No. 131565

IN THE
SUPREME COURT OF ILLINOIS

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

BRIEF OF RESPONDENT-APPELLEE PEOPLE OF THE STATE OF ILLINOIS

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

MICHAEL L. CEBULA
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-6952
eserve.criminalappeals@ilag.gov

Counsel for Respondent-Appellee People of the State of Illinois

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TABLE OF CONTENTS

Page(s)

POINTS AND AUTHORITIES

NATURE OF THE CASE

Petitioner was convicted of armed robbery and murder in 1989. He appeals the denial of his third successive postconviction petition following a third-stage hearing. No issue is raised on the pleadings.

ISSUES PRESENTED

1. Whether, under this Court's longstanding precedent, the circuit court's judgment is reviewed for manifest error.

2. Whether, as the lower courts held, petitioner's actual innocence claim is meritless because it is based on old, cumulative evidence that would not change the result of petitioner's trial.

3. Whether petitioner's challenge to the eyewitnesses' testimony under *Neil v. Biggers*, 409 U.S. 188 (1972), is barred and meritless.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315, 612, and 651(d). This Court allowed petitioner leave to appeal on May 28, 2025.

STATEMENT OF FACTS

On the night of August 9, 1986, petitioner, Wayne Millighan, and a third man robbed a grocery store and, during that robbery, petitioner fatally shot Nazih Youssef. R15-22, 1252-66.[1] Petitioner and Millighan were

[1] "C_" and "CI_" refer to the common law record and impounded record; "R_" and "SuppR_" refer to the report of proceedings and supplemental report of proceedings. "Pet. Br. _" and "A_" refer to petitioner's opening brief and appendix.

identified by eyewitnesses and charged with first degree murder and armed robbery. CI610.

A. Pre-Trial Rulings

After his arrest, petitioner told police (1) he was with Millighan in the store on the night in question but was not there during the robbery, and (2) he went to the store often and "the people there should know him." R754. Millighan moved to sever their trials because petitioner's statement would "corroborate testimony given by the State witnesses and would tend to bolster their credibility" regarding their ability to identify the perpetrators. R749-50, 755. Prosecutors responded that they would use the statement only to impeach petitioner if he testified contrary to his statement. R751.

Millighan's counsel argued that the trials nevertheless should be severed because Millighan intended "to point the finger" at petitioner as the culprit. R755-56. The trial judge acknowledged the "conflict" that Millighan's intended defense presented and severed the trials. R757.

Meanwhile, petitioner moved to quash his arrest. At the hearing on petitioner's motion, Michael Ballard, a Chicago police officer, testified that store employees said the shooter was a black male between 25 to 35 years old, was 5'6" to 5'8" tall, weighed 165 to 190 pounds, and had a mustache, an earring in his left ear, a black leather jacket, and a hat. R711-12, 720-21. During the investigation, Ballard spoke with people in the neighborhood. R714-15. A man who wished to remain anonymous said "Iceberg" was responsible for Youssef's murder and Iceberg's real name was Michael McCoy

(*i.e.*, petitioner); the man also provided a description of petitioner that was "very close" to the eyewitnesses' description of the shooter. R715-16, 722-24. Two days after the shooting, police arrested petitioner. R716-17. At that time, petitioner (a black male) was 24 years old, 5'9" and 170 pounds, had an earring in his left ear, and was wearing a black leather jacket and hat. R726-29. The court denied petitioner's motion to quash his arrest. R742.

B. Petitioner's Convictions and Sentence

At petitioner's jury trial in 1989, Hussein Awwad testified that he worked at M&R Food and Liquor Store (M&R), a small grocery store owned by Youssef. R1240-41. On April 6, 1986 (three days before Youssef was murdered), Millighan was hired to work at the store. R1242-44. Youssef fired Millighan after only one day because Millighan ignored his responsibilities and paid too much attention to employees who moved cash from the register to the back office. R1244-46.

Awwad was working at the store on the night of the shooting with Youssef, Mohammed Ghrayyib, and Achmed Hassan. R1247. Around 11:00 or 11:30 p.m., petitioner and Millighan came into the store; Awwad was familiar with petitioner because petitioner had been in the store on several other occasions. R1247-49. Petitioner and Millighan bought gin and began "bothering the customers, especially the women." R1249-50. Their behavior was so bad that Awwad told Youssef they should call the police, but Youssef was worried that would escalate the situation. R1250. Awwad spoke with petitioner during this time and petitioner said that one day he (petitioner)

would own the store. R1288-89. Millighan and petitioner left after 30 minutes (*i.e.*, approaching midnight). R1251. Shortly thereafter, around 1:00 a.m., Awwad was in the stockroom when he heard a loud noise and Ghrayyib began calling for him. R1251-52. Awwad walked to the front of the store and saw Millighan holding a gun and "announcing a stick-up." R1252-54. Millighan told Ghrayyib to open the register and then started taking cash from the register. R1256. Awwad then heard a gunshot in another area of the store. R1256-57. Moments later, petitioner walked out of that section of the store holding a .38 caliber revolver and a bag that employees used to store cash in the back office. R1257-58. Petitioner walked right in front of Awwad, "about four to five feet away." R1257-58, 1282. Millighan, petitioner, and a third man then left the store. R1259.

Awwad went to the back office and found Youssef on the floor, covered in blood; Awwad called the police. R1259-61. A couple days later, Awwad viewed a lineup and identified petitioner as the shooter. R1262-66.

Similar to Awwad, Ghrayyib (the second M&R employee) testified that around 11 p.m., petitioner and Millighan came into the store and bought gin; Ghrayyib knew Millighan because he had worked briefly at the store. R8-10. Petitioner and Millighan stayed for 30 minutes, bothering women in the store, then they left. R10-11. Shortly thereafter, around 1:00 a.m., Ghrayyib was standing at the register when he heard a loud noise from the front of the store; Millighan walked into the store with petitioner and a third man. R13-

16, 44. Millighan had a gun and said, "this is a stick up"; Ghrayyib yelled for Awwad, who came to the register. R17. Millighan told Ghrayyib to open the register. *Id*. Meanwhile, petitioner walked to the back of the store. R18.

While Millighan was taking cash from the register, Ghrayyib heard a gunshot. *Id*. Moments later, petitioner walked out of the area of the store where Ghrayyib had heard the gunshot; petitioner was holding a revolver and a bag that employees used to store cash. R19-20. The store was "well lit" and Ghrayyib could see petitioner's face "clearly" as he walked out of the store with Millighan and another man. R12, 20, 47.

A day or two after the shooting, Ghrayyib viewed a black and white photo array; he recognized petitioner in the array but said he preferred to see color photos (which the police did not have). R34-42, 180, 182, 209. A day or so later, he viewed a lineup and identified petitioner as the shooter. R25-27.

Hassan (the third M&R employee) testified that Millighan and petitioner came into the store around 11 p.m. and bought gin; they stayed in the store for 20 or 30 minutes, bothering customers. R58-60. Around 1:00 a.m., Hassan was in the store's cooler when he heard a gunshot; he waited awhile, then went to Yousef's office and saw that Yousef had been shot. R60-61. Hassan identified petitioner in a photo array two days after the shooting and, on a later day, identified him in a lineup. R63-71.

A detective testified that shortly after the shooting, he spoke with Ghrayyib and Awwad, who said the shooter was a black male between 25 to

30 years old, 5'6" to 5'8" tall, weighed 160 to 190 pounds, had a mustache, and wore a gold earring in his left ear, a hat, and a black leather jacket. R1208. Officer Ballard testified that based on conversations with people in the neighborhood, police began looking for a man known as "Iceberg," which was petitioner's nickname. R141-42, 160-61. Ballard testified that police arrested petitioner two days after the shooting; at that time, petitioner was 24 years old, 5'9" and 170 pounds, and he had a gold earring in his left ear, a tattoo that said "Iceberg," and a goatee. R147-50.

Rick Roberts, a forensics expert, testified that he performed a "preliminary" test of petitioner's shoes. R96. That preliminary test was "positive for the presence of blood" on one shoe. R98. However, the "amount of sample was insufficient for any further testing." *Id.* The prosecution asked what further tests can be performed after a preliminary test, but the court sustained a defense objection to the question and Roberts did not answer. *Id.* During a sidebar, the defense objected that due to the preliminary nature of the test, it was "prejudicial to say it's blood at all"; the judge overruled that objection because the defense had "all the evidence." R97-98. On cross-examination, Roberts stated that the preliminary test could not determine whether the blood was from a human or animal. R100-01.

Other testimony established that Yousef died of a close range gunshot wound to the head fired by a .38 caliber revolver. R86-88, 111-12.

Petitioner did not testify. The defense presented evidence that a shoeprint on the store's front door did not match petitioner's shoes. R278-80.

Beverly Barney, a longtime friend of petitioner's family who had previous convictions for child neglect and felony possession of cocaine with intent to deliver, testified for the defense. R289-91. Barney said she went to M&R to buy cigarettes one night in September (Youssef's murder occurred in April) the year of the shooting. R294-96. Barney and her boyfriend were the only customers; after Barney left the store and crossed the street, "seven or eight" men ran by carrying money. R288, 303-05. Barney did not see petitioner in the group; however, the men were 40 feet away and it was too dark even to see what race the men were. R289, 307-08. Barney also stated she could not "see anybody's faces." R309. Barney did not know where the men were coming from; they "could have come out from the ten-story building" on the block "and come through the field." R307.

The jury found petitioner guilty of armed robbery and first degree murder. R401. The trial judge, after noting that petitioner had been "convicted of crime after crime" and had a long history of "hurting people," including violent sexual assaults and an armed robbery conviction, sentenced petitioner to life in prison. R694-97.

