No. 4-11-0415

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES SNOW, Petitioner-Appellant.	)))))))))))	On Appeal from the Eleventh Judicial Circuit, McLean County Circuit Court Circuit Ct. No. 99 CF 1016 Honorable Judge McMillen, Presiding

REPLY BRIEF AND ARGUMENT FOR PETITIONER-APPELLANT

ORAL ARGUMENT REQUESTED

Jon Loevy
Russell Ainsworth
Gayle Horn
Tara Thompson
Elizabeth Wang
THE EXONERATION PROJECT
at the University of Chicago Law School
6020 S. University Ave.
Chicago, IL 60637
COUNSEL FOR PETITIONER-APPELLANT

INTRODUCTION

The case the State presented at James Snow's criminal trial for the murder of William Little was not a complicated one. The State presented witnesses from the scene who claimed they saw Mr. Snow at the gas station the night that Bill Little was killed, and witnesses who claimed that in the months and years after Mr. Little's death, Mr. Snow confessed his involvement in the crime. The evidence Mr. Snow presented in his post-conviction petition was also not complicated – he presented affidavits from scene witnesses recanting their own trial testimony and discrediting the testimony of others, affidavits from confession witnesses recanting their testimony and explaining previously-undisclosed deals that prosecution witnesses received or hoped to receive, and significant evidence of his trial counsel's impairment during trial. This evidence is pretty simple – it tells the story of what caused his wrongful conviction and explains how so much of the trial testimony against him was false. This evidence is also powerful and comprehensive. It tells a detailed story that reveals that Mr. Snow is innocent and that his rights were violated in numerous ways during his trial. Based on his pleadings, Mr. Snow deserves further discovery, ballistics testing, and an evidentiary hearing.

The State's Response does not present this Court with any significant opposition to granting such relief. The State's Response merely restates caselaw and legal standards Mr. Snow already identified for this Court, presents facts that do not conflict with any relied upon by Mr. Snow, and argues feebly in defense of the lower court's decisions. As Mr. Snow's Opening Brief and his post-conviction pleadings demonstrate, there can be no defense of the lower court's rulings. The State does not dispute that the appropriate standard of review for this Court is to take as true all well-pled facts, and for the Court to consider whether Mr. Snow has made a substantial showing of constitutional violations in

his case. People v. Coleman, 183 Ill.2d 366, 380-81 (1998). Under this standard, there is no question Mr. Snow deserves an evidentiary hearing on his claims. Mr. Snow hereby provides the following Reply to address the State's Response and to supplement the arguments made in his Opening Brief.

ARGUMENT

I. MR. SNOW HAS MADE A SUBSTANTIAL SHOWING OF HIS ACTUAL INNOCENCE

Mr. Snow's most important and most central claim is that he is actually innocent of the murder of William Little. As Mr. Snow argued in his Opening Brief, he presented voluminous evidence that was new, material, non-cumulative, and would likely change the result on retrial as required by People v. Washington, 171 Ill.2d 475, 489 (1996). The State responds to this showing by pointing out ways that, in its view, certain evidence is not new or would not have changed the result on retrial. Each of these arguments fail, and the State's piecemeal approach to this analysis is unsupported by caselaw. The simple fact is that evidence demonstrates that Mr. Snow is innocent.

A. Evidence of Actual Innocence Should Be Considered in Its Totality

As an initial matter, the State's analytical approach to this evidence is misguided. The State's Response addresses Mr. Snow's actual innocence claim by considering each individual piece of evidence separately and arguing that these pieces of evidence, standing alone, would not change the result on retrial. This approach is flawed. Although each piece of evidence must be new and non-cumulative, the Court should assess the materiality of the new evidence as a whole, by comparing the new evidence presented in a petition with the evidence presented at trial to determine the effect that

new evidence would have on the outcome. See, e.g., People v. Edwards, 291 Ill. App.3d 476, 477 (1st Dist. 1997); Cf. People v. Munoz, 406 Ill. App.3d 844 (1st Dist. 2010) (noting the importance of the fact that new testimony offered was consistent with others' trial testimony). This is particularly important in a case like Mr. Snow's, where a number of witnesses testified and where multiple sources support the evidence of actual innocence. Of course comparing the effect any one piece of evidence might have on the outcome will yield a different result than considering the effect of the new evidence in the aggregate, but that renders Mr. Snow's petition no less material and no less likely to change the result on retrial than a recantation affidavit from the sole witness in a different kind of case. Analytically, Illinois law treats these two situations identically.[1]

