No. 124818

IN THE
SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Appellate Court
	)	of Illinois, First District
Respondent-Appellee,	)	No. 1-17-1773
	)	
	)	There on appeal from the Circuit Court
v.	)	of Cook County, Illinois
	)	No. 01-CR-17492
	)	
KEVIN JACKSON,	)	The Honorable
	)	Evelyn B. Clay,
Petitioner-Appellant.	)	Judge Presiding.

BRIEF OF RESPONDENT-APPELLEE
PEOPLE OF THE STATE OF ILLINOIS

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

NATURE OF THE CASE

Defendant was convicted of murder and aggravated battery with a firearm after shooting at a rival gang member, killing one innocent bystander, and injuring another.[1] He appeals the denial of his motion for leave to file a successive postconviction petition. An issue is raised on the pleadings: whether defendant sufficiently pleaded actual innocence or cause and prejudice as is necessary to allow his successive filing.

ISSUES PRESENTED

1. Whether defendant sufficiently pleaded actual innocence based on affidavits from (a) witnesses who repeated their trial testimony and (b) a witness he chose not to call and who told police defendant was the shooter.

2. Whether defendant sufficiently pleaded cause and prejudice based on allegations of police misconduct in unrelated cases, where (a) the overwhelming majority of those allegations were not sustained, (b) the overwhelming majority could have been discovered either before trial or before defendant's first postconviction petition, and (c) the allegations of misconduct are dissimilar to the allegations here.

JURISDICTION

Jurisdiction lies under Supreme Court Rules 315 and 612. This Court allowed defendant's petition for leave to appeal in September 2019.

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[1] Consistent with petitioner-appellant's brief, the People refer to petitioner-appellant as "defendant" and cite his brief and appendix as "Def. Br. _" and "Appx. _." The common law record, supplemental record, and report of proceedings are cited as "C_," "SCR_," and "R_."

STATEMENT OF FACTS

A. This Court Should Disregard Defendant's Statement of Facts.

Defendant's statement of facts violates Supreme Court Rule 341(h)(6)'s requirement that it must "contain the facts necessary" to understand the case, with citations to the record, "stated accurately and fairly without argument or comment." Instead, defendant (1) discusses evidence not in the record, (2) misstates evidence in the record, and (3) provides an impermissibly argumentative factual summary.

First, defendant's fact section devotes several pages to a discussion of "evidence" — including General Progress Reports, statements non-testifying witnesses supposedly made, and physical comparisons — that is not contained in the record on appeal. Def. Br. 5-7, 10, 19; *see also infra* p. 23.

Second, defendant's fact section misstates the record. For example, it states that one detective involved in his case "admitted to highly coercive witness interrogations" in an unrelated civil lawsuit. Def. Br. 15. In fact, that detective *denied* coercing the witnesses, and the federal court agreed and dismissed the civil suit. *Infra* pp. 18, 56-58. Defendant's assertion that prosecutors in that federal lawsuit "determined the witnesses' statements were entirely false" and that the suspect was "exonerated," Def. Br. 3, 16, is also incorrect, as the federal courts concluded, *infra* pp. 56-58. Similarly incorrect is defendant's allegation that it was "established" in another unrelated civil lawsuit that a detective "had, over the course of a 50-hour interrogation, coerced a young, mentally disabled suspect into falsely

confessing that he killed his mother." Def. Br. 17. In fact, that detective was not named in the complaint, nor was he otherwise alleged to have engaged in that conduct. *Infra* pp. 52-53. Other misstatements are addressed below.

Third, the fact section is impermissibly argumentative. Defendant repeatedly argues, for example, that the appellate court's reasoning "strains credulity"; witness statements were "false," "coerced," and "appalling"; "compelling" evidence "supports [defendant's] claim of innocence"; "glaring" inconsistencies "cast doubt on the integrity of the police work"; prosecutors' theories were "insidious," "paradoxical[]," "concocted," and "gratuitous[]"; and "shocking examples" of misconduct and "oppressively coercive" interrogations in other cases "bear a remarkable resemblance" to his claim. Def. Br. 3-19.

For these reasons, this Court should disregard defendant's improper fact section.

B. The Investigation

Around 1:30 a.m. on May 6, 2001, Ernest Jenkins drove to a gas station in Chicago. R938. His passengers — Michael Watson (Michael) and his nephew Stanley Watson (Stanley) — got out to pump and pay for the gas. R616. As Stanley walked back to the car, he warned that a member of the Vice Lords street gang was approaching, but before anyone could flee, that man began shooting. R617. Jenkins, who had just celebrated his fifty-fourth birthday, was fatally shot; Michael was also shot, but survived. R619, 934-39, 914.

Michael told police that the shooter was a "dark black" "little, thin guy," who drove a box-style Chevy with tan doors and primer. R621, 697. Two weeks later, police found defendant driving a car matching that description two blocks from the gas station. R699-700. Defendant also matched Michael's description of the shooter: he was a 5'9" and 150-pound black man with a "dark complexion." SCR161. Michael told police that a month before the murder, he had seen the shooter sitting in the Chevy outside E&J Liquor Store, R707; defendant later admitted to police that he occasionally drove his car to that liquor store, SCR167.

Ultimately, five eyewitnesses — including defendant's girlfriend, Quiana Davis — told police that defendant was the shooter and that Stanley was his intended target. R738-40, 785-87, 809-12, 821-24; SCR172. The police investigation showed that (1) defendant is a Vice Lord and Stanley, a member of the rival Gangster Disciples, had encroached on Vice Lord territory by coming to the gas station, and (2) Stanley had sexually propositioned defendant's girlfriend, Davis. R615-16, 738-40, 785-87, 809-12, 821-24; SCR172. For his offenses, defendant was charged with first degree murder, attempted murder, and aggravated battery with a firearm. C5-19.

C. Trial

Michael

Michael, the surviving victim, testified that he and Stanley drove with Jenkins to the gas station around midnight. R612. Michael warned Stanley

not to come because Stanley was a Gangster Disciple, and the gas station was Vice Lord territory, filled with "nothing but Vice Lords." R612. Michael explained that Vice Lords and Gangster Disciples are deadly enemies: "if you on they turf, they gonna get you." R615-16. Stanley came anyway because he wanted to meet a woman. R613, 616. Jenkins sat in the car while Michael pumped gas and Stanley went inside to pay. R616. Stanley returned and warned that a Vice Lord was approaching. R617. Michael spotted the shooter 120 feet away; the shooter was "dark black" and "a little, thin guy." R620-21. The shooter began firing and hit Michael, who was able to get away. R619.

At one point during his testimony, Michael said that he "could not see [the shooter's] face." R621. At another point, Michael said that defendant did not look like the shooter. R622. Then Michael said that he did not know who shot him. *Id.* And he testified that he "did not see the person who shot Mr. Jenkins." R631.

Detective Brian Forberg

Detective Forberg testified that he and his partner, Detective John Foster, were two of the detectives who investigated the shooting. R695-96. After interviewing Michael, they looked for a box-style Chevy with primer paint. R697. Nine days later, police located defendant sitting inside the car about two blocks from the gas station. R699-700. Police photographed the vehicle, and Michael identified it as the shooter's car. R707.

The detectives then interviewed eyewitness Vernon Clay, who confirmed that defendant was at the gas station during the shooting. R714-15. Clay first said that a Vice Lord named "Norman" was the shooter. R715. But when detectives showed Stanley a photograph of a Vice Lord named Norman who lived in the area, Stanley denied that it was the shooter. R718.

When Detectives Forberg and Foster re-interviewed Clay, he abandoned the "Norman" story. R720-21. Clay said defendant drove to the gas station with several people; Davis got out of the car and walked toward the store; Stanley propositioned her; Davis said defendant was her man; then Stanley hugged Davis and whispered in her ear. R721-22. Moments later, Clay heard gunshots, then saw defendant running away with a gun. R722.

Detective Forberg told Clay that they were trying to locate other witnesses and Clay said he was "fearful" and wanted to stay in the station because he and defendant were Vice Lords and if other gang members knew he was cooperating, "he would be in some kind of danger." R724-25. Clay remained at the station overnight and, the next day, he again said that he would be in danger if the Vice Lords knew he was helping police. R726. Clay said he had withheld certain details out of "fear": specifically, he had not told police that defendant was the shooter and defendant had told Clay not to cooperate with police. R727-30.

Assistant State's Attorney (ASA) Lisa Hennelly took Clay's written statement in which he identified defendant as the shooter. R730-35. That

same night, another eyewitness, Shameka Mason, gave a statement to ASA Colleen Daly identifying defendant as the shooter. R746-47. Police then arrested defendant. R749-50. When he was arrested, defendant was parked at the gas station where the shooting occurred in the same car that Michael had identified as belonging to the shooter. *Id.*

Clay

Clay, a two-time convicted felon, testified that he and defendant were Vice Lords, he considered defendant a friend, and Stanley was a Gangster Disciple. R456, 459, 509. After Clay was shown a copy of his statement identifying defendant as the shooter, Clay admitted signing all five pages of his statement, but claimed that the statement was incorrect because he (Clay) was at home when the shooting occurred, R472-75, and he signed it only because he thought it was a property receipt, R478. Clay claimed that Detective Forberg told him that, because everyone had told police that he was not at the gas station, Clay would be permitted to leave upon signing a property receipt. R468. A "Mexican guy" (i.e., neither Forberg nor Foster) covered up the text of the statement and said he needed to sign the bottom of each page to get his property back. R476-80.

Clay admitted that he testified before the grand jury two weeks after signing the statement; he claimed at trial that an unnamed police officer told him to answer "yes" to everything he was asked during the grand jury. R489.

However, when confronted with his grand jury testimony, Clay admitted that he gave narrative answers rather than merely answering "yes." R491-508.

ASA Kathleen Lanahan testified that she met with Clay before he testified before the grand jury, and he told her his signed statement was true. R870. ASA Lanahan then read Clay's grand jury testimony into evidence. R873. Clay testified before the grand jury that he saw defendant at the gas station on the night of the shooting. R875. Stanley approached Davis (defendant's girlfriend) and loudly asked if she wanted to have sex. R876-77. Clay went inside the store, came out a few minutes later, and began walking away. R877. Clay heard about eight gunshots and saw defendant shooting at Stanley. R877-78. Clay said he was treated "good" by police. R880.