C. Petitioner's Direct Appeal

On appeal, petitioner claimed, among other things, that prosecutors erred by implying that Yousef's blood was on petitioner's shoe because the

preliminary test could not determine that the substance was human blood. *People v. McCoy*, 238 Ill. App. 3d 240, 246-52 (1st Dist. 1992). The appellate court disagreed and affirmed his convictions. *Id.*

D. Millighan's Convictions

At Millighan's 1990 trial, Ghrayyib and Awwad testified that (1) Millighan, petitioner, and a third man robbed the store; and (2) petitioner was the shooter. CI2730. Millighan testified that he was innocent and was not present when the store was robbed. CI2675-76. Instead, according to Millighan, that night he was attacked by a man named Donnell Collins while walking outside; he shot Collins (non-fatally) in self-defense, then fled to Wisconsin. CI2666-70.[2] The jury found Millighan guilty of armed robbery and murder. CI2734. The trial judge sentenced Millighan to 70 years in prison. *Id.* The judge acknowledged that Millighan was "not the trigger man" but noted that the evidence showed that he planned the robbery and held the employees at bay "while [petitioner] forced Mr. Yousef to get down [on] his knees and then executed him." *Id.*

E. Petitioner's Initial Postconviction Petition

In 1997, petitioner filed a postconviction petition alleging he was innocent and his counsel provided ineffective assistance. CI770-78. In relevant part, the petition included the affidavit of Thomas Shanklin, who claimed that (1) he saw five men running out of the "Arab store" carrying

[2] Millighan was not charged with any offense for shooting Collins. CI2723.

money; (2) he talked to one of those men, Howard Reed (who died in 1988, before petitioner's trial); and (3) Reed said he shot someone. CI783, 1946-47. Petitioner argued that Shanklin's affidavit established that he was innocent because it was Reed who "killed the Arab" and his counsel was ineffective for not interviewing or calling Shanklin to testify. CI772-74. The circuit court dismissed the petition as meritless and untimely. CI813, 923.

On appeal, appointed counsel moved to withdraw because "there are no arguable bases for collateral relief" and the petition also was untimely. CI813-14. The appellate court "agree[d] with counsel's evaluation," granted leave to withdraw, and affirmed the circuit court's judgment. CI814.

F. Petitioner's Successive Postconviction Petitions and Other Collateral Proceedings

In 2000, petitioner filed his first successive petition, alleging that his counsel erred during his postconviction appeal by not arguing that his actual innocence claim had merit. CI816-19. The circuit court denied leave to file the petition, and the appellate court affirmed, holding that counsel could not be faulted for failing to argue petitioner was innocent based on Shanklin's affidavit because such a claim was meritless and untimely. CI862. Petitioner filed a second successive petition again challenging the dismissal of his actual innocence claim; the circuit court dismissed the petition, and the appellate court affirmed. CI924-32.

In 2013, the circuit court granted petitioner leave to test his shoe for DNA. CI992-94. No DNA testing occurred because the state crime

laboratory conducted a preliminary blood test and found "no blood indicated" on the shoe as of 2013. CI2226. This meant that, as of 2013, either there was no blood present or there was not enough present to detect. SuppR249.

Over the years, petitioner commenced several other collateral proceedings in state and federal courts that were denied, dismissed, or withdrawn. *E.g.*, *McCoy v. Welborn*, 857 F. Supp. 632, 639 (N.D. Ill. 1994), *aff'd*, 78 F.3d 586 (7th Cir. 1996); CI1520-23 (discussing procedural history).

G. Petitioner's Third Successive Postconviction Petition

In 2014, with the assistance of counsel, petitioner sought leave to file a third successive postconviction petition alleging he was innocent based on an affidavit from Millighan (1) admitting he participated in the robbery; and (2) claiming petitioner did not participate, but Howard Reed did. CI1046-47. In 2015, the circuit court granted leave to file the petition. CI1101. Petitioner filed the operative petition four years later, in 2019. CI1134-57. The petition claimed, in part, that (1) petitioner was innocent, (2) prosecutors violated *Brady v. Maryland*, 373 U.S. 83 (1963), by presenting "false" testimony that there was blood on petitioner's shoe, and (3) trial counsel provided ineffective assistance by failing to present evidence that there was no blood on the shoe. CI1144-52.

The People moved to dismiss the petition. CI2630-60. In response, in 2020 — six years after being granted leave to file a successive petition and 31

years after his conviction — petitioner filed a "supplement" that included affidavits from Dr. Nancy Franklin and Deanna Lankford. CI2167-2628.

Dr. Franklin, a psychologist, stated that she reviewed the trial transcripts and believed there (1) there was a "significant risk" that Ghrayyib's and Hassan's identifications of petitioner as being in the store around 11:30 p.m. causing a disturbance were "erroneous," and (2) there was a "significant risk" that the eyewitnesses' identifications of petitioner as participating in the robbery at 1:00 a.m. were "erroneous." CI2237. Petitioner alleged that Dr. Franklin supported (1) his innocence claim, and (2) a new claim that admitting the eyewitness identifications violated due process pursuant to *Neil v. Biggers*, 409 U.S. 188 (1972). CI2188-92.

Lankford, a forensic scientist, stated that (1) she reviewed the trial testimony of Roberts, the blood expert; (2) Roberts testified that he performed only a preliminary blood test; and (3) he should have reiterated during cross-examination that the test was preliminary. CI2230-31. Petitioner claimed that Lankford supported his *Brady* and ineffective assistance claims. CI217274.

Petitioner also included in his "supplement" arrest reports and other documents related to Howard Reed, which showed that Reed was 6'0" tall and died in 1988. CI2591-2626.

The circuit court dismissed the petition. CI1515-38. The court ruled that Millighan's new story that Reed was the shooter was not credible, while

Dr. Franklin's and Lankford's affidavits rehashed information known at trial and failed to support petitioner's claims. CI1527-38.

H. Petitioner's First Appeal of the Denial of His Third Successive Petition

On appeal, petitioner raised only his actual innocence claim and expressly abandoned his other claims. *People v. McCoy*, 2023 IL App (1st) 220148, ¶ 7. The People agreed that the circuit court should not have denied petitioner's innocence claim because, at the second stage, the court was required to accept Millighan's affidavit as true, even though it was rebutted by other evidence. *Id.* ¶¶ 9, 15. The appellate court remanded for a third-stage hearing on the merits of petitioner's innocence claim. *Id.* ¶¶ 4-16.

I. The Third-Stage Hearing

At the third-stage hearing, petitioner's counsel conceded that petitioner was in M&R beginning around 11:00 p.m. with Millighan causing a disturbance, but claimed he was not there during the robbery. SuppR7-8. As at trial, petitioner did not testify in support of his claim. Instead, he presented three witnesses: Millighan, Dr. Franklin, and Lankford.

Millighan testified that he had terminal Parkinson's disease and was released from prison in 2019 before completing his sentence. SuppR124-25, 139-40, 160. Millighan knew petitioner at the time of the robbery and saw him "a lot in the neighborhood." SuppR132-33. Petitioner lived near M&R and Millighan saw him in the store "many times." SuppR159. Although petitioner repeatedly had conceded he was with Millighan causing a

disturbance at M&R at around 11:00 p.m. on the night of the shooting, Millighan claimed he did not see petitioner that night. SuppR133.

Millighan admitted that he had falsely testified during his own trial that he (Millighan) was innocent; Millighan now admitted he was involved in the robbery. SuppR138-39, 158. According to Millighan's new version of events, he robbed the store with three people: "Gino," "Buck," and Reed. SuppR126-28. Gino's role was to get "the safe" in "the back of the store." SuppR127. Reed went to the back of the store, too. *Id*. Millighan claimed he and his accomplices stole money from three registers. SuppR130-31.

Millighan did not know "Buck's" or "Gino's" last names; however, he knew they were now dead. SuppR127, 135. Millighan claimed that Reed, who was also dead, said he (Reed) had shot the owner. SuppR135, 138. Millighan admitted that he never claimed petitioner was innocent until after he had a conversation with petitioner in prison in 2010. SuppR141-43, 150.

Dr. Franklin stated that she had testified as an eyewitness identification expert 85 times, each time on behalf of defendants, and had never testified that an identification was reliable. SuppR37-39. According to Franklin, the eyewitnesses' identifications of petitioner were "at high risk of being inaccurate" because, as relevant here, (1) trial testimony showed it was a cross-racial identification and a high-stress situation; and (2) trial testimony and documents created before trial showed that police biased the witnesses by using photo arrays and suggestive lineups, and interviewing

them together "immediately after the crime." SuppR44-45, 57-64, 69-74. Franklin admitted that, although she criticized the police, she had not seen photographs of the lineups or the photo arrays they used. SuppR64-65, 103. She also admitted to making multiple errors in her report, including that she "misattributed the photo arrays that were discussed multiple times to the wrong suspects," but she said that her multiple errors did not change her conclusions. SuppR43-44.

Franklin also admitted that some people are better than others at making identifications, but she had not tested the ability of the eyewitnesses in this case to identify someone. SuppR90-94, 97-98. According to Franklin, "the more times that you have interactions with a person it is probable that you're going to have a better memory of what they look like." SuppR106-07. But Franklin did not know how often petitioner went to M&R. *Id*.

Lankford, the forensic scientist, testified that she did not perform any scientific tests related to petitioner's case. SuppR234, 266. Instead, she gave opinions based on (1) the trial testimony of Roberts (the blood expert), (2) the report Roberts prepared before trial, and (3) the 2013 crime lab report stating that petitioner's shoe could not be tested for DNA because a preliminary blood test conducted in 2013 showed no blood was indicated at that time. SuppR234-36, 245-46.

Lankford noted that Roberts had testified that he conducted an "ortho-tolidine test," which is a "preliminary" test that can reveal a sample "is

possibly indicating the presence of blood" but cannot "confirm the presence of blood." SuppR237-39. Typically, if a preliminary test indicates the presence of blood, the next step is to conduct a confirmatory test. SuppR240. However, Roberts could not conduct a confirmatory test because both his report and testimony stated that there was "insufficient amount of sample" for further testing. SuppR239-40. According to Lankford, Roberts's testimony showed that after the preliminary test, "there simply wasn't enough left on the gym shoe to test any further." SuppR240, 255. In turn, the 2013 test results merely meant that as of 2013 either "there was no blood present or there was not enough blood present to detect." SuppR249.

According to Lankford, one could not say the substance on petitioner's shoe was definitely blood, but it is accurate to say the substance was "possibly blood." SuppR245. Lanford acknowledged that Roberts testified that his test was preliminary. SuppR243, 245, 256. However, in Lankford's opinion, that testimony was "overstated" because "he did say it was a preliminary test, a preliminary chemical test for the presence of blood," but she "didn't feel that the explanation was made so that one could determine whether or not that they believed it was indeed blood or not." SuppR245.

The circuit court denied petitioner's third successive petition. R2958. After observing Millighan's testimony, the court concluded that Millighan was not credible and, therefore, his testimony was "not of such a conclusive character that it will probably change the result on retrial." R2944.

