶ 98 Myles' specific identification of Auston is material because it identifies someone other than defendant as the perpetrator, making his account both relevant and probative of defendant's innocence. See *People v. White*, 2014 IL App (1st) 130007, ¶ 24 (finding that a witness' account was material when "he aver[red] that defendant is not the man who shot [the victim]"). Although the State again argues that this evidence would not be material because it does not negate defendant's guilt under an accountability theory, the State may not argue accountability now when it did not do so at trial. See *Robinson*, 2020 IL 123849, ¶ 75.

¶ 99 We also find that Myles' identification is not cumulative because it goes to the ultimate issue of the identity of the shooter (see *Ortiz*, 235 Ill. 2d at 335-36), and because no evidence was presented at trial identifying Auston as the shooter (see *Rosalez*, 2021 IL App (2d) 200086, ¶ 129). Indeed, inexplicably, despite being a codefendant who was tried at the same time as defendant, Auston's name was never mentioned in any testimony at trial.

¶ 100 The State’s cases do not compel a different conclusion. In *People v. Evans*, 2017 IL App (1st) 143268, ¶ 37, the witness did not see the shooting and her testimony was therefore “of limited value in determining whether [the defendant] was the shooter.” In *People v. Anderson*, 401 Ill. App. 3d 134, 141 (2010), the defendant was convicted of murder and attempted murder on an accountability theory and this court concluded that a codefendant’s affidavit corroborating the defendant’s trial testimony that the defendant did not know that there would be a shooting was not exculpatory. However, *Anderson*’s analysis was muddled by its incorrect application of a “total vindication” or “exoneration” standard. See *Robinson*, 2020 IL 123849, ¶ 55 (recognizing that the supreme court specifically rejected such a standard in 2001). Further, because the ultimate issue in that case was the defendant’s intent and knowledge of the circumstances, this court’s finding that corroborative testimony on those issues was cumulative appears to be contrary to the supreme court’s rulings in *Ortiz* and *Molstad*.

¶ 101 In *People v. Horton*, 2025 IL App (1st) 221286-U, ¶¶ 17-19, where the defendant was convicted of murder despite his claim of self-defense, this court ruled that a new witness account corroborating the defendant’s assertion that the victim was armed was cumulative of the defendant’s trial testimony. However, that decision is distinguishable because the new witness did not see the shooting and therefore, could only speculate as to the ultimate self-defense issue. *Id.* Lastly, in *People v. Sawyer*, 2021 IL App (1st) 182123-U, ¶¶ 6-11, the defendant was convicted of armed habitual criminal after firearms were thrown out of the vehicle he was driving while fleeing police. To support a postconviction actual innocence claim, the defendant attached affidavits from two codefendants who were also in the vehicle, averring that the defendant never possessed the weapons and had no knowledge of their presence. *Id.* ¶¶ 18-19. This court concluded

that the affidavits were “cumulative and not sufficiently conclusive” (*id.* ¶ 34), but our analysis did not differentiate between the two elements and instead seemed to focus entirely on the conclusiveness element, without any discussion of the cumulative nature of the evidence (see *id.* ¶¶ 34-36). We therefore find that decision unpersuasive.

¶ 102 The final element is whether Myles’ account “places the evidence presented at trial in a different light and undercuts the court’s confidence in the factual correctness of the guilty verdict.” *Coleman*, 2013 IL 113307, ¶ 97. In making this determination, we “in effect predict[] what another jury would likely do, considering all the evidence, both new and old, together.” *Id.* We agree with defendant that Myles’ affidavit places the trial evidence in a different light and undermines the court’s confidence in the judgment of guilt. Myles’ trial account was consistent with that provided by defendant at trial. Further, Auston’s physical description is similar to that of Hodgey, whom three of the four surviving victims initially identified as the shooter with significant corroboration from the new accounts from Williams and Ellis, provides compelling evidence of defendant’s innocence and undermines our confidence in the verdict.

¶ 103 For its part, the State does not challenge defendant’s argument that Myles’ affidavit is conclusive. Rather, the State admits that “[d]efendant’s affiants support the proposition that defendant was not the shooter they saw.” Instead, the State argues only that the affidavit does not undermine defendant’s guilt under an accountability theory. However, as addressed previously, the State cannot now argue that defendant is guilty based on accountability. See *Robinson*, 2020 IL 123849, ¶ 75. We reject the State’s argument.

¶ 104 In sum, we conclude that defendant made a substantial showing that Myles’ new account is conclusive evidence of his innocence. Accordingly, we reverse the circuit court’s dismissal of

defendant's claims that counsel rendered ineffective assistance by failing to investigate Williams and Ellis and that he is actually innocent, and we remand for further proceedings on both claims.

¶ 105 As a final matter, as we did when this case last appeared in this court 12 years ago, we must again comment on the lamentable delays that have plagued this case. Defendant was convicted in 1993 and initiated this postconviction proceeding in 1996. Three decades later, what is essentially defendant's initial petition is still being litigated—and is only just now completing the second stage of proceedings. While we understand that the investigation of new witnesses takes time, the 26 years that it took to produce the operative supplemental petition is obviously beyond the pale. It appears that fault lies in more than one place—primarily with multiple defense attorneys requesting numerous continuances and partly with the court for granting so many. But regardless of fault, we implore the parties and the circuit court to expeditiously advance defendant's petition to its conclusion so that he may get the finality that justice requires.

¶ 106 Reversed and remanded.