Clay's signed statement was also read into evidence at trial. R737. Among other things, Clay said that (1) he and defendant are Vice Lords, while Stanley is a Gangster Disciple; (2) Davis and defendant had a sexual relationship; (3) Stanley sexually propositioned Davis at the gas station; (4) defendant shot at Stanley; and (5) police had treated him well. R738-40.

Brandy Butler[2]

Brandy Butler testified that she grew up with defendant and knew that he is a Vice Lord. R400, 415. She drove to the gas station with Davis and Manny Stewart. R401. Butler identified a photo of the Chevy in which she drove; it was the same car that Michael had identified as belonging to the

[2] Sometimes referred to as Brandy Grant, she is referred to as Butler here to be consistent with the lower courts' opinions.

shooter and that defendant admitted he owned. R447-48. Butler and Davis got out of the car, Davis talked to Stanley, and when Butler went inside the store to buy a "blunt" (a cigar to put marijuana in), she heard "about ten" gunshots. R402.

Butler testified that, a month after the shooting, she was interviewed by Detectives Forberg and Foster and gave a signed statement to ASA Daly that identified defendant as the shooter. R404-05, 821-24.

However, at trial, Butler claimed that defendant was not at the gas station. R403. Butler testified that she never read the statement that she had signed, but then she admitted that it was read aloud to her and she was allowed to make changes. R414-15. She then testified that police "made this story up." R419. She claimed that before giving her statement, she was made to wait at the police station "for hours" and threatened with arrest. R440-41. Yet Butler admitted that before giving her statement, she told ASA Daly that she had been treated "fine" by Detectives Forberg and Foster. R406. And she admitted that she later told ASA Lanahan that she had been treated well by police and ASA Daly. R423.

ASA Daly testified that she interviewed Butler, who said that police had treated her fine and she had not been threatened or promised anything. R816-17. After speaking with Butler, ASA Daly prepared the statement. R817. ASA Daly read the statement aloud, Butler was permitted to make changes, and then Butler signed the statement. R818.

At trial, Butler's signed statement was read into evidence. R821. In it, Butler stated that she drove to the gas station with defendant, Davis, Stewart, and Stewart's brother. R822. She had known defendant for several years and knew that he is a Vice Lord. *Id.* Butler got out of the car and saw Stanley, who she knew was a Gangster Disciple. R822-23. Stanley "called out" to Davis while Butler went inside to buy a blunt. R823. Butler heard gunshots; she looked outside and saw defendant shooting at Stanley, who was unarmed. *Id.* After defendant ran away, Butler went outside and saw a man slumped over in the car that Stanley had been standing near when defendant opened fire. R823-24. Butler said she was treated well by police and not threatened or promised anything. R824.

ASA Lanahan testified that she examined Butler in the grand jury proceedings. R842. Before Butler appeared at the grand jury, she told ASA Lanahan that her signed statement "was true." R843. Without looking at the statement, Butler told ASA Lanahan what occurred during the shooting and it matched the statement. R844. Lanahan confirmed with Butler that police had not threatened or promised her anything. R843.

Butler's grand jury testimony was then read into evidence. R850. In it, Butler similarly stated that (1) she was riding in defendant's car with defendant, Davis, and others; (2) defendant is a Vice Lord; (3) while in the gas station store, she looked outside and saw defendant shooting at Stanley; and (4) police had not threatened or promised her anything. R851-58.

Shemika Mason

Mason, a three-time convicted felon, testified that she had known defendant for years. R529, 553. She identified a photo of the Chevy — that Michael testified was driven by the shooter — as defendant's car. R552-53. She also testified that Stanley is a Gangster Disciple and that she signed a statement identifying defendant as the shooter. R542, 549.

However, Mason testified that she was not at the gas station. R532. She claimed that she was driving around with Davis and Butler, "getting drunk and smoking some marijuana." *Id.* Around 1:00 a.m., they went to Davis's house; Mason stayed there, and Davis and Butler left. R532-33.

Mason claimed that she signed her statement because Detectives Forberg and Foster said they would "take care of" an outstanding warrant she had. R535. She testified that she was picked up by police around "9 or 10 o'clock at night" on June 12 and signed her statement at 2:17 a.m. R554. Butler admitted that she told ASA Daly that she had been treated "fine" by Detectives Forberg and Foster. R541.

ASA Daly testified that she spoke with Mason alone and Mason said that she had been treated well by police and that no threats or promises had been made to her. R802-03. Daly prepared the statement by asking Mason questions and writing down Mason's answers. R804. Then they read the statement together, and Mason made changes she wanted; when Mason was satisfied, she signed it. R805-06.

Mason's statement was read into evidence. R809-13. In it, Mason stated that she was driving around with defendant, who is a Vice Lord, Butler, Davis, and Stewart. R810. At the gas station, she and Butler went inside the store, while Davis talked to Stanley, who is a Gangster Disciple. R810-11. When Mason returned, she saw defendant holding a gun; he then began shooting at Stanley, who was unarmed. R811. A man standing by a car between defendant and Stanley got shot and collapsed. *Id.* Defendant later told Mason, Butler, and Davis not to talk to the police. R812. Mason's statement attested that she had been treated well by police. *Id.*

Manny Stewart

Stewart testified that he is defendant's cousin and they are Vice Lords. R557, 576. He was shown a photo of the car that Michael said was driven by the shooter and Stewart said that he and defendant owned the car. R558. Stewart also testified that Stanley is a Gangster Disciple. R561. At the time of trial, Stewart was in prison for attempted aggravated arson. R557.

Stewart testified that he was at the gas station to buy some blunts, but denied that defendant was there. R560. Instead, Stewart claimed that "Rick Party" was the shooter. R562. Stewart admitted that he first told police that he had no knowledge of the shooting and then later told police that defendant was the shooter. R567-68. Stewart claimed that he implicated defendant because police threatened to arrest him. R569. However, Stewart also acknowledged that he told ASA Hennelly that (1) defendant was the shooter;

and (2) he was treated well by police, allowed to use the restroom, and given something to eat, and not threatened or promised anything. R572-80.

Detective Kevin Howley testified that Stewart told him that (1) defendant was the shooter, and (2) he had made up the story about "Rick Party" to protect defendant. R655-57. Howley testified that he "never talked" to Detectives Forberg and Foster. R658.

Detective John Clisham testified that (separate and apart from Howley) he spoke with Stewart, who said defendant was the shooter. R774-76. Shortly thereafter, ASA Hennelly took Stewart's written statement identifying defendant as the shooter. R778-83. Stewart never asked to leave during his interview. R791. If Stewart had said he did not want to give a statement, Hennelly would not have taken it. R794.

Stewart's statement was read into evidence. R784. In it, Stewart acknowledged that he was defendant's cousin and they are both Vice Lords. R785. They drove to the gas station with Davis and others. R785-86. Davis began talking to Stanley, a Gangster Disciple. R786. Minutes later, Stewart heard gunshots and saw defendant shooting; a man in the car in front of defendant got shot. *Id.* Stewart stated he was treated fine by police and not threatened or promised anything for his statement. R787.

ASA Lanahan testified that she met with Stewart before the grand jury, and he confirmed that his signed statement was true. R860. Stewart's grand jury testimony was then read into evidence. R862. In it, Stewart

confirmed the account in his statement and testified that he "was treated good" by police. R864-69.

Forensic Evidence

A forensic investigator testified that he recovered six casings from a nine-millimeter handgun near Jenkins's car and a fired bullet from the floor of the car. R665-68. The parties stipulated that the casings and bullet came from the same gun. R898. A forensic pathologist testified that Jenkins died due to multiple gunshots that entered the left side of his body. R906-14.

Defendant's case

Defendant neither testified nor called any witnesses. R935. In closing argument, defense counsel told that jury that defendant "clearly" had been "framed" by police and that the police "sweat[ed]" the witnesses to get them to implicate defendant. R968. Defense counsel told the jury that Detective Forberg "lied to you. He lied to you." R964. Defense counsel repeatedly argued that police testimony about the witnesses' statements was "nonsense," and the police "were trying to fool you" and were "smiling" about lying to the jury. R965. The police were "so unprofessional" and acted "without caring for what the facts and the evidence were." R966.

C. Verdict and Sentence

The jury found defendant guilty of first degree murder and aggravated battery with a firearm. R1026. Defendant was sentenced to an aggregate term of 45 years in prison. R1223-24.

D. Direct Appeal

On appeal, defendant argued that the evidence was insufficient to convict him because the State's case rested on recanted, coerced statements. C124. The appellate court affirmed, holding that "[t]he evidence here sufficiently establishes that defendant was the shooter" because the eyewitnesses identified him as such in their statements, it was reasonable to infer that they recanted due to fear of defendant's gang, and forensic evidence "corroborat[ed]" the eyewitnesses' accounts of the shooting. C130-34. This Court denied leave to appeal. *See* No. 102613.

E. Prior State and Federal Collateral Proceedings.

In 2007, defendant filed a postconviction petition alleging that his counsel erred by not calling Davis to testify because she was in court and prepared to testify. C151-52. The circuit court dismissed the petition as frivolous and patently without merit, C212-27, the appellate court affirmed, and this Court denied leave to appeal, *see* No. 108564.

In 2009, defendant filed a federal habeas corpus petition alleging that the evidence was insufficient to sustain his convictions. *Jackson v. Hardy*, No. 09 C 7774, 2011 WL 1357310, at *8 (N.D. Ill. Apr. 11, 2011). The federal court rejected that claim on the merits. *Id.*

F. Motion for Leave to File a Successive Petition.

In 2017, defendant (represented by counsel) filed a motion for leave to file a successive postconviction petition raising two claims: (1) he is innocent,

and (2) evidence of police misconduct in other cases corroborates his due process claim that his conviction rests on coerced statements. SCR4.