Millighan's assertion that Reed was the shooter was incredible because, among other reasons, (1) Millighan had changed his story often and his accounts varied "greatly"; (2) Reed was 6'0", while the shooter was described as 5'6" to 5'8"; and (3) Millighan was a convicted murderer. R2940-44. The court further observed that Millighan's new version of events was rebutted by Awwad and Gyrayyib. R2941-44. Specifically, Awwad's and Gyrayyib's identification of petitioner as the shooter was "consistent, clear and credible" and they "had an adequate opportunity to view" petitioner; and, in contrast to Millighan's changing stories, Awwad and Gyrayyib had consistently testified that petitioner was the shooter and they had never recanted. *Id*.

The court further found that Dr. Franklin's testimony did not provide new, noncumulative information that would change the result of trial because she had repeated arguments that were presented at trial. R2944-45. And Lankford's testimony would not change the result of trial because both she and Roberts testified that Roberts had performed only a preliminary blood test and there was insufficient sample to perform additional tests. R2949-51. As the court put it, "[r]ather than undermine the trial testimony of Mr. Roberts," Lankford "corroborate[d] the trial testimony." R2950-51. In sum, petitioner's innocence claim was meritless because the "evidence presented at this evidentiary hearing" when "considered along with the trial evidence" failed to show that "it is more likely than not that no reasonable jury would find the petitioner guilty beyond a reasonable doubt." R2957-58.

J. Petitioner's Second Appeal of the Denial of His Third Successive Petition

On appeal, petitioner argued that Millighan's new version of events was credible, but the appellate court held that there was "no merit to any of [petitioner's] arguments." A9 ¶ 16. Among other things, the appellate court noted that petitioner failed to present corroborating evidence that "conclusively demonstrates that Millighan was testifying truthfully" when he changed his account and claimed that Reed was the shooter and petitioner is innocent. A10 ¶ 19. The appellate court faulted the circuit court for considering Dr. Franklin and Lankford "one-by-one" rather than considering their testimony "collectively," but held that, in light of the evidence presented at trial, Franklin's and Lankford's testimony failed to show that the result of a new trial would be different, in part because they neither "point[ed] to another perpetrator" nor "exclud[ed]" petitioner. A7-8 ¶ 14; A11 ¶ 20. The appellate court concluded,

> Ultimately, [petitioner's] actual innocence claim was reliant on the credibility of Millighan, and the determination of his credibility was a matter for the circuit court to decide. The court found him not credible, and [petitioner] has not demonstrated that the court's credibility determination was manifestly erroneous. Without that key evidence, [petitioner] cannot show that there would probably be a different result on retrial.

A11 ¶ 21.

STANDARD OF REVIEW

The circuit court's judgment following a third-stage postconviction evidentiary hearing is reviewed for manifest error. *See infra*, Section I.

ARGUMENT

The circuit court's judgment is reviewed for manifest error. *Infra* Section I. Here, the circuit court correctly determined that petitioner failed to prove he is actually innocent, and petitioner's arguments to the contrary are rebutted by the record and settled law. *Infra* Section II. Petitioner's alternative arguments based on *Neil v. Biggers*, 409 U.S. 188 (1972), are barred and meritless. *Infra* Section III.

I. The Circuit Court's Judgment Is Reviewed for Manifest Error.

It is settled that the denial of a postconviction petition following a third-stage hearing is reviewed for "manifest error." *E.g., People v. Reed*, 2020 IL 124940, ¶ 51. The manifest error standard is highly deferential and requires petitioner to prove that it is "'clearly evident, plain, and indisputable'" that the circuit court erred by denying his petition. *Id.*

The Court applies such a deferential standard because during the third-stage hearing the circuit court "acts as a fact-finder, making credibility determinations, and weighing the evidence," and is in the "best position" to observe witnesses and determine their credibility. *Id.* ¶¶ 51, 54; *see also People v. Fair*, 2024 IL 128373, ¶ 80 (manifest error standard applies because "the postconviction trial judge is able to observe and hear the witnesses at the evidentiary hearing" and is in "a position of advantage in a search for the truth which is infinitely superior to that of a tribunal where the sole guide is the printed record" (internal quotations omitted)).

Despite this settled authority, petitioner asks this Court to review his claims de novo, give no deference to the circuit court's judgment or credibility findings, and grant him a new trial because the circuit court purportedly made procedural errors, including applying the wrong standard of proof. Pet. Br. 18. Petitioner's argument fails for multiple reasons.

To begin, petitioner cites no case holding that de novo review applies to the third-stage denial of a petition; instead, he cites inapposite cases that merely stand for the proposition that legal questions are reviewed de novo. *Id*. Indeed, his argument that de novo review applies to review of the denial of his petition is foreclosed by *People v. Harris*, 2025 IL 130351, ¶ 44.

This Court explained in *Harris* that when a petitioner appeals the denial of his petition following a third-stage hearing, a reviewing court has three options: (1) "affirm the circuit court's order, finding it was not manifestly erroneous"; (2) "find that the circuit court's ruling was manifestly erroneous" and remand for a new trial; or (3) find that the circuit court applied the wrong standard of proof, or made other procedural errors, thus "warranting a remand for a new third-stage hearing." *Id*. (collecting cases). Accordingly, if petitioner were correct (he is not) that the circuit court procedurally erred — and the error was not harmless — then the proper remedy would be to remand for a new third-stage hearing.

Importantly, however, here the circuit court's judgment should be affirmed under the manifest error standard; remand is unnecessary because

petitioner has failed to show that the circuit court made any procedural error. To start, petitioner argues that the court applied "an unwarranted higher standard for innocence claims" that required petitioner to "affirmatively prov[e]" he was innocent due to "impossibility or an alternative offender." Pet. Br. 19, 31-32. But petitioner fails to cite where in the record the circuit court imposed an "unwarranted higher standard," so he has forfeited his argument. Ill. S. Ct. R. 341(h)(7); *see, e.g.*, *People v. Daje M.*, 2025 IL App (4th) 250205-U, ¶ 50.

Petitioner's argument is also meritless. Judges are presumed to "know and follow the law unless the record demonstrates otherwise." *In re Snapp*, 2021 IL 126176, ¶ 22. Here, the record shows that the circuit court applied the correct standard: the court noted that petitioner was required to prove that his new evidence "would probably change the result" of trial, *i.e.*, that "it is more likely than not that no reasonable jury would find the petitioner guilty." R2957-58; *see, e.g., People v. Taliani*, 2021 IL 125891, ¶ 59 (petitioner must prove new evidence "would probably lead to a different result on retrial," *i.e.*, it is "more likely than not that no reasonable juror" would convict him).

Petitioner's contention that the circuit court "refus[ed] to consider the evidence collectively" and "fail[ed] to consider the evidence new and old together," Pet. Br. 20, fails for similar reasons. Petitioner again fails to cite where in the record the court "refused" to consider old and new evidence

collectively. *Id*. To the contrary, the court stated that it had "considered all the claims, arguments, filings, trial transcripts, the facts contained within the record, as well as the testimony, [and] exhibits presented at this third-stage evidentiary hearing." R2957. The court's ruling also contained a lengthy summary of the evidence presented at trial, the third-stage hearing, and prior collateral proceedings. R2934-57. And the court plainly evaluated the old and new evidence together: for example, the court explained that Millighan's new story that Reed was the shooter was incredible because, among other reasons, (1) Millighan's version of events had changed greatly over time; (2) Millighan's new story was rebutted by the eyewitnesses' trial testimony; and (3) petitioner presented evidence proving that Reed was 6'0", while eyewitnesses said that the shooter was 5'6" to 5'8." R2941-44. Similarly, the court recognized that Lankford's testimony corroborated Roberts's trial testimony and Dr. Franklin's testimony repeated arguments made by the defense at trial; thus, Lankford and Franklin neither supported Millighan's new story that Reed was the shooter nor otherwise showed the result of trial would change. R2944-45, 2949-51.

Lastly, petitioner is incorrect that the circuit court judge erred because he "decided that he personally disbelieved" petitioner's witnesses, but did not "predict how a jury might view the evidence." Pet. Br. 23-24. At the third-stage hearing, the circuit court's responsibilities include "making credibility determinations." *E.g.*, *Reed*, 2020 IL 124940, ¶¶ 51-54 (affirming circuit

court's judgment that exculpatory witness was not credible). Therefore, it was proper for the circuit court to determine whether petitioner's witnesses were credible. And, as noted, contrary to petitioner's assertion that the court did not predict how a jury might view the evidence, the court held that petitioner failed to show "it is more likely than not that no reasonable jury would find [him] guilty." R2957-58.

In sum, petitioner has failed to show that the circuit court committed procedural errors during the third-stage hearing. Therefore, this Court should review the circuit court's judgment for manifest error and affirm.

II. The Lower Courts Correctly Held that Petitioner's Actual Innocence Claim Is Meritless.

A. Petitioner must present new, noncumulative evidence proving it is more likely than not he would be acquitted.

As petitioner's cases hold, the actual innocence standard is "extraordinarily difficult to meet." *People v. Coleman*, 2013 IL 113307, ¶ 94 (cited at Pet. Br. 16-18, 23-28). Actual innocence claims are "rarely successful" because petitioners must present (1) "newly discovered" material evidence, (2) that is not cumulative of the trial evidence, and (3) is "of such conclusive character" that "it is more likely than not that no reasonable juror would have convicted him." *People v. Edwards*, 2012 IL 111711, ¶¶ 32-33. Each witness a petitioner relies on to support his claim must be "new" and "noncumulative;" thus, if a petitioner relies on multiple witnesses, but fails to prove one is "new" and "noncumulative," that witness will not be considered when determining whether the petitioner proved that the result of a retrial

would be different. *E.g.*, *People v. Robinson,* 2020 IL 123849, ¶ 53; *Coleman*, 2013 IL 113307, ¶¶ 100-13; *Edwards*, 2012 IL 111711, ¶¶ 34-40.

Petitioner incorrectly asserts that it is "undisputed" that his evidence is new and noncumulative. Pet. Br. 16. While the People agree that Millighan's testimony is new and noncumulative, the People have repeatedly argued that Dr. Franklin's and Lankford's testimony is not. *E.g.*, SuppR312, 325, 331-37. Moreover, the People are appellee and "may raise any argument" supported by the record to affirm the circuit court's ruling, even if they did not raise it earlier. *In re Veronica C.*, 239 Ill. 2d 134, 151 (2010).