B. New Evidence Concerning Eyewitness Testimony Would Change the Result on Retrial

The State, recognizing the importance of Jeffery Pelo's affidavit, contends that it is irrelevant because trial testimony established that the perpetrator of the crime left before police officers arrived at the gas station. (State Resp. at 20-21.) In the State's view, this means that Pelo's affidavit does not change any of the evidence presented at trial. In fact, this ignores the true meaning and import of Pelo's affidavit. At trial, the testimony was that officers did not see the perpetrator, unlike Danny Martinez, because

[1] For instance, were this Court to determine that Larry Biela's affidavit concerning the oral recantation Steve Scheel provided to him is not stand-alone evidence of actual innocence, this Court should consider the effect this affidavit would have on retrial. At a retrial on this matter, any testimony by Steve Scheel that Mr. Snow confessed to him would be severely undercut by Mr. Biela's testimony concerning the admissions Mr. Scheel made to him. Mr. Biela's affidavit is therefore relevant to Mr. Snow's actual innocence claim.

the perpetrator had already left by the time they arrived. What Pelo's affidavit makes clear, however, is that he was on the scene *at the same time* that Danny Martinez purportedly saw Mr. Snow coming out of the gas station, a fact that prosecutors specifically instructed Pelo not to disclose (A.23-24.) This is why the evidence is new, material, non-cumulative, and would likely change the result on retrial – it makes it impossible for Danny Martinez to place Mr. Snow at the scene. For purposes of claims of actual innocence, evidence is material where it supplies a "first-person account of the incident that directly contradict[s]" the State's trial evidence. People v. Ortiz, 235 Ill.2d 313, 335 (2009). Pelo's affidavit does exactly that. This piece of evidence alone would have changed the result on retrial given the significance of a witness putting Mr. Snow at the scene. as opposed to the less inculpatory evidence from other sources.

Second, the State contends that Mr. Snow has overstated the value of Danny Martinez's testimony at trial, and that he was not a "star witness." (State Resp. at 20.) This change in position makes sense now given that Martinez only ever really identified Mr. Snow after he knew he was the State's only suspect, but it was not the State's position at trial. The State now says that it was Carlos Luna who was really the centerpiece of the case because of his "superior performance in the lineup." (Id.) This supposedly "superior performance" is exactly the subject of Mr. Luna's affidavit, in which he explains that he has no idea whether Mr. Snow was the man he saw when looking down the street from his apartment to the gas station, and that he identified Mr. Snow because he "best fit the description" and because, knowing Mr. Snow was law enforcement's suspect for the crime, he believed law enforcement was right (A.413-15.)

The State shifting its supposed focus to Carlos Luna does not salvage its arguments because Luna's new affidavit also challenges his earlier identification of Mr. Snow. The State's analysis appears to imply that Carlos Luna and Danny Martinez's stories supported each other; in fact, they discredited each other in a number of respects. Martinez testified that he observed a man walking backwards out of the gas station; before he ever identified Snow as that man he described him as 5'7" to 5'8" with a long, light tan jacket, ball cap, a goatee and long brownish hair with stubble. (R.160, 170-71, 193-203.) Luna, however, testified that the man was wearing a waist-length coat, that he saw him walking straight out of the convenience store, not backwards, and he did not recall him having any facial hair or any distinct scars, mustache or beard. (R.18-26, 91-92.) In fact, testimony from the composite sketch artist not presented at Mr. Snow's trial showed that Luna could not identify any physical features of the man he supposedly saw. (A.143.) These were two different identifications that do not support one another. Because of these distinctions and Mr. Snow's new evidence, neither Luna nor Martinez can support Mr. Snow's conviction. This is significant evidence that necessitates a hearing.