Defendant relied on four categories of supporting evidence. First, defendant attached affidavits from Stewart, Butler, and Davis. SCR221-33, 239-43. Stewart's and Butler's affidavits generally repeat their trial testimony. SCR230-33, 239-43. Davis's affidavit states that (1) contrary to other witnesses' (unrecanted) accounts, she sat in the car during the shooting and did not speak to Stanley; (2) she refused to give police a statement inculpating defendant; and (3) police "harass[ed]" her. SCR221-28.

Second, defendant attached the police department's Case Supplementary Report. The report states that Davis told police that (1) defendant was at the gas station; (2) Stanley sexually propositioned her after she got out of the car, then began "groping" her; (3) after Stanley walked back to his car, defendant shot at him; and (4) she had a romantic relationship with defendant and would not put her statement in writing. SCR172.[3]

Third, defendant attached documents related to a Complaint Register (i.e., civilian complaint or "CR") that Davis and her mother filed against Detectives Forberg and Foster a year after Davis told police that defendant was the shooter. SCR154. The complaint alleged that Forberg and Foster (who were not the detectives who took Davis's statement implicating

[3] Although Davis's name is redacted, the parties agree the report concerns Davis. Defendant has at times disputed the nature of his relationship with Davis but given her statements to police and other evidence of their sexual relationship, the People refer to Davis as defendant's "girlfriend."

defendant) came to Davis's residence and threatened her with arrest and, on one occasion (after Davis implicated defendant), searched the residence. *Id.* The officer who investigated Davis's complaint reported that (1) Davis initially lied to him about her identity; (2) Davis told him "that she did not want to be a witness or give detectives a statement because she is a friend of the alleged offender and did not want to give him any trouble"; (3) when Forberg and Foster came to the residence, she hid while her mother falsely said that she was not there; and (4) she did not see anyone search the house. SCR155. The investigating officer also spoke with Detectives Forberg and Foster, who admitted going to the residence but denied entering it. *Id.* The investigating officer further noted that Davis had an outstanding warrant for theft, he was unable to locate her again, and he found her "to be deceptive." *Id.* Accordingly, Davis's complaint was not sustained. *Id.*

Third, defendant attached a spreadsheet prepared by his counsel that listed other Complaint Registers filed against the four detectives who interviewed the testifying eyewitnesses (the "interviewing detectives"). Counsel's spreadsheet asserted that:

- Detective Forberg had thirty-four other complaints between 1996 and 2014. SCR60-61. None was for "coercion of a witness or suspect." *Id.* Only one complaint was sustained, a finding of "gang affiliation" (which is undefined) in 2014. *Id.*

- Detective Foster had sixty-five other complaints between 1993 at 2013. SCR59-60. None was for "coercion of a witness or suspect." *Id.* Three complaints were sustained: sexual harassment in 1998, "association with a felon" in 2006, and use of his firearm while off duty in 2013. *Id.*

- Detective Clisham had ten complaints between 1992 and 1998. SCR61. None was sustained or related to witness coercion. *Id.*

- Detective Howley had two complaints between 1987 and 1992. SCR62. Neither was sustained or related to witness coercion. *Id.*

Fourth, defendant identified four civil lawsuits in which he claimed that one or more of the detectives who investigated his case were involved.

Publicly available information about these lawsuits reveals the following:

- *Bell v. City of Chicago*: the complaint in this case did not name any of the detectives involved in defendant's case.[4]

- *McGee v. City of Chicago*: this malicious prosecution lawsuit did not name any of the detectives who interviewed testifying witnesses in defendant's case; it did name Detective Robert Bartik (who participated in Davis's interview), but the verdict in favor of McGee was overturned on appeal and the case was subsequently settled without a finding of wrongdoing. 2012 IL App (1st) 111084.

- *Bridewell v. Eberle*: the federal district court granted a partial motion to dismiss, finding that allegations of coercive interrogation by Detective Forberg and another officer were meritless because those allegations showed "nothing more than a standard police interrogation and did not violate [plaintiff's] constitutional rights." *Bridewell v. Eberle*, No. 08 C 4947, 2009 WL 1028229, *3 (N.D. Ill. Apr. 16, 2009). The district court later rejected the plaintiffs' remaining claims, and the Seventh Circuit affirmed. *Bridewell v. Eberle*, 730 F.3d 672 (7th Cir. 2013).

- *Patterson v. City of Chicago*: this wrongful conviction lawsuit named ten defendants (including Detectives Forberg and Foster); it was settled with no finding of wrongdoing.[5]

The circuit court denied leave to file the successive petition, and the appellate court affirmed, finding that (1) the affidavits were not new evidence

[4] *See* www.law. northwestern.edu/legalclinic/macarthur/projects/wrongful/documents/BellComplaint.pdf.

[5] https://chicago.legistar.com/legislationdetail.aspx?ID=1213332&GUID=689C804A-70D3-4ED1-AB03-BD6071071304.

because Butler and Stewart merely repeated their trial testimony and defendant, by his own admission, could have called Davis to testify; and (2) defendant failed to make "the necessary connection" of "sufficient similar misconduct" between the alleged coercion in his case and the allegations of misconduct in the other cases that he relied on. *People v. Jackson*, 2018 IL App (1st) 171773, ¶¶ 70-92. Justice Mikva dissented upon denial of rehearing, arguing that (1) Davis's affidavit should be considered new evidence; and (2) defendant had alleged a connection between Detectives Forberg's and Foster's alleged misconduct in *Bridewell* and *Patterson* and the coercion alleged at defendant's trial. *Id.* ¶¶ 98, 106, 112 (Mikva, J., dissenting). Justice Mikva did not find that Stewart's and Butler's affidavits should be considered newly discovered evidence and she cautioned that "for most of the detectives involved in this case, [defendant] has failed to establish prejudice by connecting the dots between what the recanting witnesses said happened to them and evidence of prior coercive behavior." *Id.*

STANDARD OF REVIEW

Denial of leave to file a successive postconviction petition is reviewed de novo. *People v. Bailey*, 2017 IL 121450, ¶ 13.

ARGUMENT

It is "well-settled" that successive postconviction petitions are "disfavored" because they impede the finality of litigation. *People v. Edwards*, 2012 IL 111711, ¶ 29; *see also People v. Holman*, 2017 IL 120655, ¶ 25. Accordingly, the Post-Conviction Hearing Act requires defendant to obtain leave of court to file a successive petition. 725 ILCS 5/122(f). And, in seeking leave, defendant faces "immense" procedural hurdles. *People v. Davis*, 2014 115595, ¶ 14. Defendant may file a successive petition only if his pleading (1) asserts a colorable actual innocence claim, supported by new evidence showing that it is more likely than not that no reasonable juror would convict him; or (2) meets the "cause and prejudice" test for the constitutional claim he seeks to raise, i.e., establishes that an external factor prevented the claimed error from being raised earlier and the error so infected the trial that his conviction violates due process. *See, e.g.*, *Edwards*, 2012 IL 111711, ¶¶ 32-33; *Holman*, 2017 IL 120655, ¶ 26.

I. Defendant Has Not Asserted a Colorable Actual Innocence Claim.

A. Defendant's Supporting Evidence Is Insufficient to Meet the Actual Innocence Standard.

As defendant's own cases hold, the actual innocence standard is "extraordinarily difficult to meet." *People v. Coleman*, 2013 IL 113307, ¶ 94 (cited at Def. Br. 30-32, 35-38); *see also Edwards*, 2012 IL 111711, ¶ 32 ("claims of actual innocence are rarely successful"). Defendant's motion must present (1) "newly discovered" evidence, (2) that is not cumulative of evidence

presented at trial, and (3) is "of such conclusive character" that it raises the probability that "it is more likely than not that no reasonable juror would have convicted him." *Edwards*, 2012 IL 111711, ¶¶ 32-33. The evidence defendant relies on for his actual innocence claim — affidavits from Stewart, Butler, and Davis — fails to meet that standard.

1. Stewart's affidavit is insufficient because it repeats his trial testimony.

Stewart's affidavit repeats his trial testimony that (1) "Rick Party" was the shooter; and (2) police coerced him into identifying defendant. *Compare* SCR230-33 (affidavit) *with* R562-71 (testimony). Thus, the appellate court correctly concluded that Stewart's affidavit was not new, it was cumulative of evidence presented at trial, and it was not of such conclusive character that it would result in defendant's acquittal. *Jackson*, 2018 IL App (1st) 171773, ¶ 73. Defendant does not dispute this conclusion — indeed, his only reference to Stewart's affidavit is in his fact section, where he describes the affidavit as "generally consistent" with Stewart's trial testimony, Def. Br. 19; thus, defendant has forfeited any argument that Stewart's affidavit supports his innocence claim, *see* Ill. S. Ct. R. 341(h)(7) (arguments not raised in appellant's opening brief are forfeited).

2. Butler's affidavit is insufficient because it repeats her trial testimony.

The appellate court likewise correctly concluded that Butler's affidavit does not meet the actual innocence standard because it merely repeats her trial testimony that defendant was not the shooter and that police coerced

her into identifying defendant. *Jackson*, 2018 IL App (1st) 171773, ¶ 73; *compare* SCR239-42 (affidavit) *with* R401-03, 419-20 (testimony).

Defendant concedes that Butler's affidavit is "generally consistent" with her trial testimony, Def. Br. 19, but argues that there is one difference: Butler's affidavit states that after the murder, she "found out that the police were harassing Quina [*sic*]" (i.e., Quiana Davis, defendant's girlfriend). Def. Br. 32. But that alleged "harassment" is not new evidence: Butler testified at trial that the police "kept harassing me and Quiana" to implicate defendant, R437, and stated on cross-examination that police "told me if I didn't [sign the statement] I was gonna be doing time for that; me, Quiana. You can ask Quiana," R441; *see also* R439 ("They came and got us. They was harassing us.").

Therefore, defendant's argument — that the Butler affidavit's assertion that police harassed Davis should be considered new because such testimony would not have been allowed at trial — is affirmatively rebutted by the record, which shows that the testimony was, in fact, admitted at trial. Def. Br. 32. Moreover, this Court has squarely rejected defendant's theory that evidence should be considered "new," even if known at the time of trial, if it would have been inadmissible at trial. *Bailey*, 2017 IL 121450, ¶ 45 (evidence not "newly discovered" for purposes of successive petition even though trial court "refused to allow [petitioner] to present it at trial" due to lack of relevance); *see also Coleman*, 2013 IL 113307, ¶ 96 ("New means the

evidence was discovered after trial and could not have been discovered earlier through the exercise of due diligence").