Lastly, to the extent petitioner suggests that this Court changed the actual innocence standard in *Robinson,* 2020 IL 123849, ¶¶ 47-48 (cited at Pet. Br. 31-32), such that he needed only to present evidence that "places the trial evidence in a different light" and undermines confidence in the verdict, he is incorrect. Like the Court's prior precedent, *Robinson* explained that to place the trial evidence in a different light and undermine confidence in a guilty verdict, a petitioner must present new, noncumulative evidence "that would probably change the result on retrial." *Id*. And following *Robinson*, this Court has continued to emphasize that the actual innocence standard is an intentionally "high standard." *E.g., Taliani*, 2021 IL 125891, ¶ 68 (new evidence must "persuasively" show "the petitioner is factually innocent").

To be sure, a petitioner may try to meet the actual innocence standard in different ways — *e.g.*, here, petitioner claims he has conclusive proof that

another person committed the murder. But regardless of the theory or evidence a petitioner presents, the same standard applies: the petitioner must present new, material, noncumulative evidence proving that it is more likely than not that no reasonable jury would convict him. *E.g., Coleman*, 2013 IL 113307, ¶ 96.[3]

This Court's recent decision, *People v. Prante*, 2023 IL 127241, is instructive. There, the petitioner attempted to undermine the trial evidence by presenting (1) new evidence that the bite-mark identification used to convict him is now considered junk science, and (2) expert testimony impeaching the witnesses who testified at trial that the petitioner made inculpatory comments. *Id.* ¶¶ 61, 75, 79. One could argue that such evidence placed the trial evidence in a different light. Yet, this Court reiterated that actual innocence is an intentionally "high standard" and affirmed the judgment denying the petition because (1) even excluding the bite-mark evidence, witnesses testified that the petitioner made inculpatory statements; and (2) evidence impeaching witnesses' testimony generally is insufficient to meet the actual innocence standard. *Id.* ¶¶ 73-86 (petitioner must make a

[3] Petitioner's cases are inapposite. Pet. Br. 31-32. *Martinez* and *Montanez* did not "grant[] relief on [a] post-conviction claim of innocence" as petitioner contends. *Id.* 31-32. Rather, *Martinez* held that the circuit court erred by denying a petition at the second stage, where a petitioner's allegations are taken as true. 2021 IL App (1st) 190490, ¶¶ 2, 57, 69. *Montanez* remanded for a new third-stage hearing before a different judge because the original judge committed errors such as "turn[ing] a blind eye to much of the evidence." 2016 IL App (1st) 133726, ¶¶ 44-46. And petitioner's remaining cases involve direct appeals, not postconviction petitions.

"persuasive showing that [he] did not commit the offense with which he was charged and was, therefore, wrongfully convicted").

In sum, petitioner must show, based on new, material, noncumulative evidence, that it is more likely than not that he would be acquitted on retrial. As the lower courts correctly held, petitioner fails to meet that standard.

B. The lower courts correctly concluded that Milligan's version of events is not credible.

The lower court's conclusion that Millighan lacks credibility, and therefore his testimony failed to show petitioner is innocent, was not manifestly erroneous; indeed, it was plainly correct. To start, Millighan lacks credibility because he is a convicted murderer who admittedly committed perjury by falsely testifying at his own trial that he was not involved in the robbery of M&R. SuppR138-39; *see*, *e.g.*, *People v. Rivera*, 166 Ill. 2d 279, 293 (1995) (credibility of accomplice who provided exculpatory testimony was "clearly suspect" because he was "a convicted murderer and admitted perjurer" who falsely testified during his own trial that he was not guilty); *People v. Reznik*, 361 Ill. 145, 151 (1935) (prior instance of perjury "is the most damaging impairment that can be placed upon the credibility of any witness"). In addition, Millighan did not claim petitioner was innocent until he spoke with petitioner in prison in 2010, decades after Youssef's murder. SuppR141-43. Therefore, the timing and circumstances under which Millighan first claimed petitioner is innocent underscores the conclusion that his new version of events is not credible. *See*, *e.g.*, *Reed*, 2020 IL 124940,

¶¶ 13-14, 54 (accomplice's testimony that petitioner was innocent was incredible because accomplice exculpated petitioner only after they spoke while in prison together).

Moreover, a key part of Millighan's new version of events is impeached by petitioner himself. Specifically, Millighan testified at the third-stage hearing that he did not see petitioner on the night of the shooting. SuppR133-34. But petitioner has repeatedly conceded (including at the third-stage hearing) that he was with Millighan in M&R around 11 p.m. causing a disturbance. *E.g.*, SuppR7-8; R754. That Millighan testified falsely about this key fact undermines the rest of his testimony.

Similarly, as the circuit court noted, Millighan repeatedly changed his story over time, and his different accounts "vary greatly" and are "contradictory." R2943. Indeed, contrary to his current assertion that petitioner is innocent, Millighan successfully argued in 1989 that his trial should be severed from petitioner's trial because he intended "to point the finger" at petitioner as the culprit. R755. And Millighan testified at his own trial that he (Millighan) was not involved in the robbery. CI2675-76. But then, at the third-stage hearing decades later, Millighan admitted that he was guilty but claimed petitioner was innocent. SuppR138-39. Because Millighan's story has changed dramatically over time, it is not "indisputable" that the circuit court manifestly erred by finding Millighan's new version incredible. *E.g., Rivera*, 166 Ill. 2d at 293 (accomplice who changed story to

exculpate defendant not credible); *People v. Jackson*, 2021 IL 124818, ¶ 45 (innocence claim failed, despite eyewitness's claim that the petitioner was not the shooter, in part because eyewitness previously inculpated petitioner).

It is also important to put petitioner's reliance on Millighan's new story in context: petitioner is not merely contending that Awwad and Ghrayyib made a simple mistake of misidentification when they said petitioner was the shooter; instead, in relying on Millighan's new story, he is contending they are completely wrong about basic facts of the store in which they worked and how the robbery occurred. Under Millighan's new version of events, (1) four men with guns entered the store, (2) two men (Reed and "Gino") went to the back of the store to "get the safe" and shoot Youssef, and (3) the men took money from three registers. SuppR126-30. But Awwad and Ghrayyib testified that (1) only three men robbed the store, (2) only one man went to the back of the store, (3) there were only two registers in the store, and (4) Millighan robbed only the front register. R13-21, 50, 1252-58. Thus, to credit Millighan over Awwad and Ghrayyib, one must believe that Awwad and Ghrayyib were wrong about such basic facts as the number of registers in the store and how many perpetrators went to the back office. The more reasonable conclusion, as the circuit court correctly found, is that Millighan's new story is false.

Indeed, there is good reason the jury, the circuit court, and the appellate court found Awwad's and Ghrayyib's testimony credible. To begin,

in contrast to Millighan, there is no evidence Awwad and Ghrayyib ever committed perjury, are convicted felons, or recanted. And the evidence shows that their identifications of petitioner as the shooter are very strong.

Notably, this is not a case where eyewitnesses identified a stranger whom they only saw for a few brief seconds. Rather, it is undisputed that petitioner was in the store on multiple occasions before the shooting and was known to the employees who worked there. For example, Awwad testified that petitioner had been in the store several times before the shooting, R1248-49, and petitioner told police he "frequent[ed] the store" and "the people there should know him," R754. It is also undisputed that near midnight on the night of the shooting, petitioner was in the store with Millighan for 30 minutes, drawing the attention of the employees because he was drinking gin and bothering women; in fact, petitioner's behavior was so bad that Awwad wanted to call the police. R10-11, 1249-50. And it is undisputed that Awwad had a conversation with petitioner during that time. R1288-89. Therefore, when petitioner returned at 1:00 a.m. to commit the robbery, he was not a stranger or even someone the witnesses had merely seen in the store at some point in the past; rather, he was *just there*, and not for a short time, but for 30 minutes during which he drew attention to himself and had a conversation with Awwad.

Moreover, during the robbery itself, Awwad and Ghrayyib had excellent opportunities to view petitioner. Ghrayyib testified that the store

was "well lit" and he could see petitioner's face "clearly." R12, 20, 47. And Awwad testified that petitioner walked right in front him, only "about four to five feet away." R1258, 1282. That Awwad and Ghrayyib had an excellent opportunity to view petitioner during the robbery is reflected by the level of detail they used to describe the shooter. They did not vaguely describe the shooter in generic terms, but instead told police that the shooter was a black male between 25 to 30 years old, was 5'6" to 5'8", weighed 160 to 190 pounds, had a mustache, had a gold earring in his left ear, and was wearing a black hat and leather jacket — a description that matched petitioner almost exactly when he was arrested two days later. R147-49, 1208. And the eyewitnesses' identifications of petitioner are corroborated by (1) the informant who told police that petitioner was involved in the robbery, R141-42, 160-61, 715-16; (2) petitioner's admission that he was in the store with Millighan shortly before the robbery and store employees should know him, R754; SuppR8; and (3) Roberts's and Lankford's conclusion that a preliminary test of petitioner's shoe showed the possible presence of blood, R98; SuppR245.

By contrast, petitioner provides no physical evidence or other eyewitness testimony that Howard Reed was the person who killed Youssef. And as the circuit court observed, petitioner's own evidence undermined his claim that Reed was the shooter because it showed that Reed was 6'0", while eyewitnesses said the shooter only 5'6" to 5'8". R2941. Moreover, while petitioner asks this Court to believe that he was not in the store when

Youssef was shot, he has not explained, let alone testified or presented alibi evidence about, where he was when Youssef was killed.

Lastly, what little petitioner says to bolster Millighan's new version of events is rebutted by the record and settled law. Petitioner is incorrect that Reed had a "modus operandi" that was "very similar" to Youssef's murder. Pet. Br. 21. To establish modus operandi, the proponent must show a "high degree of identity" between the facts of the crime in question and the alleged perpetrator's prior offenses that is "so distinctive that separate crimes are recognized as the handiwork of the same wrongdoer." *People v. Cruz*, 162 Ill. 2d 314, 349 (1994). Petitioner does not attempt to make such a showing here, nor could he credibly do so. Moreover, during petitioner's sentencing, the trial judge noted that petitioner has been "convicted of crime after crime" and has an extensive history of "hurting people," including violent assaults of two women at gunpoint and an armed robbery conviction. R694-97; *see also* R519-54. Thus, a comparison of petitioner's convictions and Reed's arrest records fails to prove that Reed must be the shooter.