The State's Response dismisses as "inconclusive" the collection of other evidence Mr. Snow presents discrediting Martinez.[2] How the Hendricks' affidavits are

[2] The State's conclusory arguments about numerous issues – passing mentions of certain objections and the numerous arguments presented without citation to any authority, should result in the waiver of most of its claims. Brown v. Tenney, 125 Ill.2d 348, 362 (1988) ("A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Supreme Court Rule 341(e)(7). . . and is, therefore, waived.") (internal citations omitted).

"inconclusive" the State chooses not to explain, and this is probably because these affidavits actually provide specific facts that contribute to Mr. Snow's innocence. For instance, both Hendricks brothers explain that they had several conversations with Mr. Martinez during the State investigation in which Mr. Martinez admitted he recognized Mr. Snow, that Mr. Snow was not the person he saw at the gas station, that Mr. Snow was not the person depicted in the police composite sketch (A.73-75, 78.)

The State contends that it was known at trial that the mother of the victim had conversations with Mr. Martinez. Again, though, what is new about this aspect of Dennis Hendricks' affidavit is not the existence of contact, but the specific connection between Danny Martinez's union boss and Mrs. Little, a connection that gave Mr. Martinez further reason to testify falsely at trial and to be influenced by Mrs. Little. (A.74-75.)

The State's other arguments ignore the appropriate standard of review at the second-stage of post-conviction proceedings. The State argues that evidence about Danny Martinez knowing Mr. Snow from childhood is not new because Mr. Snow should know who his childhood playmates were. The State also generally characterizes the Hendricks' affidavits as "inconclusive." (State Resp. at 21.) These arguments raise issues of credibility – whether Danny Martinez should have recognized Mr. Snow from childhood, whether Mr. Snow should have somehow known that he knew Mr. Martinez, and the credibility of the Hendricks affidavits. These issues can only be resolved at a third stage evidentiary hearing. Coleman, 183 Ill.2d at 380-81.

C. New Evidence Discrediting Confession Evidence Would Also Likely Change the Result on Retrial

Mr. Snow also has presented evidence that certain of the confession witnesses, those who testified that Mr. Snow gave inculpatory statements to them about his involvement in Mr. Little's murder, recanted, and others admitted that they received or sought inducement to testify. Again, the State's arguments only nibble around the edges of this evidence without doing any real damage.

As the State points out, it is true that Mr. Snow's evidence concerning the confession witnesses does not address the testimony of every single witness who testified that Mr. Snow confessed. However, this is not the standard for an actual innocence claim. All that is required is evidence that would "likely change the result on retrial." Ortiz, 235 Ill.2d at 333 (internal citations omitted). Here, given the number of recantations and the testimony of those witnesses, Mr. Snow meets those standards.

In addressing the recantations from testifying witnesses Dawn Roberts, Dan Tanasz and Ronnie Wright, all of whose affidavits state that they testified falsely at trial, the State argues that these affidavits are not material (Roberts and Tanasz) or are somehow rebutted by those witnesses' trial testimony. (Tanasz and Wright). (State Resp. at 23-24.) The rebuttal argument reflects a misunderstanding of the principle that, in considering allegations in a post-conviction petition, a court may dismiss the petition if the allegations "are contradicted by the record from the original trial proceedings." Coleman, 183 Ill.2d at 382 (citations omitted). However, this line of caselaw refers to circumstances in which factual allegations in a petition are directly rebutted by the trial record, not where witnesses *recant* their trial testimony, thereby creating a question of

credibility as to which testimony was truthful. See, e.g., People v. Steidl, 177 Ill.2d 239, 260 (1997) (remanding for an evidentiary hearing on trial witness' recantations, even where witnesses had testified consistent with their trial testimony at a prior post-conviction proceeding). This distinction is reflected by the Supreme Court's counsel in Coleman to dismiss post-conviction petitions whose allegations are contradicted by the trial record of the original proceedings, but also counseling that "when a petitioner's claims are based upon matters outside the record, this court has emphasized that 'it is not the intent of the [A]ct that [such] claims be adjudicated on the pleadings." 183 Ill.2d at 382 (quoting People v. Airmers, 34 Ill.2d 222, 226 (1966)). Taking this distinction into account, neither Tanasz's nor Wright's affidavits are "rebutted" by their trial testimony. Wright's affidavit states that his trial testimony was a lie – the whole point of his affidavit is that it "rebuts" the trial record. (A.481.) This is true for all recantations.