Further, defendant has not shown that this evidence is "of such conclusive character" that "it is more likely than not that no reasonable juror would have convicted him." In addition to Butler's testimony that police harassed Davis, defendant's jury heard four eyewitnesses allege that police coerced them into identifying defendant as the shooter. But the jury necessarily rejected those allegations of coercion when they found defendant guilty; defendant cannot credibly argue that redundant testimony from Butler that police supposedly harassed Davis is "more likely than not" to change that result.

Finally, although defendant's fact section maintains that Butler's description of the shooter matches "Rick Party" (whom Stewart claimed was the shooter), defendant cites to no portion of the record providing a description of "Rick Party," Def. Br. 19, and the People were unable to find one in the record. Nor does defendant provide record support for his claim that Butler's description of the shooter matches the description an eyewitness named "Dr. Widdell" gave to police, *see* Def. Br. 19; Ill. S. Ct. R. 341(h)(7) (appellant's brief must cite "pages of the record relied on"), and defendant also fails to explain how "Dr. Widdell" described the shooter. In the appellate court, defendant argued (again without appropriate citation to the record) that "Dr. Widdell" said that "the shooter had a 'dark complex[ion],' 'short

hair,' and was 'thin.'" Def. Appx. A265 n.6. But that description *implicates* defendant, who is described in his arrest report as a black man with "Dark Complexion" and "Short Hair" and weighing 150 pounds. SCR161. In sum, Butler's affidavit fails to meet the actual innocence standard.

3. Davis's affidavit is insufficient.

Quiana Davis, defendant's girlfriend, did not testify at trial, but fourteen years later she signed an affidavit, prepared by defendant's counsel, claiming that defendant was not the shooter. SCR221-28. As defendant's own sworn statement shows, Davis's affidavit neither can be considered "newly discovered" nor would it "more likely than not" have led to his acquittal.

i. Davis's affidavit is not "newly discovered."

a. Davis's potential testimony was known at trial.

Defendant's 2007 postconviction petition alleged that trial counsel was ineffective for failing to present testimony from Davis. C152. According to the sworn petition, Davis (1) told the defense before trial that defendant was innocent, and (2) she "was at trial" and "ready to testify" on his behalf. *Id.* Defendant supported that petition with his own affidavit attesting that (1) he frequently talked with Davis "over visiting hours and phone calls" during his incarceration; (2) before trial, Davis told a defense investigator that defendant was not the shooter; and (3) Davis "was present during trial" and ready to testify. C175. Defendant also attached to his 2007 petition an affidavit he prepared for Davis, in which she attested that defendant was not

the shooter and that, before trial, she told the defense investigator "exactly what happen[ed] the night of the shooting." C177 (Davis's "first affidavit"). That first affidavit was unsigned, but defendant maintained that he was merely waiting on her signature. C152. Defendant does not now claim that Davis's first affidavit is untrue — to the contrary, he argues that it was unjustly overlooked earlier in this case. Def. Br. 34. Accordingly, petitioner's affidavit and Davis's first affidavit demonstrate that Davis's potential testimony was known to the defense at trial, and thus is not "new evidence" that could support an actual innocence claim.

b. Defendant's contrary argument — that whether evidence is newly discovered is "not outcome determinative" — is meritless.

Defendant argues in several different ways that this Court should consider Davis's proposed testimony (even though it is not new evidence), but they are all meritless. Defendant's primary argument — that whether evidence was known at the time of trial "is not outcome determinative on the issue to leave to file" a successive petition, Def. Br. 30-31 — is foreclosed by this Court's precedent. *See, e.g.*, *Bailey*, 2017 IL 121450, ¶ 45 (denying leave to file successive petition where evidence was not newly discovered); *Edwards*, 2012 IL 111711, ¶¶ 34-37 (same). Indeed, a case defendant cites to support this argument held that witness testimony that could have been discovered before trial is not new evidence, and therefore fails to meet the actual innocence standard, even though the testimony was "certainly

important." *People v. Tyler*, 2015 IL App (1st) 123470, ¶¶ 160, 199 (cited at Def. Br. 31, 38).

Defendant's remaining cases either rebut his argument or are inapposite. *Coleman* held that a petitioner may not base an actual innocence claim on potential witnesses "presumably" known to defense counsel at trial. 2013 113307, ¶ 100. *Sanders* held that if the evidence would not lead to acquittal, the court need not analyze whether it is newly discovered. *People v. Sanders*, 2016 IL 118123, ¶ 47. *Ortiz* held that witness testimony was "new" evidence because it was unknown until the witness came forward ten years after trial. *People v. Ortiz*, 235 Ill. 2d 319, 334 (2009). And the *Washington* concurrence repeated the rule that petitioners may raise actual innocence claims based on newly discovered evidence. *People v. Washington*, 171 Ill. 2d 475, 493 (1996) (McMorrow, J., concurring).

c. Defendant's argument that he was "prevented" from calling Davis to testify at trial is meritless.

Defendant's next argument — that Davis's second affidavit should be deemed new evidence because defendant was somehow "prevented" from offering her testimony at trial — fails because defendant and Davis previously attested that trial counsel knew of Davis's potential testimony and Davis came to court prepared to testify. C152, 175-177; *supra* pp. 24-25.

Perhaps realizing that, Davis's second affidavit (prepared ten years after her first one) claims for the first time that she did *not* come to court, because someone (she does not specify who) purportedly said her testimony

"would not be needed." SCR227. Defendant does not acknowledge, let alone account for, this significant difference.

Defendant instead speculates — without citing any evidence — that the prosecution told Davis that her testimony would not be needed. Def. Br. 33-34. But that speculation is contrary to defendant's sworn postconviction petition, his sworn affidavit, and Davis's first affidavit, which attested that Davis was in court ready to testify and faulted trial counsel for not calling her to the stand. C152, 175-77. Moreover, defendant's speculation is not credible: Davis had a close relationship with defendant and she attests she was in communication with the defense but attempted to avoid (and was distrustful of) the State; there is thus no reason to believe that she would decline to appear in court because the prosecution told her that her testimony was unnecessary. Rather, consistent with defendant's first petition, the most reasonable conclusion is that defense counsel was aware of Davis's testimony and decided not to call her. *See* C152. And any ambiguity in Davis's second affidavit about who said her testimony would not be needed should be construed against defendant, especially given that his current counsel drafted it. *See Bailey*, 2017 IL 121450, ¶ 45 (petitioner must plead "facts that would support a finding that the evidence is newly discovered").

Even in the unlikely event that the prosecution told Davis that her testimony was unnecessary, defense counsel could still have presented her testimony, given that (according to the affidavits attached to defendant's

2007 petition) she was communicating with the defense. Yet the trial record contains no evidence that defense counsel attempted to do so, such as by seeking a continuance or to enforce a subpoena. Thus, even accepting defendant's theory that the prosecution told Davis her testimony was unnecessary, her affidavit is not new evidence. *See, e.g.*, *Edwards*, 2012 IL 111711, ¶¶ 35-37 (witnesses' testimony was not new, despite assertions that they rejected defense counsel's attempts to persuade them to testify, where counsel took no additional steps to secure their appearance).

Defendant's argument that it "strains credulity" to believe that defense counsel would have decided that Davis's testimony was unnecessary ignores his sworn postconviction petition and affidavit (alleging that counsel erred by deciding not to call Davis) and the trial record (which shows no effort by defense counsel to seek a continuance or enforce a subpoena). Def. Br. 34.

Defendant's argument also ignores the risks of calling Davis to testify. By the time the prosecution rested, the jury had heard (1) the surviving victim claim that he could not identify defendant and (2) four eyewitnesses recant and testify that defendant was not the shooter. Given that defendant has repeatedly argued the evidence was insufficient to prove his guilt, *supra* p. 15, he cannot now contend that it would have been unreasonable, at the close of the prosecution's case, for defense counsel to have believed that defendant had a reasonable chance of acquittal. And assuming that Davis's

second affidavit is true, defense counsel had to know that calling Davis would undermine defendant's chance of acquittal for three reasons.

First, as the police reports attached to defendant's successive petition show, if Davis had testified on defendant's behalf, the prosecution could have called multiple witnesses to testify that Davis told police that defendant was the shooter but they had a relationship and she did not want to get him in trouble. SCR155, 172; *see also supra* p. 16.

Second, Davis's second account would have contradicted Butler's and Stewart's (unrecanted) testimony. Butler and Stewart both testified that Davis got out of the car at the gas station and, moments before the shooting began, was talking with Stanley, whom the prosecution alleged was defendant's intended target (because he was a rival gang member and had sexually propositioned Davis). R402, 561. In contrast, Davis's second affidavit states that she saw Stanley, and fearing for her safety, she "immediately got back in the car" without talking to him. SCR222. Given that stark difference on such a significant, readily observable fact, it would be reasonable for counsel to decide not to present Davis's contradictory account.

Third, Davis's account would have supported the rest of the prosecution's theory, because her second affidavit states that she "knew it was dangerous" for Stanley to be at the gas station because it was "Vice Lord territory" (defendant's gang) and Stanley "might be targeted by Vice Lords for being in their territory." *Id.*

Thus, assuming it is true that Davis was "prevented" from testifying at defendant's trial, that likely was because defense counsel decided not to call her, as defendant maintained in his sworn 2007 petition. Davis's second affidavit therefore is not new evidence. *See, e.g., Edwards*, 2012 IL 111711, ¶¶ 35-37 (because defense counsel failed to take additional steps to bring alibi witnesses to court, the "logical assumption is that the witnesses' testimony would not have been helpful").

d. Defendant's argument that he was "prevented" from presenting Davis's first affidavit in his initial postconviction proceeding is incorrect and irrelevant.

Defendant's last theory is that Davis's second affidavit should be considered "new evidence" — even though she "was known to [him] at the time of trial" — because dismissal of his initial postconviction petition was due in part to the fact that Davis's first affidavit was unsigned. Def. Br. 33-34. According to defendant, had his postconviction petition been filed after this Court's subsequent decision in *People v. Allen*, 2015 IL 113135, the fact that Davis's affidavit was unsigned would not have been a basis to dismiss his petition. Defendant's argument fails for four independent reasons.