Petitioner is also incorrect that police reports are per se inadmissible and, therefore, that the circuit court erred by noting that Millighan's new version of events is contradicted by Reed's arrest reports, which show Reed was much taller than the shooter. Pet. Br. 26. Police reports are admissible for impeachment. *E.g., People v. Williams*, 159 Ill. App. 527, 533 (1st Dist. 1987). More importantly, the rules of evidence "do not apply" to

postconviction hearings, so the circuit court was permitted to rely on the reports regardless of their admissibility. Ill. R. Evid. 1001(b)(3). And even setting that aside, petitioner cannot complain that the circuit court relied on the arrest reports because petitioner attached the reports to his petition, introduced them at the hearing, and asked the circuit court (and asks this Court) to rely on them. *E.g.*, SuppR298, 342; Pet. Br. 21; *In re Det. of Swope*, 213 Ill. 2d 210, 217 (2004) (party may not complain of actions it induced the court to take). Petitioner's related arguments that it is unclear how the shooter's height was known, and when that information was given to police, are rebutted by the record, which shows that the eyewitnesses saw the shooter during the robbery and described his height to police before petitioner's arrest. R711-12, 1208.

Similarly, the record undermines petitioner's contention that Millighan had "everything to lose" and acted against his penal interest by testifying at the third-stage hearing because Millighan admitted he (1) participated in the robbery, (2) perjured himself during his own trial in 1990, and (3) shot Donnell Collins in an unrelated incident. Pet. Br. 24-25. Millighan testified at the third-stage hearing that he believed there was no risk in signing his 2010 affidavit in which he admitted to participating in the robbery (and, thus, also to perjuring himself at his trial). SuppR144. And, as the appellate court observed, there was no risk to Millighan signing an affidavit or testifying at the hearing because Millighan had already been convicted of

murder for his role in the M&R robbery. A9 ¶ 17 (collecting cases). Similarly, there was no risk of Millighan being charged with perjuring himself during his 1990 trial because the three-year statute of limitations for that offense had expired. 720 ILCS 5/3-5(b). Nor was there any risk in Millighan mentioning he had shot Collins: while petitioner calls this a new confession, Pet. Br. 5, Millighan testified during his own trial in 1990 that he shot Collins in self-defense, and he was never charged. CI2664-68, 2723. Finally, Millighan has a terminal illness and had been released from prison before serving his sentence, further underscoring his testimony that he had nothing to lose by exculpating petitioner more than three decades after the crimes. SuppR124-25, 139-40, 160.

Petitioner is also incorrect that the circuit court was required to find Millighan credible because as "one of the admitted (and convicted) offenders in this case," he has "a greater ability than anyone else to accurately identify the other offenders." Pet. Br. 26. Although petitioner relies on *Coleman*, 2013 IL 113307, that opinion does not hold that accomplice testimony must be accepted. To the contrary, it is settled that courts "look[] askance at an accomplice's testimony" even "when the witness gave exculpatory testimony for the defendant." *People v. Fane*, 2021 IL 126715, ¶¶ 35-47 (collecting cases); *see also Rivera*, 166 Ill. 2d at 291-92 (where accomplice provides exculpatory testimony, it is proper to instruct the jury that the testimony is "subject to suspicion" and should be considered "with caution"). That

Millighan is an accomplice therefore supports, rather than undermines, the circuit court's conclusion that he is not a credible witness.

The bottom line is that Millighan is a convicted murderer and admitted perjurer whose new version of events is uncorroborated, impeached by petitioner himself, and rebutted by multiple eyewitnesses. The circuit court observed and heard Millighan's live testimony, considered the parties' evidence and arguments, and found Millighan was not credible. Petitioner has failed to show that it is "indisputable" that the circuit court's judgment was incorrect.

C. The lower courts are correct that Lankford's testimony fails to support petitioner's actual innocence claim.

The lower courts are also correct that Lankford's testimony that the substance on petitioner's shoe was "possibly blood" fails to corroborate Millighan's new story that Reed was the shooter or otherwise support petitioner's innocence claim because it repeats information known at trial and is inculpatory. R2949-53.

1. Lankford's testimony provides no new evidence.

Petitioner's reliance on Lankford fails from the start because the record demonstrates that the information she provided was known at trial. Evidence used to support an actual innocence claim must be "newly discovered," which means it "was discovered after trial" and "could not have [been] discovered earlier through the exercise of due diligence." *Jackson*, 2021 IL 124818, ¶ 42. Tellingly, petitioner's opening brief does not argue

that Lankford provided new evidence, so he has forfeited that argument. *See* Ill. S. Ct. R. 341(h)(7). Forfeiture aside, the record shows that Lankford's testimony is not new evidence.

It is undisputed that Lankford did not perform any scientific tests as part of her work on petitioner's case; instead, she merely reviewed the trial testimony of Roberts (the blood expert) and reviewed tests that Roberts and others performed years before petitioner retained her. SuppR234-38. And at the third-stage hearing, Lankford merely testified that (1) Roberts had performed a preliminary blood test, which cannot conclusively prove that a substance is blood; and (2) because there was insufficient sample to conduct a second, conclusive test, it could only be said that the substance on petitioner's shoe was "possibly blood." SuppR237-40, 243, 245, 255-56. But Lankford conceded that this information "was known in 1986" (two years before petitioner's trial, when Roberts conducted the preliminary test). SuppR237-40, 260-61. And the record corroborates Lankford's concession: (1) Roberts testified that he had performed only a "preliminary" test and the sample was too small for additional testing, R96, 98-101; and (2) the defense objected that due to the preliminary nature of the test, it was "prejudicial to say it's blood at all," R97-98.

Nor is the second preliminary blood test that the crime lab performed at petitioner's request in 2013 "new evidence." Scientific evidence that was discoverable before trial is not new, and petitioner fails to explain why a

second blood test could not have been attempted before his trial rather than waiting several decades after trial. *E.g., Taliani*, 2021 IL 125891, ¶ 71 (scientific evidence that is discoverable at the time of trial cannot support actual innocence claim); *Coleman*, 2013 IL 113307, ¶ 100 (evidence that "could have been discovered earlier through the exercise of due diligence" is not new). Even setting that aside, the 2013 test provides no information that was unknown at trial. Lankford explained that the 2013 test showed that, as of 2013, either there was "no blood present" on the shoe or "there was not enough blood present to detect." SuppR249. But, as Lankford explained, it was known before trial that after Roberts performed the first preliminary test, "there simply wasn't enough left on the gym shoes to test any further." SuppR255. The 2013 test therefore confirmed information known before trial: Roberts's preliminary test consumed any useable sample on the shoe.

2. Lankford's testimony is cumulative.

Lankford's testimony fails to support an actual innocence claim for the additional reason that it is cumulative, *i.e.*, it repeats information the jury heard at trial. *Coleman*, 2013 IL 113307, ¶ 96. As the circuit court put it, Lankford's testimony is cumulative because "[r]ather than undermine the trial testimony of Mr. Roberts," Lankford "corroborate[d]" Roberts's testimony. R2950-51. Petitioner fails to acknowledge the circuit court's ruling or otherwise argue that Lankford's testimony is noncumulative, so he has forfeited such arguments. Ill. S. Ct. R. 341(h)(7). Forfeiture aside, any argument that Lankford's testimony is noncumulative is meritless.

As the circuit court correctly noted, both Roberts and Lankford testified that (1) Roberts performed a "preliminary" test; (2) there was insufficient sample remaining to conduct more tests; and (3) due to the preliminary nature of the test, it cannot definitively be said that the substance on petitioner's shoe was human blood. R2949-51; *compare* R95-101 *with* SuppR237-40, 244-45, 255. Lankford's testimony is thus cumulative of the trial testimony and cannot support his innocence claim.

3. Lankford's testimony inculpates petitioner.

The circuit court was also correct that Lankford's testimony "would not have changed the results" of petitioner's trial. R2951. Petitioner insists that he would be acquitted because Lankford's testimony "prov[es] that the substance on [his] shoe was not blood." Pet. Br. 1-2; *see also id.* 15, 20, 32, 43, 44. Not so. Lankford did not testify that there was no blood on petitioner's shoe; Lankford testified that it was accurate to say that the substance on petitioner's shoe was "possibly blood." SuppR245. Again, Lankford's point was not that there was no blood on the shoe, but that (1) the preliminary test showed that the substance was "possibly blood," and (2) the sample was too small to conduct a second test to confirm it was blood. SuppR244-45, 255.

Obviously, Lankford's conclusion that the substance on petitioner's shoe was "possibly blood" neither supports Millighan's new story that Reed was the shooter nor otherwise proves that petitioner is innocent. Rather, Lankford's conclusion inculpates petitioner (at least in a small way) because it is consistent with the eyewitnesses' testimony that petitioner was the

shooter. Accordingly, petitioner cannot show that the circuit court committed manifest error by finding that Lankford did not support petitioner's innocence claim — that is, petitioner cannot show that it is "indisputable" that if a jury heard Lankford's conclusion that the substance found on petitioner's shoe was "possibly blood," he would most likely be acquitted.

D. The lower courts are correct that Dr. Franklin's testimony fails to support an actual innocence claim.

The lower courts also correctly held that Dr. Franklin's testimony does not provide new information that would change the result of trial, *i.e.*, it fails to corroborate Millighan's new story that Reed was the shooter or otherwise support an actual innocence claim. R2944-45.

1. Petitioner has failed to show that Dr. Franklin's testimony is new evidence.

Petitioner's brief does not argue that Dr. Franklin's testimony constitutes new evidence, so petitioner has forfeited that argument. *See* Ill. S. Ct. R. 341(h)(7). Forfeiture aside, Franklin's testimony is not new.

Petitioner relies on Franklin's opinion that the eyewitnesses' identifications are unreliable because (1) the circumstances of the robbery (a cross-racial identification, in a high-stress situation involving offenders with guns) increased the chance of misidentification; and (2) post-robbery events (such as that the eyewitnesses spoke together and some eyewitnesses were shown photo arrays before the lineup) increased the chance of misidentification. Pet. Br. 12-14, 26-31. During the third-stage hearing, petitioner stated in conclusory fashion that Franklin's opinion should be

considered "new" because there had been unspecified "developments" in the scientific understanding of eyewitness identification since petitioner's trial. SuppR304. But evidence is only new if it "either did not exist or could not have been discovered at the time of trial." *See*, *e.g.*, *People v. Flournoy*, 2024 IL 129353, ¶¶ 73, 79. Petitioner's conclusory assertion that there have been unspecified "developments" is insufficient to satisfy his heavy burden to present new evidence that would change the result of trial. *See*, *e.g.*, *Taliani*, 2021 IL 125891, ¶ 68 (actual innocence is an intentionally "high standard" because it "undermines the finality of a conviction"). Petitioner needed to specify precisely what information is known today that was not known in 1989 (and thus could not have been presented at trial) but has failed to do so.