Second, the affidavits of Roberts and Tanasz are material and non-cumulative. Both witnesses aver that their trial testimony against Mr. Snow, testimony in which Tanasz claimed that Mr. Snow told them that he was involved in a robbery in Illinois and Roberts claimed that Mr. Snow was making toasts to the victim and ordering that composite sketches around Bloomington be taken down, were false. (A.35-36.) These affidavits directly contract these witnesses' trial testimony and are not cumulative.

As to those witnesses who testified about receiving benefits, the State argues that the affidavits concerning Winkler, Palumbo and Schaal are irrelevant because in those cases the witnesses only attempted to get a benefit rather than actually receiving a benefit from the State. The State cites no caselaw for the proposition that evidence that a witness

testified against a defendant hoping to receive a deal has no bearing on an actual innocence claim. The fact that a witness only hoped to receive a deal or had received no inducement to testify, might have a bearing on a Brady claim, but not on an actual innocence claim where the evaluation of the newly-discovered evidence requires asking the question whether the evidence would make a difference on retrial. Here, it is certainly relevant to the credibility of those witnesses and to an analysis of how to balance the other evidence of innocence to know that these men were influenced by their hope that they would receive a deal in exchange for providing testimony against Mr. Snow. Mr. Snow has presented as much evidence as is available to him about the substance of these deals. He has investigated them as much as he is able on his own and has developed significant evidence that deals took place, despite the State's argument to the contrary. As discussed *infra*, this is sufficient for him to receive discovery on his claims and to proceed to an evidentiary hearing.

The State also claims that Mr. Snow cannot use evidence of deals to support a claim of actual innocence because he also has an ineffective assistance of counsel claim for his counsel failing to use available evidence of deals and pressure. This bootstrapping argument takes up two sentences in the State's Response (at pp. 22-23) but is worth addressing because of its tortured reading of available precedent. Under this logic, if Mr. Snow uses a piece of evidence (in any material way) to support a claim for a constitutional violation, it is *per se* barred from use to support his claim of actual innocence. However, courts have repeatedly allowed a petitioner to use the same evidence to support both an actual innocence and other constitutional claim. See, e.g.,

People v. Woidtke, 313 Ill.App.3d 399, 408-10 (5th Dist. 2000) (ruling that briefcases and documents that were seized by the police therein provided support for defendant's actual innocence claim as well as defendant's ineffective assistance of counsel claim). That is for good reason.

First, as post-conviction proceedings are civil in nature, it is axiomatic that a post-conviction petitioner may plead in the alternative, even if those theories are inconsistent. Heastie v. Roberts, 226 Ill.2d 515, 557-58 (2007) ("Where, as here, the facts are controverted, determining which, if any, of the possible theories is meritorious is a question for the trier of fact."); Weydert Homes, Inc. v. Kammes, 395 Ill. App.3d 512, 522 (2d Dist. 2009) (specifically allowing the pleading of inconsistent theories). In the post-conviction context, a petitioner might use the same affidavit to allege both actual innocence and ineffective assistance of counsel. If the court finds that the affidavit presents truly "new" evidence, then the affidavit ultimately supports a claim of actual innocence. If, however, the court determines that the petitioner could have secured the testimony in the affidavit sooner through due diligence, then the affidavit supports a claim of ineffective assistance of counsel. Petitioner should not be forced to make the Hobson's choice of deciding which claim to pursue at the outset, particularly given the restrictions on successive petitions and piecemeal litigation inherent in the Post-Conviction Hearing Act. See, e.g., People v. Meeks, 31 Ill.App.3d 396, 400 (1st Dist. 1975) (discouraging the "piecemeal invocation of post-conviction remedies.").