First, as shown above, Davis was known to the defense at trial, so her potential testimony is not newly discovered. Defendant cites no authority for his theory that an uncalled witness who was known at trial becomes "newly discovered" for purposes of a successive petition if the petitioner fails to follow procedural rules when filing his initial petition. Rather, defendant's theory

contradicts this Court's precedent, the intent of the Post-Conviction Hearing Act, and the important policy of protecting the finality of litigation. *See, e.g.*, *Holman*, 2017 IL 120655, ¶ 25 ("The Act itself contemplates the filing of a single petition" because "successive petitions impede the finality of criminal litigation").

Second, even under *Allen*, defendant's first petition would have been summarily dismissed. Although *Allen* held that an affidavit's lack of *notarization* is not necessarily a basis to dismiss a petition, the affidavit in *Allen* was drafted and signed by the affiant, was expressly made under penalty of perjury, and included the affiant's thumbprint. 2015 IL 113135, ¶¶ 14, 31, 34. By contrast, Davis's first affidavit would not have met the *Allen* exception because it was unsigned, was not drafted by Davis, was not made under penalty of perjury, and contained no fingerprint or other authentication. C177. Defendant's theory that a petition should proceed to the second stage so long as the petitioner drafts a proposed affidavit for a supposed exculpatory eyewitness, even if the proposed affidavit is unsigned, unnotarized, and contains no other form of verification, is contrary to established law. *See, e.g.*, *People v. Harris*, 224 Ill. 2d 115, 142 (2007) (unsigned affidavits are insufficient to avoid dismissal).

Third, defendant contends that it would be "a glaring miscarriage of justice" to preclude him from going forward with Davis's second affidavit, Def. Br. 34, but in fact the equities are against him. To begin, because defendant

admits that he frequently communicated with Davis, often in person, when preparing his initial petition, he could have delayed filing the petition until Davis signed the first affidavit. C152, 175-77.

More importantly, in his first petition, defendant provided a sworn statement and affidavit (and prepared a similar affidavit for Davis) attesting that trial counsel knew Davis had helpful testimony and was in court ready to testify, and defendant argued that counsel erred by not calling her to testify. *Id.* By contrast, in his successive petition, defendant alleges that (due to the prosecution's interference) Davis never came to court. Def. Br. 18-19, 34; SCR227. The interests of justice do not require this Court to allow defendant to file a successive petition that completely changes key factual allegations and legal theories. To the contrary, the interests of justice should bar defendant from doing so.

Lastly, the single case defendant cites in favor of his "miscarriage of justice" theory is inapposite. *See People v. Warren*, 2016 IL App (1st) 090884-C (cited at Def. Br. 32-34). In *Warren*, the petitioner's counsel filed an initial postconviction petition alleging actual innocence but attached no supporting evidence, even though counsel was in contact with several witnesses (discovered after trial) who could have provided supporting affidavits. *Id.* ¶¶ 25, 38. The petitioner sought to substitute his counsel, alleging that counsel had failed to present his claims; the circuit court summarily denied that request and dismissed the petition. *Id.* ¶¶ 28-30. The petitioner then

filed a pro se motion for leave to file a successive petition, attaching exculpatory affidavits from those witnesses. *Id.* ¶ 32. Given the "unique facts" of the case, the appellate majority held that the petitioner should be allowed to file a successive petition supported by those affidavits because: (1) postconviction counsel had provided "unreasonable assistance" by "inexplicably" failing to include them in the initial petition, and (2) the postconviction court had denied petitioner leave to substitute counsel. *Id.* ¶¶ 116-118, 141-42. Notably, the opinion cautioned that it was based on "unique facts" and was "confined to the unique instance" where retained counsel filing the first petition "inexplicably" failed to include affidavits or "make any record whatsoever" of new exculpatory evidence. *Id.* ¶¶ 141-42. By contrast, here, defendant admits he knew Davis at the time of trial and regularly communicated with her while preparing his initial postconviction petition; any error in supporting his claim in the initial petition was entirely his own.

ii. Defendant cannot show that it is "more likely than not" that Davis's testimony would result in his acquittal.

Even if Davis's second affidavit were new, defendant's claim would still fail. Actual innocence claims are "rarely successful" in part because the petitioner must also show, on the pleadings, the probability that it is "more likely than not" that "no reasonable juror" would find him guilty. *Edwards*, 2012 IL 111711, ¶ 33. This standard "requires a stronger showing than that required to establish *Strickland* prejudice." *Id.* ¶ 40; *see also Coleman*, 2013

IL 113307, ¶ 94 (actual innocence standard is "extraordinarily difficult to meet") (cited at Def. Br. 30-32, 35-38).

For example, in *Edwards*, this Court affirmed the denial of a motion for leave to file a successive petition, holding that an affidavit from a man attesting that he (the affiant) was the shooter and that the petitioner (a fifteen-year-old boy) "had nothing to do with this shooting" and was neither "a part [of nor] took part in this crime," was insufficient to show that no reasonable juror would convict the petitioner of murder, even though none of the eyewitnesses presented at trial placed the petitioner at the scene, the People had no physical evidence tying him to the murder, and his inculpatory statements were allegedly coerced. 2012 IL 111711, ¶¶ 4, 7, 39.

Davis's affidavit likewise fails to show that it is more likely than not defendant would be acquitted for at least three independent reasons. First, as noted, *supra* pp. 16, 29, defendant's own documents show that had Davis testified, the prosecution could have called multiple witnesses to testify that she told police that defendant was the shooter but declined to sign a statement because they were in a relationship and she did not want to hurt his case, SCR155, 172.

Second, as also noted, *supra* p. 29, Davis's proposed testimony would directly contradict Butler's and Stewart's (unrecanted) testimony that Davis got out of the car and talked to Stanley. As defendant's own cases show, he cannot meet the actual innocence standard by relying on an affidavit that is

contradicted on a key factual point by other witnesses. *See Sanders*, 2016 IL 118123, ¶¶ 52-53 (affidavits attesting that petitioner was not at scene insufficient to show actual innocence because they contradicted testimony of other witnesses and "merely add[] conflicting evidence to the evidence adduced at trial") (cited at Def. Br. 30, 37); *People v. Evans*, 2017 IL App (1st) 143268, ¶¶ 40-42 (following *Sanders* and holding that exculpatory affidavits from two new witnesses that contradicted prior statements of two other witnesses inculpating defendant were insufficient to meet actual innocence standard, even though those other witness recanted their prior statements at trial).

Third, as noted, *supra* p. 29, Davis's second affidavit would support the People's theory that the shooting was motivated in part by gang rivalry because she attested that she "knew it was dangerous" for Stanley to be at the gas station because it was "Vice Lord territory" and Stanley "might be targeted by Vice Lords" for being there, SCR222. For all these reasons, there is no basis to believe that Davis's proposed testimony would more likely than not lead to acquittal.

B. Defendant's Sufficiency Arguments Are Barred and Meritless.

This Court should disregard defendant's arguments that the trial evidence was insufficient to prove his guilt, *see, e.g.*, Def. Br. 8-12, 21, 25, 39-40, for an actual innocence claim is not an appropriate vehicle to relitigate the sufficiency of the evidence adduced at trial, *see, e.g.*, *Washington,* 171 Ill.

2d at 479. Instead, the trial evidence is relevant only to the question of whether the purportedly "new evidence" defendant relies on is sufficient to show that it is "more likely than not" he would now be acquitted. Because strong evidence proved defendant's guilt, he cannot establish a reasonable probability of an acquittal.

Notably, unrecanted testimony established that defendant matched the shooter in appearance, gang affiliation, and car ownership. The surviving victim, Michael, testified that just before the shooting, his nephew Stanley warned that a Vice Lord was approaching, and multiple witnesses testified (without recantation) that defendant is a Vice Lord. R415, 456, 576, 617. Multiple witnesses also testified (without recantation) that the car Michael said the shooter drove belonged to defendant. *E.g.,* R447-48, 552-53, 558. In addition, Michael testified that the shooter was a "dark black" "little, thin guy," R621, and defendant's arrest report states that he is a 5'9" 150-pound black man with a "dark complexion." SCR161.

Prosecutors also presented evidence of two motives for the shooting. First, unrecanted testimony proves that, as a member of the rival Gangster Disciples, it was dangerous for Stanley (the intended target) to be at the gas station, which was located in the territory of the Vice Lords (defendant's gang). R549, 561, 612-16; *see also* SCR222 (Davis's second affidavit). Second, the evidence shows that Davis was in a relationship with defendant, and Stanley either loudly propositioned Davis (Clay's account) or at least spoke to

Davis (unrecanted testimony of Stewart and Butler) at the gas station. R402, 561, 738-39, 876-77; *see also* SCR172 (Davis's verbal statement to police about Stanley propositioning and "groping" her).

Moreover, four eyewitnesses provided written statements identifying defendant as the shooter, and three of them identified defendant in their grand jury testimony (the fourth did not testify before the grand jury). R738-40, 786, 811, 822-23, 851-58, 867-69, 878. Those statements were corroborated by (1) the unrecanted evidence of the shooter's physical appearance, gang affiliation, and car; and (2) as the appellate court previously held, forensic evidence showing that the bullets' trajectory and the location of the shell casings were consistent with the witnesses' accounts of the shooting. C130.

What is also notable is the evidence that defendant's successive petition does *not* provide. It is undisputed that defendant's car was at the scene of the shooting — along with defendant's cousin, girlfriend, and other friends — but defendant does not explain why they would be driving his car in the middle of the night without him. Indeed, it is telling that defendant's actual innocence claim presents no alibi evidence whatsoever.