Nor could petitioner satisfy this heavy burden with respect to Dr. Franklin. The factors that Franklin testified can potentially affect the accuracy of identifications were known in the scientific community before petitioner's trial. Tellingly, Franklin cited over 40 academic or other sources in her report that were published *before* petitioner's 1989 trial. CI2269-83. For example, her report states that "50 years of research" — *i.e.*, going back to the 1970s — has uncovered issues with cross-racial identifications. CI2251. Thus, Franklin's own report undermines any contention that her testimony about factors that can affect identifications is new. *E.g.*, *Taliani*, 2021 IL 125891, ¶ 71 (because petitioner's documents showed scientific community knew before his trial that psychotropic medication can cause

involuntary intoxication, that information was not "newly discovered evidence").

Moreover, caselaw shows that experts testified about those same factors before 1989. *E.g.*, *People v. McDonald*, 690 P.2d 709, 716-17, 720-21 (Cal. 1984) (proper for expert to testify that presence of a gun increases odds of misidentification, cross-racial identifications are less likely to be accurate, confidence is not a reliable indicator, and post-offense events can cause misidentifications); *State v. Chapple*, 660 P.2d 1208, 1221 (Ariz. 1983) (proper for expert to testify that misidentifications can be caused by stress, by allowing witnesses to talk together, and through "unconscious transfer," which occurs when a witness recognizes a person because he saw him elsewhere before and now mistakenly identifies that person as the offender); *State v. Hanson*, 749 P.2d 181, 183-84 (Wash. Ct. App. 1988) (expert could testify that stress and "weapon focus" can cause misidentifications and "explain the doctrine of unconscious transference").

Petitioner's suggestion to the circuit court that Franklin's opinion is new because it would have been excluded had he tried to present it at trial, SuppR304-05, was incorrect. According to petitioner, it was not until *People v. Lerma*, 2016 IL 118496, was decided in 2016 that expert testimony regarding eyewitness identification was permitted in Illinois. SuppR304-05. Thus, under petitioner's theory, anyone convicted based on eyewitness testimony before 2016 has a colorable innocence claim because under then-

existing law, they were barred from introducing expert testimony regarding eyewitness identifications. There are multiple problems with petitioner's argument.

To begin, petitioner cannot prove that the trial court would have excluded the proposed expert testimony (or, if excluded, that the ruling would have been upheld on direct appeal). As noted, years before petitioner's trial, courts had permitted such testimony. *Supra* p. 39. Nor was such testimony per se barred in Illinois before *Lerma*, as petitioner suggested. *See People v. Enis*, 139 Ill. 2d 264 (1990). The defendant in *Enis*, who was tried around the same time as petitioner, sought to introduce expert testimony regarding eyewitness identifications but the trial court excluded it. *Id.* at 285-86. On appeal, this Court recognized that such testimony had been excluded in some cases but that "in the past decade a number of courts have held that expert testimony concerning eyewitness identification should be admissible in certain circumstances." *Id.* at 286-87 (collecting cases). The Court ultimately held that the trial court did not abuse its discretion in excluding the testimony because it was not relevant under the facts of Enis's case: for example, testimony that stress can lessen the accuracy of identifications was irrelevant as "none of the eyewitnesses was in a high stress situation" because when they saw the defendant they were unaware a crime had occurred. *Id.* at 288-89. Thus, like Enis, petitioner could have tried to

present the available expert testimony and, if it was excluded, argue on appeal that the testimony was relevant.

Lerma merely noted that expert testimony had become even more widely accepted since *Enis*. 2016 IL 118496, ¶ 24. Indeed, the Court emphasized: "it is important to reiterate that, even in *Enis*, this Court recognized that eyewitness identification is an appropriate subject for expert testimony." *Id.* ¶ 28. Moreover, *Lerma*, a direct appeal case, affirmed the appellate court's ruling that expert testimony regarding identification was admissible, *id.* ¶ 35, and does not stand for the proposition that expert testimony regarding eyewitness identifications is "new evidence" that can support postconviction innocence claims, *see id.* ¶ 28; *see also*, *e.g.*, *People v. Porter*, 2024 IL App (1st) 231330-U, ¶ 38 ("[A]s our supreme court observed in *Lerma*, the subject of eyewitness identification expert testimony is not a new one, nor is it one whose propriety has only recently been established.").

Second, even assuming the expert testimony would have been excluded, it does not qualify as "new" because evidence is not considered "new" for purposes of an actual innocence claim even where the trial court previously *ruled* it inadmissible. *See People v. Bailey*, 2017 IL 121450, ¶ 45. The petitioner in *Bailey* sought leave to file a successive petition, arguing that he had medical evidence proving that an injury to his wrist showed he could not have committed his charged offense. *Id.* Because the petitioner knew of his injury before trial, this Court held that the evidence was not new,

even though the trial court had ruled "that the evidence was irrelevant [and] refused to allow him to present it at trial." *Id.* Plainly, if a trial court's express ruling that evidence was inadmissible does not render the evidence "new," then the same must be true when the petitioner did not even attempt to introduce his evidence at trial and merely speculates that the trial court would have excluded it. *See id.*; *see also Flournoy*, 2024 IL 129353, ¶¶ 68, 71-73 (evidence is "new" only if it was "*unavailable* to the parties when the defendant was being tried" (emphasis added)); *cf. People v. Guerrero,* 2012 IL 112020, ¶ 20 (no cause to file successive petition where claim was available at time of trial even though this Court had rejected claim in a case with "strikingly similar" facts because "the lack of precedent for a position differs from 'cause' for failing to raise an issue, and a defendant must raise the issue, even when the law is against him, in order to preserve it for review"); *cf. also People v. Dorsey*, 2021 IL 123010, ¶ 73 (additional helpful support for claim available at trial insufficient to establish cause); *People v. English*, 2013 IL 112890, ¶¶ 25-27, 31 (similar).[4]

Simply put, a defendant must attempt to introduce purportedly exculpatory evidence if it is available at the time of trial. *See, generally, Flournoy*, 2024 IL 129353, ¶¶ 68, 71-73. If defense counsel fails to introduce

[4] A petitioner raising a constitutional claim must meet the "cause and prejudice" test, which requires him to prove in part that an external factor prevented him from raising the error earlier. *See*, *e.g.*, *People v. Smith*, 2014 IL 115946, ¶ 23. It is similar to the actual innocence test in that both tests require a petitioner to show that he could not have raised his claim earlier. *See Flournoy*, 2024 IL 129353, ¶¶ 68, 71-73.

the evidence at trial, the defendant can assert an ineffective assistance claim in the appropriate proceeding. *Id.* But this Court's precedent forecloses petitioner's attempt to demonstrate innocence several decades after his conviction based on evidence that was available at trial.

2. Dr. Franklin's testimony is cumulative.

The circuit court also is correct that Dr. Franklin's testimony is cumulative — and thus cannot support an actual innocence claim — because at trial "the eyewitnesses were questioned extensively on direct and cross-examination before the jury regarding their observations, descriptions, and identifications" and "the issue of identification was thoroughly addressed in closing argument." R2945. Petitioner does not acknowledge this portion of the circuit court's ruling, let alone dispute it, so he has forfeited any argument that Dr. Franklin's testimony is noncumulative. *See* Ill. S. Ct. R. 341(h)(7).

Forfeiture aside, the circuit court correctly held that the testimony is cumulative. In *Prante*, this Court held that a similar opinion proffered by Dr. Franklin could not support an actual innocence claim because it was cumulative. 2023 IL 127241, ¶¶ 79-80. There, the petitioner was convicted based in part on witnesses who came forward years after the murder and told police that petitioner had made statements suggesting that he had information that only the killer would know. *Id.* ¶¶ 25-31, 77-78, 82-84. The petitioner claimed his innocence based in part on Franklin's affidavit, which

discussed the limits of human memory and concluded that the "witnesses' testimony was tainted" by events occurring after the murder. *Id.* ¶ 79. This Court held that her affidavit was "cumulative to evidence introduced at trial" because at trial the "witnesses were questioned as to why they did not come forward earlier with their information regarding [the petitioner]." *Id.* ¶ 80.

Likewise, Franklin's testimony is cumulative of testimony and arguments made at petitioner's trial. Petitioner contends that Franklin's opinion proves that the eyewitness identifications are unreliable due to the circumstances of the robbery and post-robbery events. Pet. Br. 12-14, 26-31. But at trial the eyewitnesses were questioned extensively on (1) the circumstances of the robbery and their opportunity to view the shooter (including that there were multiple offenders, it was a stressful situation because Millighan was pointing his gun at them, and the robbery was relatively brief); and (2) what occurred after the robbery and how it may have affected their identifications (including the timing of the descriptions they provided police, that the witnesses were questioned together, the timing of the line-up, and whether they viewed photo arrays before the line-up). R11-55, 59-72, 1248-59, 1261-70, 1274-90. In addition, law enforcement officers were questioned about post-robbery events that might have influenced the identifications, including how they interviewed the eyewitnesses and the procedures used for the photo arrays and line-up. R234-40, 244-54, 1204-11, 1226-30, 1235-38.

Moreover, in closing argument, defense counsel focused on the issue of identification and suggested that it was common to misidentify someone, even if a witness believed they were telling the truth. R354-55. Among other things, counsel repeatedly emphasized that during the robbery, Millighan's "gun" was "in [the witnesses'] face." R352; *see also id*. ("This guy's still got the gun on them."); R351 ("Where is his gun? Pointing at them"). Counsel also argued that the eyewitnesses did not tell the first responding officer that the shooter had facial hair and their description changed over time. R352-53. And counsel argued that the eyewitnesses "felt compelled to pick somebody" out of the lineup "and they picked [petitioner] because they had seen him before. Because they saw pictures the day before the lineup." R354. As defense counsel put it: "as we go along the [eyewitnesses'] identifications and descriptions get better and better. I'm not saying to you that [the eyewitnesses] intentionally lied, but identification is a tricky thing." R354-55. Accordingly, as in *Prante*, Dr. Franklin's testimony is cumulative here.