Second, in evaluating an actual innocence claim the Court must take into account the totality of the evidence that both exonerates and inculpates a petitioner; that is part of

the calculus in determining whether the evidence is material, cumulative and would probably change the result on retrial. Thus, there will inevitably be some overlap between the evidence that is presented in support of an actual innocence claim and in support of other constitutional claims. For example, in People v. Ortiz, 235 Ill.2d 319 (2009), the Supreme Court affirmed the decision of the First District that the newly-discovered affidavit of Sigfriedo Hernandez, an eyewitness who exonerated the defendant of the shooting, was sufficiently demonstrative of the defendant's actual innocence to warrant a new trial. In so ruling, the Court not only evaluated Hernandez's affidavit, but also the other evidence that the defendant had presented in this and previous post-conviction petitions and the evidence at the original trial, to determine whether the defendant had set out a claim for actual innocence. Id. at 334-37. Indeed, the issue in evaluating an actual innocence claim is not, as the State's argument suggests, whether the evidence is also used to support a separate constitutional claim. Rather, whether evidence supports a claim of actual innocence is determined by evaluating whether the evidence proposed helps prove the ultimate issue in the case – whether James Snow is the person who killed William Little. Thus, the State's bootstrapping argument does not apply to bar this Court from considering the totality of the evidence in this case.

D. New Evidence of a Pattern of Misconduct Would Also Likely Change the Result on Retrial

Finally, the State argues that evidence of other cases of misconduct by the McLean County States Attorney and the Bloomington Police Department are not relevant to Mr. Snow's claim of actual innocence because Mr. Snow has not connected the misconduct in these other cases to the misconduct in Mr. Snow's case. (State Resp. at

27.) This is untrue. As Mr. Snow argued, the specific prosecutor (and now a member of the judiciary, Charles Reynard) and police detective (Detective Dan Katz) were involved in similar misconduct in these other cases. (A.191-261.) Mr. Snow has demonstrated that these two specific officials have a pattern in other cases of withholding exculpatory evidence from defendants, including evidence about other suspects and evidence of consideration provided to key witnesses. This is exactly the type of misconduct that the evidence Mr. Snow has collected demonstrates occurred in his case, which is why this is relevant to show these officials' *modus operandi*, intent, plan and motive to commit this type of misconduct in Mr. Snow's case. See People v. Banks, 192 Ill. App.3d 986, 994, (1st Dist. 1989). Nothing in the State's Response addresses this specific argument.[3]

II. MR. SNOW HAS MADE A SUBSTANTIAL SHOWING THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL

The new evidence of Mr. Snow's actual innocence only partially answers the question of how someone in Mr. Snow's shoes could be convicted of a crime of which they are innocent. As Mr. Snow set forth in his post-conviction petition, his trial counsel committed a series of significant errors that affected the outcome of the trial. The State's Response presents conclusory and unsupported arguments that this claim fails because it is barred by the doctrine of *res judicata* and because Mr. has not shown he was prejudiced by his counsel's failures. (State Resp. at 28-34.) These arguments fail.

[3] The State below made a claim that to plead an actual innocence claim Mr. Snow was required to, but did not, demonstrate state involvement in the false testimony that witnesses later recanted. The State does not raise this claim on appeal, so it should be deemed waived. Brown, 125 Ill.2d at 362.

A. *Res Judicata* Does Not Bar Mr. Snow's Claims.

First, the State misleadingly cites People v. Albanese, 125 Ill.2d 100 (1988) for a proposition that it does not support. According to the State's Response, Albanese provides that "*res judicata* bars the relitigation of counsel's ineffectiveness even if different allegations of incompetence are added." (State Resp. at 28.) This true, but only if those different allegations are also allegations that could have been raised in a prior proceeding. Albanese, 125 Ill.2d at 105-06. The doctrine of *res judicata* does not bar a litigant from raising new claims of ineffective assistance of counsel that could not have been raised in a lower court, either because they were outside the record and therefore could not be raised on directly appeal, or because those were newly-discovered and arose after the opportunity to raise them in prior proceedings had passed. People v. Taylor, 237 Ill.2d 356, 372 (2010). *Res judicata* also does not bar a petitioner from raising claims that were not raised on direct appeal due to the ineffective assistance of appellate counsel. People v. Pitsonbarger, 205 Ill.2d 444, 458 (2002). The State's Response fails to acknowledge either of these legal realities, and further fails to identify a single aspect of Mr. Snow's ineffective assistance claim that he did raise or could have raised below. That is the best indicator that this *res judicata* argument is a red herring.