Instead, defendant's brief repeats his failed argument (rejected in prior state and federal proceedings) that the four eyewitnesses recanted their identifications. *E.g.,* Def. Br. 21, 29, 39. But the jury heard the witnesses' testimony and claims of coercion, as well as the testimony of the police

officers and ASAs who denied coercing the witnesses' signed statements, and determined that the eyewitnesses' statements (and corroborating grand jury testimony) were true and that defendant was the shooter. This was reasonable, for as this Court consistently has held, it is "well-settled" that recantations are "unreliable." *People v. Brooks*, 187 Ill. 2d 91, 132-33 (1999) (affirming conviction despite eyewitnesses' recantations); *People v. White*, 2011 IL 109689, ¶¶ 137-38 (affirming conviction despite multiple eyewitness recantations and two witnesses providing defendant an alibi). Indeed, defendant's coercion theory requires this Court to believe that multiple detectives and ASAs (some of whom never spoke to one another), independently decided (for unexplained reasons) to coerce defendant's friends into framing defendant, but not the surviving victim (Michael) or surviving target (Stanley), both of whom presumably would be more amenable to such influence than defendant's friends.

More importantly, as the appellate court previously determined, there was ample reason to believe that the recantations were driven by fear of defendant and his deadly gang, because defendant is a Vice Lord and

> defendant told Butler, Mason, and Clay not to speak with police. . . . Clay told Detective Forberg that he was worried about the danger he would face if the Vice Lords found out that he was cooperating with the police. Clay also believed that defendant threatened him when he told Clay not to talk to the police.

C31, 33-34. As the federal court held when denying defendant's sufficiency claim on habeas review, "[t]he jury, who was in the position to best judge the truthfulness and credibility of the witnesses by observing their demeanor

when testifying, chose to credit the witnesses' first statements, made close to the crime, rather than the witnesses' recanted testimony later on. That is the jury's prerogative." *Jackson*, 2011 WL 1357310, at *8.

Defendant's remaining argument — that the surviving victim, Michael, "asserted unequivocally" that defendant was not the shooter — is rebutted by the record, which shows that Michael's testimony on that point varied widely and, as the jury necessarily concluded, was not credible in that instance. Def. Br. 4, 11, 39-40. It is true that (despite providing a physical description of the shooter that matched defendant) at one point Michael said that he had never seen defendant before and defendant did not look like the shooter. R622. But that testimony was not "unequivocal," as defendant contends, because just before that Michael testified that (1) he "could not see [the shooter's] face"; and (2) the shooting occurred in the middle of the night, the shooter was 120 feet away, and Michael did not see anyone approaching until just before shots rang out, at which point he hid behind a gas pump, then ran home. R618-21. Indeed, Michael later testified that he did not know who shot him and he "did not see the person that [fatally] shot Mr. Jenkins." R622, 631. Given Michael's changing account of whether he saw the shooter, as well as the specter of gang retaliation, it was reasonable for the jury to discount any suggestion by Michael that he believed that defendant was not the shooter.

C. Defendant's Argument that This Court Has Overruled *Hobley* Is Meritless.

It is firmly settled that evidence offered to support a constitutional claim — such as a claim that police coercion violated a defendant's due process rights — may not be used to supplement an actual innocence claim. *See, e.g.*, *People v. Hobley*, 182 Ill. 2d 404, 444 (1998). The appellate court correctly applied that rule when it held that defendant's allegation that the detectives in this case coerced witnesses in other cases may not be used to support his actual innocence claim. *Jackson*, 2018 IL App (1st) 171773, ¶ 71.

Defendant does not dispute that *Hobley* is directly on point. And his argument that this Court has overruled *Hobley* is wrong. Def. Br. 35-39. In *Washington*, this Court recognized that a free-standing claim of actual innocence may be raised in a postconviction petition, and defined an actual innocence claim as one that "is not being used to supplement an assertion of a constitutional violation with respect to trial." 171 Ill. 2d at 479. In other words, actual innocence claims concern newly discovered evidence showing the petitioner is actually innocent, *even though no error occurred at trial*. By contrast, the cause and prejudice standard governs allegations of constitutional error that infected the trial, *even though the petitioner is not innocent*. Indeed, as defendant's own cases show, actual innocence and constitutional error are two distinct bases for seeking leave to file a successive petition and are subject to distinct requirements: constitutional claims are subject to the cause and prejudice standard, while innocence

claims are subject to the actual innocence standard. *See, e.g.*, *Edwards*, 2012 IL 111711, ¶ 31 (circuit court erred in applying cause and prejudice test to actual innocence claim) (cited at Def. Br. 31-32, 37-38).

Consistent with *Washington* and its progeny, in *Hobley* this Court held that evidence used to support a claim of constitutional error at trial may not also be used to support a claim that the defendant is innocent. There, the petitioner presented evidence that certain officers had engaged in a "pattern and practice" of police torture in other cases. *Hobley*, 182 Ill. 2d at 444. This Court noted that such evidence could support petitioner's claim that his constitutional rights were violated because police coerced his confession. *Id.* But the Court also stated that an actual innocence claim is one that is based on new evidence that is "not being used to supplement an assertion of a constitutional violation with respect to [the] trial." *Id.* at 443-44. Because the officers' purported "pattern and practice" of misconduct was used to support petitioner's constitutional claim, it could not be used to support his actual innocence claim. *Id.* at 444.

This Court reaffirmed *Hobley* in *People v. Orange*, 195 Ill. 2d 437 (2001). There, the petitioner presented evidence that the officers involved in obtaining his confession had a history of coercion. *Id.* at 445. Quoting *Washington*, this Court reaffirmed that an actual innocence claim may be based only on evidence that "'is not being used to supplement an assertion of

a constitutional violation.'" *Id.* at 459. This Court then affirmed the dismissal of the petition, holding:

> We find *Hobley* to be on point. Here the defendant's evidence fails to present a free-standing claim of actual innocence under *Washington*. Instead, it is being used to supplement his claim that his confession was coerced and involuntary.

Id. at 460.

Defendant incorrectly claims that this Court overruled *Washington*, *Orange*, and *Hobley* in *People v. Coleman*, 2013 IL 113307 (cited at Def. Br. 35-36). But *Coleman* cited neither *Hobley* nor *Orange*, and it expressly noted the Court's "unwavering" support of *Washington*. *Id.* ¶ 93. And *Coleman* cannot have overruled *Hobley*, even *sub silentio*, for the only claim raised in *Coleman* was one alleging actual innocence based on eyewitness affidavits attesting that the petitioner was not involved in the crime. *Id.* ¶¶ 1, 49, 98-103. Thus, the Court had no reason to consider whether evidence used to support a constitutional claim could also be used to support an actual innocence claim. Rather, the issue in *Coleman* was whether the Court should adopt a heightened standard for claims of actual innocence. *Id.* ¶¶ 1, 85. This Court rejected that argument and, in doing so, distinguished actual innocence and constitutional claims:

> In Illinois, a postconviction actual-innocence claim is just that — a postconviction actual-innocence claim. Where a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the later claim must meet the *Washington* standard [of actual innocence].

Id. ¶ 91. As the Court further noted, "in the 17 years since we decided *Washington*, nothing has changed. Our commitment to that holding is unwavering." *Id.* ¶ 93. Thus, *Coleman* did not overrule *Washington*, *Hobley*, or *Orange*.

Defendant's argument that *Coleman* overruled these cases rests on selective and misleading quotations from that case. In particular, when quoting the Court's conclusion, defendant uses ellipses to omit the Court's holding that "[w]here a defendant makes a claim of trial error, as well as a claim of actual innocence, in a successive postconviction petition, the former claim must meet the cause-and-prejudice standard, and the later claim must meet the *Washington* standard [of actual innocence]." *See* Def. Br. 36. The remainder of the quotations defendant relies on contrasting "freestanding" and "gateway" claims merely refer to federal law. *See id.*

Notably, defendant cites no case holding that *Coleman* overruled *Washington*, *Hobley*, and *Orange*. Instead, defendant points out that in other opinions this Court did not cite *Hobley, see* Def. Br. 37-39, but that is meaningless because those cases concerned unrelated issues and/or did not involve a petitioner using the same evidence for both actual innocence and constitutional claims. For example, *Collins* merely affirmed dismissal of a petition that did not attach supporting evidence. *People v. Collins*, 202 Ill. 2d 59, 66 (2002). *Johnson* and *Shum* concerned requests for DNA testing. *People v. Johnson*, 205 Ill. 2d 381, 388 (2002); *People v. Shum*, 207 Ill. 2d 47,

57 (2003). *Allen* addressed whether a petition supported by an unnotarized affidavit must be summarily dismissed. *Allen*, 2015 IL 113135, ¶ 19. The only claim on appeal in *Sanders* was whether the petitioner had satisfied the actual innocence standard based on another man's confession. *Sanders*, 2016 IL 118123, ¶¶ 1, 30. And *Tate* expressly said it was not addressing an actual innocence claim. *People v. Tate*, 2012 IL 112214, ¶ 27.

The two appellate cases defendant cites likewise provide no support for his argument. The petitioner in *Whirl* abandoned his actual innocence claim and instead asserted (relying in part on the Torture Inquiry and Relief Commission Act, which is not at issue here) that he could withdraw his guilty plea because his confession was coerced. *People v. Whirl*, 2015 IL App (1st) 111483, ¶¶ 50, 113. And *Tyler* acknowledged that evidence used to support a constitutional claim cannot be used to supplement an actual innocence claim, prior to holding that the petitioner was not doing so. *Tyler*, 2015 IL App (1st) 123470, ¶¶ 201-02. Indeed, the appellate court has consistently held that evidence used to support a constitutional claim cannot be used to supplement an actual innocence claim. *See, e.g.*, *People v. Zareski*, 2017 IL App (1st) 150836, ¶ 71; *People v. Collier*, 387 Ill. App. 3d 630, 637-38 (1st Dist. 2008).

Lastly, even if this Court were to consider the allegations of misconduct in other cases when addressing defendant's actual innocence claim, that claim would still fail. Nearly all of the misconduct allegations defendant points to were available to him at trial (or at least before

defendant's first petition), so they are not "new evidence"; moreover, the allegations are dissimilar, so defendant cannot establish that this evidence would "more likely than not" result in his acquittal. *See infra* pp. 45-59.

II. Defendant Has Not Met the Cause and Prejudice Standard.

A petitioner's motion for leave to file a successive petition "must submit enough in the way of documentation" to establish both cause and prejudice "for each individual" constitutional claim. *People v. Smith*, 2014 IL 115946, ¶ 35. The appellate court correctly concluded that defendant's allegations that the interviewing detectives engaged in misconduct in other cases failed to meet that standard.