3. Dr. Franklin's testimony would not change the result of trial.

Dr. Franklin's testimony is insufficient to meet the actual innocence standard for the additional reason that it is (at most) impeachment evidence and does not show that petitioner is innocent of robbing M&R and murdering Youssef. As petitioner's authority notes, evidence that merely impeaches a trial witness is insufficient to meet the actual innocence standard. *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009) (postconviction evidence that impeaches a

trial witness "is an insufficient basis for granting a new trial") (cited at Pet. Br. 17-18); *see also People v. Rodriguez*, 2024 IL App (1st) 210907-U, ¶ 119 (expert testimony about accuracy of eyewitness identifications insufficient to prove actual innocence because "our Supreme Court has held on multiple occasions that impeachment evidence is insufficient to justify the grant of a new trial"); *People v. Berry*, 2022 IL App (3d) 200082-U, ¶¶ 14-15 (similar).

Prante is again on point. In *Prante*, as here, Dr. Franklin discussed the limits of memory and concluded the "witnesses' testimony was tainted" by events occurring after the murder. 2023 IL 127241, ¶ 79. This Court held that the petitioner's actual innocence claim failed because "impeachment evidence such as that offered in Dr. Franklin's affidavit typically is insufficient to justify postconviction relief." *Id.* ¶ 80. The same is true here: Dr. Franklin's testimony is — at most — impeachment evidence because it merely addresses factors that might (for *some* eyewitnesses) affect the accuracy of identifications. Thus, the circuit court did not manifestly err in concluding that her testimony failed to support petitioner's claim.

Lastly, Dr. Franklin's testimony conflicts with the record and does not meaningfully impeach the eyewitnesses. Perhaps most importantly, Franklin opined that there is a "significant risk" that Ghrayyib's and Hassan's identification of petitioner as someone who was in the store around 11:30 p.m. causing a disturbance was "erroneous." CI2237. But *petitioner admits that he was in the store* around 11:30 causing a disturbance. *E.g.*,

SuppR8; R754. That Franklin believes there is a "significant risk" that the eyewitnesses misidentified petitioner as being in the store at 11:30 — when it is undisputed that he was there — demonstrates that Franklin's conclusions are not credible. Conversely, the fact that it is undisputed the eyewitnesses correctly identified petitioner as being in the store around 11:30 p.m. supports the conclusion that they also correctly identified petitioner as the person who, approximately one hour later, participated in the robbery.

It is easy to see why Franklin's conclusions are faulty: she was unfamiliar with, or failed to consider, the record. Franklin's opinion was based primarily on her view that the circumstances of the shooting might tend to cause some people not to see or pay attention to the shooter. *E.g.*, SuppR44-45, 57-60. But regardless of what Franklin believes some people might tend to do, the record shows that here the eyewitnesses saw and paid close attention to the shooter because they testified that they saw the shooter clearly and gave police a detailed description of the shooter that matched petitioner's race, age, height, weight, facial hair, earring, and clothing. *Supra* p. 29.

The other basis for Franklin's opinion — that events after the shooting cast doubt on the eyewitnesses' identifications — also reflects her misunderstanding of the record. Petitioner argues that Franklin's testimony proves that the identifications were unreliable because the eyewitnesses were shown photo arrays before viewing a live lineup and "fail[ed] to identify

[petitioner] in the initial photo array." Pet. Br. 22. But that assertion is inconsistent with the record. To begin, neither Awwad nor the officer responsible for the photo arrays testified that Awwad was shown a photo array (let alone that he failed to identify petitioner); instead, Awwad viewed a live lineup and identified petitioner as the shooter. R176-78, 190-91, 1262-66; *see also* SuppR291 (petitioner's counsel stating that Awwad did not see the photo array).[5] Hassan was shown a photo array, but he identified petitioner in the array and a day later, identified him in a lineup. R180, 191-92. And Ghrayyib testified that he recognized petitioner in the photo array (which was black and white) but told police he "would prefer" to see color photos (which the police did not have); a day later, Ghrayyib also identified petitioner as the shooter in a lineup. R25-27, 34-36, 40-42, 179-82, 189-90, 209.[6] In short, Dr. Franklin's opinion is premised on a misapprehension of the record.

Petitioner splices together different sentences and adds words Ghrayyib did not say when he argues that police influenced the identifications because Ghrayyib testified that "the police showed him and

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[5] Ghrayyib stated that he thought Awwad may have viewed photographs "separately," R39, but this is inconsistent with the other witnesses' testimony, and petitioner's counsel conceded that Awwad did not view the photo array, SuppR291. In any event, Ghrayyib did not testify that Awwad misidentified the shooter.

[6] The officer who administered the arrays interpreted Ghrayyib's request to see color photos as a refusal to view the black-and-white array, and not as a nonidentification of petitioner. R209.

the other witnesses color pictures 'because they wanted to be sure' that 'when they brought the person and showed us the line-up' the witnesses would be able to make an identification." Pet. Br. 21. Referring to the black-and-white photo array he saw a few days after the shooting, Ghrayyib testified, "They showed us pictures because they wanted to be sure." R39. That is, police wanted to be sure they had the right suspect, a normal objective of any investigation. Then, referring to the lineup conducted after petitioner's arrest, Ghrayyib testified, "When they brought the — when they brought the person and showed us the line-up and at that same moment, they asked us whether we could identify anyone." *Id.*; *see also* R179-82, 189-92, 209. Thus, Ghrayyib did not testify that police conducted an improper identification procedure.

In sum, even if Dr. Franklin's testimony were new and noncumulative (it is not), it fails to support petitioner's innocence claim because it (1) is at best mere impeachment evidence, and (2) does not actually impeach anyone because her opinions are objectively wrong and rebutted by the record.

E. Petitioner's remaining arguments were rejected in prior proceedings and are meritless.

Petitioner's argument that he is innocent based on a 1997 affidavit purportedly signed by "Thomas Shanklin" (claiming that he saw Reed run out of M&R and that Reed told him he shot someone) is barred and meritless. Pet. Br. 27. To recap, petitioner relied on Shanklin's affidavit to support his initial postconviction petition, which he filed in 1997; the circuit court

dismissed the petition as meritless and untimely; on appeal, petitioner's appointed counsel moved to withdraw because "there are no arguable bases for collateral relief"; the appellate court agreed and affirmed the dismissal of the petition. CI770-73, 813-14, 923. In 2000, petitioner filed his first successive petition, alleging that counsel erred during his postconviction appeal by conceding that the innocence claim was meritless; the circuit court denied the petition, and the appellate court affirmed, holding that counsel could not be faulted for failing to raise a meritless and untimely claim. CI816-19, 843-45, 862-65.

Then, more than two decades later, during the third-stage hearing on petitioner's third successive petition, petitioner conceded that Shanklin's affidavit was not new evidence but asked the circuit court to consider it anyway. SuppR201. The court concluded that petitioner was "barred" from relying on Shanklin's affidavit because petitioner had unsuccessfully relied on it in previous petitions. R2957. Petitioner does not argue that the circuit court's ruling is incorrect, so he has forfeited that argument. *See* Ill. S. Ct. R. 341(h)(7).

Moreover, the circuit court is correct that petitioner is barred from relitigating yet again whether Shanklin's affidavit proves his innocence. When a petitioner raises an actual innocence claim, the court must determine whether the petitioner's "newly discovered evidence" when "considered along with all the evidence presented at trial" would probably lead to the

petitioner's acquittal. *Prante*, 2023 IL 127241, ¶ 74. That standard does not allow petitioners to file successive petitions rehashing arguments and evidence that were previously found insufficient or meritless; to the contrary, it is settled that petitioners are barred from doing so. *See*, *e.g.*, *Bailey*, 2017 IL 121450, ¶¶ 43-44 (res judicata barred petitioner from relying on affidavit and raising same actual innocence claim in successive petition that he raised in initial petition); *People v. Tenner*, 206 Ill. 2d 381, 396-98 (2003) (petitioner may not relitigate issues that were raised in previous collateral proceedings); *People v. Wiley*, 205 Ill. 2d 212, 220 (2001) (in postconviction proceedings, "any issues which have previously been decided by a reviewing court are barred"). Thus, petitioner is barred from arguing yet again that Shanklin's affidavit proves his innocence.

Even setting aside the relitigation bar, the circuit court's alternative ruling — that Shanklin fails to support petitioner's claim — is correct. R2957. Shanklin's purported account is not "new" because petitioner previously alleged that his trial counsel erred when he "chose not to interview" Shanklin or call him at trial. CI773; *Flournoy*, 2024 IL 129353, ¶¶ 28, 73, 83-84 (witness not new where petitioner previously alleged that counsel was ineffective for not calling her); *Jackson*, 2021 IL 124818, ¶¶ 21, 42 (same); *see also Taliani*, 2021 IL 125891, ¶¶ 41, 71. Moreover, petitioner's brief fails to establish that testimony from Shanklin would lead to his

acquittal; indeed, he fails to establish that "Shanklin" exists, let alone that he would testify credibly that petitioner is innocent.

Petitioner's remaining points likewise rehash arguments that were rejected decades ago. His complaint that prosecutors argued in closing that petitioner's shoe had blood on it, Pet. Br. 32, was rejected during his direct appeal in 1992, when the appellate court held that the claim was meritless because "the prosecutor also mentioned the inconclusive results of the blood tests," *McCoy*, 238 Ill. App. 3d at 251; R336. The denial of petitioner's claim on direct review was correct and, in any event, cannot be relitigated. *E.g.*, *Taliani*, 2021 IL 125891, ¶ 53 (issues "decided on direct appeal are barred from consideration").

Petitioner's assertion that Awwad omitted the shooter's height and facial hair when speaking with police, Pet. Br. 27, is inconsistent with the record. The responding officer testified that Awwad (who spoke the best English and thus spoke on the group's behalf) described the shooter's height; the officer did not think he asked whether the shooter had facial hair and explained that he was simply trying to gather basic information "as quickly as [he] possibly" could and "give it out on the radio" so other officers could possibly apprehend the perpetrators as they fled. R237, 244-46, 249-50, 252. Testimony from other officers established that the eyewitnesses were interviewed shortly thereafter by a detective (before petitioner's arrest) and they provided a detailed description of the shooter, including that he had

facial hair and was 5'6" to 5'8" tall. *E.g.*, R1208. In any event, even if Awwad initially omitted certain details, it would not change the result of the trial because he identified petitioner in a lineup and at trial, and "discrepancies or omissions in [an eyewitness's] description of the accused do not in and of themselves generate a reasonable doubt as long as a positive identification has been made." *People v. Slim*, 127 Ill. 2d 302, 309-12 (1989) (collecting cases holding that failure to mention facial hair does not make identification unreliable); *People v. Hill*, 2023 IL App (1st) 150396, ¶ 22 (if identification is made, omissions in description do not create reasonable doubt).