B. Trial Counsel's Errors Were Not the Result of Trial Strategy and Did Prejudice Mr. Snow.

The State's second attempt at dealing with Mr. Snow's ineffective assistance of counsel claim is to contend that Mr. Snow cannot show he was prejudiced by his counsel's errors, and/or that counsel was exercising reasonable trial strategy in failing to use certain evidence. Again, these arguments are fail. While the trial court, during post-

trial motions, concluded that Mr. Snow's counsel was "excellent," the trial court did not have evidence before it of counsel's errors – this is the new evidence Mr. Snow has presented in his post-conviction petition. Reliance on the trial court's conclusions are therefore unavailing.

The State argues that counsel had a reasonable strategy for not impeaching Danny Martinez because there was no point in "pounding away" at a damaged witness. (State Resp. at 29.) The State makes a similar argument for counsel's failure to impeach Carlos Luna with testimony from the composite artist. (Id.) Both of these contentions are non-starts. First, Danny Martinez was hardly a "damaged witness"--he acknowledged that he had not identified Mr. Snow until years after Mr. Little's death, but his testimony at the scene was otherwise uncontested. (R.207-08.) Trial counsel failed to use Pelo's taped interview to elicit from Pelo that it was unlikely Danny Martinez witnessed Mr. Snow walk out of the gas station, failed to use Officer Williams' testimony that supported Pelo's information, and failed to use the dispatch tape which tied Pelo and Williams down to a series of events that discredited Martinez. Discrediting Martinez would have also set the stage for the discrediting of other state witnesses. The Hendricks' also would have provided specific impeachment that Mr. Martinez ever believed Mr. Snow was the man he supposedly saw walking out of the gas station. See People v. Skinner, 220 Ill. App. 3d 479, 484 (1st Dist. 1991) (holding that it is ineffective assistance to fail to impeach the State's chief eyewitness); People v. Garza, 180 Ill. App. 3d 263, 269-70 (1st Dist. 1989) (failure to impeach sole eyewitness with major discrepancies in testimony held to be ineffective assistance). Further, there is no evidence counsel investigated these

issues, rendering decisions on this evidence not to be strategic. People v. Makiel, 358 Ill. App.3d 102, 107 (1st Dist. 2005) ("An attorney who fails to conduct reasonable investigation, fails to interview witnesses, and fails to subpoena witnesses cannot be found to have made decisions based on valid trial strategy.").

The ruling in Makiel also applies to counsel's failure to speak to Steve Scheel (A.34-35), failure to investigate the report from Randall Howard that someone on the jury knew Jamie Snow and had a reason to have animus against him (A.32-33); failure to investigate Karen Strong's reasons for providing false testimony against Jamie Snow (A.37-38); failure to investigate available evidence that witnesses in this case received deals in exchange for their testimony, and to use that evidence to impeach those witnesses; failure to ask for and develop evidence that would impeach witnesses who claimed Jamie Snow confessed to them while they were incarcerated together (A.39-40, 813-71); failure to investigate and present evidence that Dawn Roberts' testimony about toasts was flawed, and that the only toasting Jamie Snow did to any "Billy" was a respectful toasting for Tina McWhorter's brother Billy who had died shortly before (A.31-32); and failure to investigate and present evidence from Darren Smart impeaching Mary Jane Burns. (A.418.) A presumption of prejudice applies, and Mr. Snow has demonstrated prejudice, as much as is possible given his pending motion for discovery, as to each of the aspects of ineffective assistance of counsel pled in his petition.

Regardless, a determination of whether counsel had a strategy with respect to any of these decisions is an issue of credibility to be resolved at an evidentiary hearing in this matter. In order to make a determination of whether trial counsel was engaging in trial

strategy, the Court needs to hear from trial counsel, and to balance trial counsel's testimony against the overwhelming evidence of his personal difficulties at the time of Mr. Snow's trial that significantly call into question his representation of clients during this time period, as laid out in detail in several hundred pages of court testimony attached to Mr. Snow's post-conviction petition.