A. Defendant Cannot Establish Cause.

To establish cause, "defendant must show some objective factor external to the defense that impended his ability to raise the claim in the initial postconviction proceeding." *Holman*, 2017 IL 120655, ¶ 26. Defendant was convicted in 2003, filed his first postconviction petition in 2007, and waited until 2017 to seek leave to file a successive petition in which he alleged for the first time that the interviewing detectives had a history of misconduct. *Supra* p. 15.

Defendant makes no attempt to establish cause for failing to raise these allegations earlier, nor could he credibly do so. Notably, most of the Complaint Registers (CRs) defendant relies on as evidence of the four interviewing detectives' misconduct were filed before defendant's *trial*. All ten CRs naming Detective Clisham and both CRs naming Detective Howley

were filed before defendant's trial. SCR61-62. Similarly, most of the CRs naming Detectives Forberg and Foster were filed before defendant's trial; the only CRs filed against them after 2007 are unrelated to witness coercion. SCR59-61. Thus, defendant cannot show cause for failing to raise a claim based on the CRs in his initial petition in 2007.

Indeed, although the eyewitnesses testified at trial in 2003 that they were coerced, the record shows that defendant did not request the CRs until 2016, thirteen years later. SCR200. Nor is the delay attributable to the police department, which began producing responsive documents within weeks of defendant submitting a Freedom of Information Act (FOIA) request. SCR204. In fact, defendant obtained sufficient records to draft and file a 49-page successive petition in May 2017, only seven months after he finally submitted his FOIA request. SCR4. And any interim delay during that period is attributable to defendant and his counsel because defendant's own records show that he demanded the production of a substantial amount of irrelevant information relating to several dozen different police officers (some of whom he only vaguely described), even though the identities of the four interviewing detectives has been known since before trial. *See* SCR200-01.[6]

[6] For example, defendant demanded documents relating to "[a]ll . . . officers named Olsen or Olson" and "[a]ll . . . lieutenants named Riley, Reilly, or Reilly," even though no such persons had a meaningful role in this case. SCR201.

As to the four lawsuits that defendant cites as evidence of coercion, much of this "evidence" is in the form of news articles published years before his successive petition. SCR16-17. One (*Bell*) was discussed in the Chicago Tribune as early as 2002 — a year before defendant's trial.[7] Two others (*Bridewell* and *McGee*) were filed in 2008, while defendant was litigating his first petition, and the last (*Patterson*) was filed in 2011, six years before defendant sought leave to file a successive petition. *See supra* p. 18. Thus, defendant could have raised these lawsuits earlier as well.

In sum, defendant has failed to establish cause for not raising his allegations of police misconduct in other cases earlier; and because he has failed to do so, leave to file a successive petition should be denied on this basis alone. *See, e.g.*, *Davis*, 2014 IL 115595, ¶ 56 (defendant failed to plead cause where the evidence "is not of such character that it could not have been discovered earlier").

B. The Appellate Court Applied the Correct Prejudice Standard.

As to prejudice, the appellate court "carefully examined the details" of the detectives' alleged misconduct in other cases and found "that they fail to align in any meaningful way with what the witnesses in this case say those same officers did to them." *Jackson*, 2018 IL App (1st) 171773, ¶ 85. The court explained that in coercion cases, the prejudice test "is met when a

[7] https://www.chicagotribune.com/news/ct-xpm-2002-07-16-0207160227-story.html.

defendant can connect specific misconduct resulting in his conviction to sufficiently similar misconduct by the same officer or officers." *Id.* ¶ 91. The court concluded that most of the alleged prior misconduct by the detectives bore no similarity to the claims of coercion in defendant's case, in part because most of that alleged prior misconduct involved no witness coercion; the court further noted that (unproven) allegations that Detectives Forberg and Foster had previously withheld food, water, and bathroom breaks to coerce a witness were not "strikingly similar" to the allegations of coercion in this case. *Id.* ¶¶ 84-92.

Defendant incorrectly asserts that the appellate court applied the wrong prejudice standard. Def. Br. 23. Defendant's primary argument — that he need not show any particular similarity between the alleged misconduct in other cases and the allegations in his case, Def. Br. 26 — is incorrect because it is settled that "generalized allegations" that police officers engaged in a pattern and practice of coercion in other cases, without a clear link to the petitioner's case, are insufficient. *See, e.g.*, *Orange*, 195 Ill. 2d at 452-55; *Patterson*, 192 Ill. 2d at 143-45. Indeed, the sole case defendant cites, a case he contends is "squarely on point," flatly contradicts his argument. *See People v. Cruz*, 162 Ill. 2d 314 (1994) (cited at Def. Br. 26). *Cruz* holds that when a defendant seeks to rely on evidence that a witness has a "pattern" of misconduct, he must show a "high degree of identity" between the prior conduct and the conduct alleged in his case. *Id.* at 349. In

other words, "there must be a substantial and meaningful link between the offenses being compared, regardless of which party offers the evidence." *Id.* at 351.

Defendant's alternative argument — that the appellate court erred by employing a "strikingly similar" standard to a single allegation of misconduct — challenges only a sliver of the appellate court's prejudice analysis (a lawsuit involving Detective Forberg), and is incorrect in any event. Def. Br. 24-25; *see, e.g.*, *Patterson*, 192 Ill. 2d at 145. In *Patterson*, the petitioner's initial petition argued that he had new evidence corroborating his claim that his confession was coerced by Detective Jon Burge, including sixty cases showing that Burge tortured suspects through suffocation (often with a plastic bag), threats with a gun, and beatings. 192 Ill. 2d at 139, 142. This Court found that such evidence was sufficient for the petitioner to survive the first stage of initial postconviction proceedings because his description of how he had been coerced (suffocation with a plastic bag, threats with a gun, and a beating) was "strikingly similar" to the methods Burge used elsewhere. *Id.* at 145.

Since *Patterson*, courts have consistently applied the strikingly similar standard. *See, e.g.*, *People v. Upshaw*, 2017 IL App (1st) 151405, ¶ 80; *People v. Johnson*, 2011 IL App (1st) 092817, ¶¶ 80, 86; *People v. Anderson*, 375 Ill. App. 3d 121, 141 (1st Dist. 2007); *People v. Wrice,* 406 Ill. App. 3d 43, 53 (1st

Dist. 2010), *aff'd as modified to remedy,* 2012 IL 111860; *People v. Nicholas*, 2013 IL App (1st) 103202, ¶ 40.

Defendant cites no case applying a different standard. And defendant's attempt to limit *Patterson* by arguing that the Court required only one method of alleged coercion to be strikingly similar (suffocation with a bag) — is not a fair reading of the opinion, as the Court observed that the petitioner in *Patterson* and the other Burge cases shared the same three methods of coercion: suffocation with a bag, threats with a gun, and beatings. 192 Ill. 2d at 142, 145.

To be sure, not every detail or method of coercion must match exactly. Rather, allegations are sufficiently similar if the petitioner shows that (1) the same officer was involved in each instance and (2) there is a striking (i.e., substantial, meaningful, or material) similarity in the method of coercion allegedly used. *See, e.g., id.* at 145. Without such a nexus, judicial resources would be expended on cases with no meaningful connection between the alleged prior misconduct and the alleged coercion in the defendant's case.

Finally, defendant's related arguments are even more readily dispensed with. His observation that the rules of evidence do not apply to "postconviction hearings," Def. Br. 26 (citing Ill. R. Evid. 1101(b)(3)), is a non-sequitur because the issue here is whether defendant has properly *pleaded* prejudice. And his argument that courts should not consider the similarity of allegations of coercion until a third-stage evidentiary hearing is contrary to

this Court's precedent. *See, e.g.*, *Patterson*, 192 Ill. 2d at 145; *Smith*, 2014 IL 115946, ¶ 35. Defendant's reliance on *People v. Domagala*, 2013 IL 113688, ¶ 46, for that point is inapt, as it discusses the third stage of an initial petition alleging ineffective assistance, not a motion for leave to file a successive petition alleging coercion. Thus, the appellate court's articulation of the prejudice standard was correct.

C. The Appellate Court Correctly Concluded that Defendant Failed to Meet the Prejudice Standard.

Defendant does not dispute the appellate court's conclusion — with which even the dissenting justice agreed — that each detective's alleged prior misconduct must be considered separately because there is no reason to attribute the alleged prior misconduct of one detective to another. *Jackson*, 2018 IL App (1st) 171773, ¶¶ 84-85; *see also id.* at ¶ 112 (Mikva, J., dissenting). And as shown below, judged by any standard, the appellate court correctly concluded that the allegations of prior misconduct are not sufficiently similar to the allegations of coercion in this case.

1. There is no similarity between Mason's allegations of coercion and any alleged prior misconduct.

The appellate court correctly concluded that defendant failed to establish prejudice with respect to Mason because there is no similarity between her allegations about how she was treated by police, and any alleged misconduct in other cases. *Jackson*, 2018 IL App (1st) 171773, ¶¶ 89-90. Defendant presents no contrary argument, resulting in forfeiture. Ill. S. Ct. R. 341(h)(7). Any argument would also be meritless. Mason testified that

she was picked up by police and, a few hours later, signed a statement after Detectives Forberg and Foster said that an outstanding warrant for her arrest would be "take[n] care of." R535, 554. Even if this constituted coercion, it is dissimilar from any prior misconduct allegation defendant has identified.

2. There is no similarity between Stewart's allegations of coercion and any alleged prior misconduct.

Both the appellate majority and the dissent likewise concluded that defendant failed to establish prejudice with respect to Stewart because no similarity exists between his allegations of coercion and any alleged misconduct in other cases. *Jackson*, 2018 IL App (1st) 171773, ¶¶ 86, 88; *see also id.* at ¶ 112 (Mikva, J., dissenting). Defendant's brief fails to present any contrary argument, which results in forfeiture. Ill. S. Ct. R. 341(h)(7). Moreover, any argument would be meritless. Stewart claimed that he signed a statement identifying defendant because he was threatened with arrest. R569; SCR230-31. However, defendant has presented no evidence that the two people who took Stewart's statement — Detective Clisham and ASA Hennelly — have any prior history of coercing witnesses, much less in the fashion Stewart claimed occurred here.