Petitioner's observation that the trial evidence proved that a shoeprint on the store's front door did not match his shoes, Pet. Br. 21, does not support his innocence claim because the eyewitnesses testified that they did not see who kicked the door, R18, 44, and jurors could reasonably believe it was Millighan or the third robber who did so, *e.g.*, *People v. Jackson*, 2020 IL 124112, ¶ 70 (factfinder need not "search out all possible explanations consistent with innocence and raise them to a level of reasonable doubt"); Pet. Br. 34-35 (eyewitnesses could not see the shooter as he entered). And petitioner's observation that Hassan referred to petitioner as "the shooter" once during his testimony, Pet. Br. 32-33, did not mislead the jury into believing he witnessed the shooting because Hassan testified that he was in the store's cooler during the shooting and did not witness it, R60-61, 72.

Petitioner is also incorrect that the trial testimony of Barney, his family friend, shows he is innocent. Pet. Br. 21, 27. Tellingly, Barney's testimony was so unhelpful that petitioner's trial counsel did not mention it in closing argument. R347-58. And for good reason: Barney said that she went to M&R one night around September (the shooting occurred in April); she and her boyfriend were the only people in the store (*i.e.*, it was not being robbed); and as she left and crossed the street, "seven or eight" men ran by her 40 feet away in the dark carrying money (*i.e.*, more than twice as many men as were involved in the M&R robbery). R288, 295-96, 303-05. Barney also "couldn't directly say where" the men were coming from; they "could have come out from the ten-story building" on the block and "through the field." R307. Petitioner's suggestion that Barney testified about "seeing Reed" is incorrect, Pet. Br. 27, because Barney did not even mention Reed. To the contrary, Barney emphasized that she was unable to "see anybody's faces." R309. The jury reasonably found that Barney did not exculpate petitioner and petitioner provides no reason to reject the jury's conclusion 36 years later.

* * *

In sum, viewing all the evidence together, petitioner failed to meet the actual innocence standard. Millighan's new story that petitioner is innocent and Reed was the shooter is incredible, impeached by petitioner himself, and rebutted by multiple eyewitnesses. And Lankford and Franklin fail to corroborate Millighan's new story — or otherwise support a claim that

petitioner is innocent — because their testimony (1) provides no new evidence, (2) is cumulative of information and arguments provided at petitioner's 1989 trial, and (3) fails to show petitioner would be acquitted at a retrial because Lankford's testimony is inculpatory and Franklin's testimony is mere impeachment evidence that is based on a misunderstanding of the record. Accordingly, it cannot be said that the denial of petitioner's third successive petition was manifestly erroneous — to the contrary, the lower courts are correct that petitioner's actual innocence claim is meritless.

III. Petitioner's *Biggers* Challenge Is Barred and Meritless.

Long before petitioner's trial, the United States Supreme Court held in *Neil v. Biggers*, 409 U.S. 188, 198-200 (1972), that due process bars the admission of eyewitness identifications that were made after viewing impermissibly suggestive lineups, show-ups, or photo arrays, unless the "totality of the circumstances" shows the identifications were reliable. To determine whether an identification is sufficiently reliable to be admissible (despite suggestive identification procedures), *Biggers* directs courts to consider: (1) the opportunity the witness had to view the offender during the offense, (2) the witness's degree of attention, (3) the accuracy of the witness's description of the offender, (4) the witness's level of confidence, and (5) the length of time between the offense and identification. *Id.* Petitioner's claim that the eyewitnesses' testimony is unreliable and violates due process under *Biggers*, and his request that the Court "revise" *Biggers*, are barred and meritless.

A. Petitioner's challenge is barred.

To recap, petitioner alleged in his 2020 supplement to his third successive petition that the admission of the eyewitnesses' testimony violated "his due process rights" under *Biggers*; the circuit court denied the petition at the second stage; petitioner appealed only the denial of his innocence claim and expressly abandoned his other claims; the appellate court remanded for a third-stage hearing on petitioner's innocence claim; following that hearing, the circuit court held that petitioner's innocence claim was meritless. *Supra* pp. 10-16; CI2191-92; *McCoy*, 2023 IL App (1st) 220148, ¶¶ 7, 12-17.

Any *Biggers* claim or related arguments petitioner now seeks to raise are barred for multiple independent reasons. First, in postconviction proceedings, any "issues that could have been raised" in direct appeal are "barred," *Ortiz*, 235 Ill. 2d at 328, and petitioner plainly could have raised his *Biggers* challenge on direct appeal. Second, petitioner cannot ask this Court to grant a new trial based on *Biggers* given that he abandoned that claim at the second stage years ago. Finally, petitioner did not raise any *Biggers* challenge in the appellate court or his PLA, which also results in forfeiture. *People v. Cherry*, 2016 IL 118728, ¶ 30 (issues not raised in appellate court "are forfeited"); *People v. Fitzpatrick*, 2013 IL 113449, ¶ 26 (issues not raised in PLA are "forfeited.").

Petitioner's contention that this court should "revise" *Biggers* and "eliminate" one of its factors — the eyewitness's degree of confidence, Pet. Br. 33, 40 — are barred for those same reasons, plus two more. First, the

Supremacy Clause prohibits this Court from "revising" *Biggers*. U.S. Const., art. VI, cl. 2; *see People v. Hood*, 2016 IL 118581, ¶ 22 ("[W]hen the Supreme Court adopts a particular framework for applying a federal constitutional provision, we are required to follow that framework"); *see also Arkansas v. Sullivan*, 532 U.S. 769, 772 (2001) (state court may not "interpret the United States Constitution to provide greater protection than th[e] [Supreme] Court's own federal constitutional precedents" provide). Second, petitioner concedes that there have been no judicial findings related to the eyewitnesses' confidence, Pet. Br. 38, so by asking this Court to "eliminate" the confidence factor, he is improperly asking for an advisory opinion. *Peach v. McGovern*, 2019 IL 123156, ¶ 64 (reviewing courts "will not decide moot or abstract questions, will not review cases merely to establish precedent, and will not render advisory opinions"). In sum, petitioner's *Biggers*-based challenge is barred on multiple grounds.

B. Petitioner's challenge is also meritless.

Petitioner's arguments that this Court should "revise" *Biggers* and "eliminate" the confidence factor are meritless. Notably, while petitioner urges this Court to follow the Connecticut Supreme Court, Pet. Br. 42-43, that court applies *Biggers* and considers the eyewitness's degree of confidence. *See State v. McLaurin*, 337 A.3d 1039, 1051-53 (Conn. 2025) (applying *Biggers* and holding that eyewitness's confidence supported the conclusion that her identification was reliable).

Petitioner's argument is also defeated by his own evidence. His petition includes a report from the American Psychological Association recommending that a "confidence statement should be taken" when an identification is made because confidence "is a useful cue to the accuracy" of identifications in some circumstances, such as when "fair lineups" are used. CI2357-58. Dr. Franklin made similar points in her testimony. SuppR70. And petitioner's own authority notes that some studies show that confidence can be a reliable indicator of identification accuracy. *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 32 (cited at Pet. Br. 39). Moreover, petitioner's proposed rule that confidence is irrelevant (and, thus, per se inadmissible) would also bar defendants from presenting evidence that an eyewitness had *limited* confidence in his identification.

Lastly, petitioner is incorrect that the eyewitnesses' identifications of him are unreliable under *Biggers*. As petitioner's cases illustrate, it is very difficult for a defendant to establish that eyewitness identifications were unreliable under *Biggers*. *E.g.*, *People v. Davis*, 2018 IL App (1st) 152413, ¶¶ 3, 7, 45, 48, 53-56 (identifications were reliable, despite being recanted at trial, where eyewitnesses saw shooters 150 away at twilight while hiding behind a wall, failed to provide physical descriptions, viewed lineups nearly two months later, and shooters were wearing hoodies with their hoods up) (cited at Pet. Br. 34); *Macklin*, 2019 IL App (1st) 161165, ¶¶ 24-32 (identifications were reliable where eyewitnesses viewed shooter at night for

"mere seconds," shooter was wearing a hat with his hood up, and lineups were conducted 10 days later) (cited at Pet. Br. 39-40).

Here, petitioner has failed to establish that the police used suggestive identification procedures, but even if he had, each *Biggers* factor supports the conclusion that the eyewitnesses' identifications are reliable because (1) they had an excellent opportunity to view petitioner in good lighting at close range before and during the robbery, (2) they paid significant attention because they were able to describe the shooter in great detail, (3) their description of the shooter matched petitioner closely, (4) petitioner does not contend that the eyewitnesses were uncertain, and (5) the eyewitnesses identified petitioner only a couple days after the robbery. *Supra* pp. 2-6, 27-29.

In sum, the eyewitnesses are credible and their identifications are reliable. That is why petitioner was convicted in 1989 and Millighan was convicted the following year. And it is also why courts have repeatedly rejected petitioner's numerous challenges to his convictions in the last 36 years. This Court should do the same and affirm the denial of petitioner's third successive petition.

CONCLUSION

This Court should affirm the appellate court's judgment affirming the denial of petitioner's third successive postconviction petition.

October 30, 2025

Respectfully submitted,

KWAME RAOUL
Attorney General of Illinois

JANE ELINOR NOTZ
Solicitor General

KATHERINE M. DOERSCH
Criminal Appeals Division Chief

MICHAEL L. CEBULA
Assistant Attorney General
115 South LaSalle Street
Chicago, Illinois 60603
(773) 590-6952
eserve.criminalappeals@ilag.gov

Counsel for Respondent-Appellee
People of the State of Illinois

RULE 341(c) CERTIFICATE

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, and the certificate of service, is 14,626 words.

/s/ Michael L. Cebula
MICHAEL L. CEBULA
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 October 30, 2025, the foregoing **Brief of Respondent-Appellee 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 notice to the following registered email addresses:

Debra Loevy
Lauren Myerscough-Mueller
Karl Leonard
The Exoneration Project
311 North Aberdeen Street, 3rd Floor
Chicago, Illinois 60607
debra@exonerationproject.org
laurenm@exonerationproject.org
karl@exonerationroject.org

Counsel for Petitioner-Appellant

Additionally, upon its acceptance by the court's electronic filing system, the undersigned will mail thirteen copies of the brief to the Clerk of the Supreme Court of Illinois, 200 East Capitol Avenue, Springfield, Illinois, 62701.

/s/ Michael L. Cebula

MICHAEL L. CEBULA
Assistant Attorney General
eserve.criminalappeals@ilag.gov