The State dismisses this evidence as presenting "nothing new" other than that, per Maureen Kevin's affidavit, trial counsel Mr. Picl drank during lunch during Mr. Snow's trial. (State's Resp. at 30.) This complete ignorance of the scope of Mr. Picl's impairment and, by his own testimony, his complete abdication of his responsibilities to clients beginning in the time period that he represented Mr. Snow in this trial, reflects how truly damaging this evidence is for the State. Mr. Picl himself testified at his sentencing hearing that he drank daily and for between four and ten hours per day. (A.700, 703-04.) Professionals opined that Mr. Picl suffered from bipolar disorder, obsessive-compulsive disorder, and possibly attention-deficit disorder, and Picl himself told his doctor that at the time of Mr. Snow's trial he was "struggling with his professional activity." (A.655, 711-12, 737.) An expert opined that a few years thereafter Mr. Picl "was unable to function and think clearly and rationally" and had been affected by his illness "most of his adult life." (A.785.) An expert testified that Mr. Picl began drinking "due to the stress of a murder trial." (A.791.) Expert testimony also described Picl as "significantly impaired," and exhibiting a "deterioration in his function" with respect to his professional activity. (A.716, 740.)

Picl attempted to explain away his significant impairment by claiming that "[a]s a defense attorney in a courtroom, all I'm required to do in almost every case is react." (A.704.) This level of impairment shifts the burden to the State to prove a lack of prejudice, a point the State's Response does not contest. People v. Hattery, 109 Ill. 2d 449, 469 (1985); see also United States v. Cronic, 466 U.S. 648, 660-61 (1984). Mr. Picl's own description of his impairment appears to acknowledge that outside of his in-court performance he did very little work because his view was that most criminal cases merely required him to "react," not investigate witnesses and develop evidence of a client's innocence. At the very least, this significant evidence of impairment will be used at an evidentiary hearing to impeach any suggestion by Mr. Picl that he was acting pursuant to a trial strategy or that he has any credibility in assessing any aspect of his performance in Mr. Snow's trial.

III. MR. SNOW HAS MADE A SUBSTANTIAL SHOWING THAT HIS RIGHTS TO DUE PROCESS WERE VIOLATED

The affidavits and evidence Mr. Snow attached to his post-conviction petition reflect the various pieces of exculpatory evidence withheld from Mr. Snow before and during his trial. The State's provides a specific response to the various components of Mr. Snow's due process claims, but each of these arguments fail.

The State's main contention about Mr. Snow's Brady claim related to Pelo is that this information was available in the tape-recorded interview of Pelo that defense counsel did possess. (State Resp. at 36.) As described *supra*, post-conviction petitioners are allowed to plead in the alternative, and this claim represents such an alternatively-pled claim. In addition, though, Pelo's affidavit reflects, for the first time, his definitive

statement that no one could have left the gas station while he was on the scene, a statement that explicitly contradicts Danny Martinez. (A.24.) Pelo's affidavit states that the prosecution instructed him not to reveal this information, and it is not revealed in his interview with police. This is specific Brady information that was not disclosed, and for which the State has no explanation as to how it does not qualify as Brady material.

The remainder of the State's objections as to Mr. Snow's Brady claims deal with claims for which Mr. Snow has pled has best he can and sought discovery. The State argues that Mr. Snow has not established any claim with respect to Steve Scheel because Mr. Snow has only presented the affidavit of Larry Biela about these issues. (Id.) It argues that Mr. Snow has not established that any witness received a deal for their testimony. (Id. at 36-37.) It argues that Mr. Snow has shown no *modus operandi* of visiting witnesses and offering hem deals for their testimony (Id. at 37.) The State argues Mr. Snow has not established his jury claim related to members of the jury knowing Mr. Snow and believing that Mr. Snow had broken into one of their homes in the past. (Id. at 39.)