Moreover, trial testimony shows that Stewart separately told a third person — Detective Howley — that defendant was the shooter. R657. Stewart has not specifically identified Howley as someone who coerced him. SCR230-32. But even if he had, defendant incorrectly states that it was

"established" in the *Bell* lawsuit that Howley "had, over the course of a 50-hour interrogation, coerced a young, mentally disable suspect into falsely confessing that he killed his mother." Def. Br. 17. In fact, Howley was not named in that lawsuit; the complaint attributed the interrogation to other detectives not involved in this case. *Supra* p. 18. The newspaper article defendant cites also fails to support his allegation that Howley previously engaged in coercion; it states only that someone retained by the plaintiff in the *Bell* lawsuit disagreed with Howley's methodology for scoring polygraphs (a complaint that Stewart does not raise here). SCR17 n.9. And, contrary to defendant's claim that the lawsuit "established" misconduct (by anyone), defendant's cited article reports that *Bell* settled with no finding of wrongdoing. *Id.*

3. There is no similarity between Clay's allegations of coercion and any alleged prior misconduct.

The appellate court concluded that defendant failed to sufficiently link the allegations of prior misconduct with how Clay contends he was coerced. *Jackson*, 2018 IL App (1st) 171773, ¶¶ 89-90. Defendant's brief fails to raise any contrary argument, which results in forfeiture. Ill. S. Ct. R. 341(h)(7).

Any argument would also be meritless. Clay did not contend that he signed his statement because of threats or mistreatment; rather, Clay claimed he was tricked. Clay testified that after Detective Forberg brought him to the station, he waited an entire day before Forberg came in and said that they knew Clay was not at the scene, so he could leave once he signed for

his property. R464-68. Clay admitted that he signed every page of his statement, but testified that he was told that the document was a property receipt and that a "Mexican guy" (i.e., not Forberg) covered up the text of each page. R477-80. Clay's story — which is absurd on its face — is not remotely similar to any alleged misconduct by Forberg or anyone else involved in this case. Clay's story also fails to account for the presence of the ASA's signature on his statement and defendant does not allege the ASA has a history of coercion. Clay's additional claim that unidentified officers told him to answer "yes" to every question asked in the grand jury is affirmatively rebutted by the record (which shows Clay gave narrative answers) and, in any event, is not similar to any prior allegations of misconduct. R489, 491-508.

4. There is no similarity between Butler's allegations of coercion and any allegations of prior misconduct.

Butler testified that (1) before giving her statement, she told ASA Daly that she had been treated "fine" by Detectives Forberg and Foster, and (2) she separately told ASA Lanahan that she had been treated well by police and ASA Daly. R406, 422-23. In turn, ASAs Daly and Lanahan testified that Butler confirmed that defendant was the shooter and that police treated her well. R815-18, 842-43. At trial, Butler also testified that while she was in custody for "hours" before giving her statement, she was allowed to use the bathroom whenever she wished, and police brought her dinner. R419, 440.

In attempting to disavow her signed statement at trial, Butler initially said that she never read the statement, then admitted that, in fact, she reviewed the statement and made changes. R414-15. Butler then testified that she signed the statement because Detectives Forberg and Foster threatened to charge her with a crime. R420. Fourteen years later, in an affidavit drafted by defendant's counsel, Butler — who says she was pregnant at the time of the shooting, i.e., when she was out in the middle of the night, drinking, doing drugs, and purchasing drug paraphernalia — claimed that she was coerced by the detectives' supposed statements that she could lose custody of her child. SCR241.

But, importantly, defendant has presented no evidence that ASAs Daly or Lanahan have a prior history of misconduct. And, while defendant identifies two lawsuits involving Forberg and/or Foster, the misconduct alleged in those cases is not similar to the allegations of coercion here.

In the fact section of his brief, defendant identifies one wrongful conviction lawsuit (*Patterson*) against the City of Chicago and numerous government employees (including Foster, Forberg, and seven other police officers) based on a variety of alleged misconduct, including allegations that the People withheld exculpatory evidence. *See Patterson v. Chicago*, No. 11 CV 07052 (N.D. Ill.), Doc. 1. As it relates to witness coercion, the complaint in *Patterson* alleged that an eyewitness was held in custody with nowhere to sleep for three days, while food and water were withheld from her, and she

was allowed to overhear a discussion about who in the lineup she was about to view was the suspect. *Id.* ¶ 14. As the appellate court noted, the *Patterson* complaint alleged generally that a large group of "Defendant Officers" participated in those supposed actions, without specifically identifying Foster or Forberg. *Jackson*, 2018 IL App (1st) 171773, ¶ 90. The defendants denied the plaintiff's allegations, and the case was ultimately settled without a finding of fault. *Patterson*, No. 11 CV 07052, Docs. 43, 119. Tellingly, apart from a limited description of this case in the fact section of his brief, defendant does not refer to this case again. Moreover, even assuming Detectives Forberg and Foster participated in the misconduct alleged in *Patterson* (which defendant's documents do not show), allegations that a witness was kept in custody for multiple days without food, water or anywhere to sleep, then was allowed to "overhear" who in the lineup was the suspect, is not similar to Butler's testimony that her interrogation lasted "hours" (during which time she was allowed bathroom breaks and given dinner) and that she identified defendant to avoid arrest.

In the other case defendant relies on (*Bridewell*), a murder suspect and her two friends sued Detective Forberg and another detective for false arrest, coercive interrogation, and related claims. But defendant omits that *Bridewell* was decided in Forberg's favor. As relevant here, the federal district court dismissed the coercive interrogation claim with prejudice, finding that Forberg's alleged conduct amounted to "nothing more than a

standard police interrogation and did not violate [plaintiff's] constitutional rights." *Bridewell*, 2009 WL 1028229, *3. The court later rejected all remaining claims, and the Seventh Circuit affirmed. *Bridewell v. Eberle*, 730 F.3d 672 (7th Cir. 2013). Defendant's assertion that Detective Forberg "admitted" in *Bridewell* that he denied a witness bathroom breaks so that she was "forced" to urinate in the interrogation room, Def. Br. 16, 27, is rebutted by the very federal opinion he cites, which states that the police stated "that they told [the witness] she could take bathroom breaks," *Bridewell*, 2012 WL 2458548, *1. Thus, *Bridewell* is not evidence of a pattern of coercion.

Defendant's related assertion that in *Bridewell*, Forberg "admitted to using coercive interrogation tactics" to "incriminat[e]" an "innocent" person, Def. Br. 26, is not only unsupported by citation but also incorrect. Again, Forberg fought the allegations, and the federal courts ruled in his favor, including by dismissing the coercive interrogation claim with prejudice. Defendant's claim that prosecutors concluded that the suspect in *Bridewell* was innocent, or she was otherwise "exonerated," is also incorrect. Def. Br. 3, 16, 26-27. As the Seventh Circuit noted, prosecutors entered into a plea deal, where, in exchange for dropping murder charges, the suspect pleaded guilty to drug and weapons charges; the Seventh Circuit held there was no basis to believe that prosecutors thought the suspect was innocent and, to the contrary, eyewitnesses implicated her, the medical examiner believed the victim was murdered (contrary to the suspect's suicide theory), and

"convictions have been obtained on weaker evidence." *Bridewell*, 730 F.3d at 677-78.

As for defendant's contention that the *allegations* of coercion in *Bridewell* are similar to the allegations of coercion here, it suffices to note that the *Bridewell* allegations were held to be meritless. Def. Br. 28. In any event, many of defendant's proposed similarities are belied by the record. For example, defendant claims that the length of interrogation was similar, but the witnesses in *Bridewell* were allegedly interrogated over multiple days, while Butler testified that she spoke with police on June 20, was interrogated for "hours," gave a verbal statement that day, then signed her written statement shortly after midnight. R402-03, 439-440. Defendant contends that a polygraph was improperly used in *Bridewell*, but Butler does not contend she was coerced by a polygraph. And though defendant argues that witnesses in both cases were supposedly told to implicate the suspect and then later recanted, that is not a similarity but rather a fundamental requirement of any claim of coercion. Lastly, *Bridewell* is distinguishable in that it included alleged attempts to coerce a *suspect*, in addition to two witnesses, into confessing, while defendant does not contend that police attempted to coerce him.

5. Davis's allegations are insufficient to show prejudice.

Because the prejudice standard requires defendant to identify a constitutional error that "infected his trial," the appellate court correctly held that defendant cannot meet that standard with respect to Davis: she did not

testify at trial and, thus, any alleged prior history of coercion by any detective who interviewed her cannot be connected to defendant's claim that his conviction rested on her allegedly coerced statements. *Jackson*, 2018 IL App (1st) 171773, ¶¶ 86-87. Defendant's brief does not argue to the contrary, thus he has forfeited any prejudice claim regarding Davis. Ill. S. Ct. R. 341(h)(7).

Any argument would also be meritless for (1) the reason identified by the appellate court, and (2) insufficient similarity between Davis's allegations of coercion (which mostly consist of officers coming to her house looking for her) and the allegations of misconduct in other cases by the officers who interviewed her.

III. Defendant's Requested Remedy Has No Basis in Law.

Should this Court find that defendant has met the actual innocence or cause and prejudice standard, then the case should advance to the second stage. Defendant's unsupported argument that this Court should either "immediately vacate his conviction" or allow him to skip the second stage and proceed directly to a third-stage evidentiary hearing, Def. Br. 40-41, is contrary to the Post-Conviction Hearing Act and this Court's precedent, *see, e.g.*, *Wrice*, 2012 IL 111860, ¶ 87 (Court will not "short circuit" postconviction process by allowing successive petitioner to skip second stage).

CONCLUSION

This Court should affirm the appellate court's judgment.

March 24, 2020

Respectfully submitted,

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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) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 14,567 words.

/s/ Michael L. Cebula
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PROOF 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 March 24, 2020, the foregoing **Brief of Respondent-Appellee People of the State of Illinois** was (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my email address to the email addresses below:

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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.

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