For each of these claims, Petitioner has pled the claim as best he can under 725 ILCS 5/122-2. This statute requires a petitioner to attach affidavits or other evidence to a post-conviction petition, or else state why the same is not attached. Mr. Snow complied with this provision in his petition. He provided the best evidence he had as to each of these issues, evidence which provided a good faith basis for his claims and explained what additional evidence existed that Mr. Snow did not have access to. Mr. Snow's accompanying motion for discovery, which the lower court denied, sought the additional

evidence to further establish these claims. Mr. Snow provided good cause for such discovery, and so this Court should remand Mr. Snow's petition so that Mr. Snow can receive discovery and have an evidentiary hearing on these appropriately-pled claims.

IV. MR. SNOW IS ENTITLED TO POST-CONVICTION BALLISTICS TESTING

As Mr. Snow finalized his post-conviction investigation, he filed a motion for post-conviction ballistics testing based on his well-investigated and well-pled assertions that his situation met the requirements of 725 ILCS 5/116-3(a)(2). As Mr. Snow set forth in his original motion and in his Opening Brief, his case clearly meets these requirements. The best that the State can come up with is that Mr. Snow somehow never "set any hearing on his motion for ballistics testing" (State Resp. at 43.) and that he never "presented any expert testimony concerning the suitability of the recovered bullets for IBIS database testing." (Id.) The State also contends that IBIS testing would not "significantly advance" Mr. Snow's claims. (Id. at 44.)

Each of these arguments is wrong. First, Mr. Snow filed his motion for ballistics testing and noticed it up for analysis, and the Court took the motion under advisement before ultimately denying it. (A.434, 920.) Second, Mr. Snow adequately pled and argued below that the recovered bullets met the chain of custody requirement showing that the evidence had not been "substituted, tampered with, replaced, or altered in any material aspect;" i.e., that it was suitable for testing. 725 ILCS 5/116-3(b)(2). Under People v. Johnson, 205 Ill.2d 381 (2002), a petitioner seeking post-conviction testing under 725 ILCS 5/116-3 need not present expert testimony along with a motion, but must merely allege the appropriate chain of custody and then be allowed discovery to ascertain

whether the requirements are truly met. See also People v. Sanchez, 363 Ill. App.3d 470, 480-81 (2d Dist. 2006) (remanding case back to determine, with the aid of discovery if necessary, whether the chain of custody and other statutory requirements were satisfied). Here, the lower court summarily denied Mr. Snow's petition without giving him an opportunity to take advantage of these procedures.

Finally, Mr. Snow has shown that IBIS testing would "significantly advance" his claim. People v. Savory, 197 Ill.2d 203, 213 (2001); People v. Pursley, 407 Ill. App.3d 526, 530-32 (2d Dist. 2011). As Mr. Snow argued before, William Little was killed by a firearm that has never been connected to Mr. Snow and that has never been identified. Comparison of these recovered bullets to the IBIS database could connect those bullets with a firearm used by a known individual in other crimes, which would be significant evidence indicative of Mr. Snow's innocence. Other cases under this statute instruct that the test for materiality is not the likelihood that the testing will reveal results, but the likelihood that, if results are returned, those results will be material. Here, Mr. Snow undoubtedly meets that standard. For that reason, this Court should grant Mr. Snow the post-conviction ballistics testing he seeks.

For the foregoing reasons, James Snow, Petitioner-Appellant, respectfully requests that this Court reverse the lower court's grant of the State's motion to dismiss, denial of his motion for ballistics testing, motions to supplement, and motion for discovery, and order that Snow receive an evidentiary hearing. Snow also requests that should this Court remand his case back for an evidentiary hearing, it be assigned to a different court.

Respectfully submitted,

_____
Counsel for Petitioner Jamie Snow

Jon Loevy (ARDC Number 6218254)
Russell Ainsworth (ARDC Number 6280777)
Gayle Horn (ARDC Number 6286427)
Tara Thompson (ARDC Number 6279922)
Elizabeth Wang (ARDC Number 6287634)
THE EXONERATION PROJECT
at the University of Chicago Law School
6020 S. University Avenue
Chicago, Illinois 60637
(312) 243-5900 (tel)
(312) 243-5902 (fax)
Counsel for Petitioner-Appellant