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

PETITION FOR REHEARING FOR PETITIONER-APPELLANT

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You are hereby notified that on February 1, 2012, we delivered by UPS nine copies of the Petition for Rehearing in the above-entitled cause to the Clerk of the above Court, three copies to the State's Attorney's Appellate Prosecutor, and delivered by mail one copy to Appellant.

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I, Tara Thompson, certify that on February 1, 2012, I caused to be delivered by UPS nine copies of the Petition for Rehearing in the above-entitled cause to the Clerk of the above Court, three copies to the State's Attorney's Appellate Prosecutor, three to the McLean County State's Attorney, and caused to be delivered by mail one copy to Appellant.

Tara Thompson

INTRODUCTION

Mr. Snow respectfully asks this Court to reconsider its decision upholding the dismissal of his post-conviction petition, motion for leave to supplement his petition, and motion for post-conviction ballistics testing. *People v. Snow*, 2012 IL App (4th) 110415. This Court rejected Mr. Snow's actual innocence claim because (1) Petitioner did not "assert any due diligence in discovering the evidence supporting [his] actual innocence claim," *Id.* at ¶¶ 22-23; (2) Jeff Pelo's testimony about not seeing anyone leave the gas station was available at trial and therefore not new as to support his actual innocence claim, *Id.* at ¶ 25; (3) Carlos Luna's affidavit does not contain new information, *Id.* at ¶ 26; and (4) and the evidence about a pattern of misconduct is not raised in the brief and is not material to Mr. Snow's case, *Id.* at ¶ 27. It rejected Mr. Snow's ineffective assistance of counsel claim under *res judicata* because Mr. Snow did not explain which of his 12 ineffective assistance of counsel claims survived *res judicata*, and because his counsel's failure to call impeachment witnesses and his counsel's alcoholism were discussed in a post-trial motion and raised on direct appeal, *Id.* at ¶¶ 31-32. The Court denied Mr. Snow's *Brady* claims because (1) Jeff Pelo's affidavit does not support a *Brady* violation because his information was disclosed in pre-trial discovery, *Id.* at ¶ 38; (2) Jody Winkler's sentencing information and evidence of Kevin Schaal's downward departure was publicly available and therefore not the subject of *Brady*, *Id.* at ¶¶ 39-40; (3) favorable considerations to Bruce Roland do not constitute a promise by the State proving a *Brady* violation, *Id.* at ¶ 41; and (4) evidence of Steve Scheel's recantation cannot be supported solely by a hearsay affidavit, *Id.* at ¶ 42. The Court denied Mr. Snow's claim about jury prejudice as speculative and refuted by the *voir dire* transcripts, *Id.* at ¶¶ 48-49. It ruled that he waived his identification claim by failing to develop his

argument, *Id.* at ¶ 52. It denied his cumulative error claim because he did not generally incorporate his prior post-conviction claims into his final amended post-conviction petition, *Id.* at ¶ 55. This Court also rejected his argument about the denial of his motion to supplement and motion for discovery because the discovery issue became moot when the lower court dismissed his petition, and because Mr. Snow did not provide analysis on either issue in his appellate brief. *Id.* at ¶¶ 58, 60. Finally, it denied his motion for ballistics testing under 725 ILCS 5/116-3 because any new evidence would not significantly advance Mr. Snow's claim of actual innocence since the State did not rely on ballistics evidence to support Mr. Snow's guilt, and because Mr. Snow's argument that ballistics testing could show that the murder weapon here was used in other gas station robberies is "wholly speculative." *Id.* at ¶ 72.

Illinois Supreme Court Rule 367(b) provides that a petition for rehearing shall "state briefly the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portion of the record and brief relied upon" and that "[r]eargument of the case shall not be made in the petition." Although Mr. Snow respectfully disagrees with this Court's ruling in its entirety, it is not his intention to merely reargue the case in this Petition. However, Mr. Snow petitions this Court for rehearing because of a few key points that were overlooked in this Court's analysis in ruling on each of Mr. Snow's claims. Mr. Snow addresses those key points below.

1. **The State, as was its burden, failed to explain how *res judicata* barred Mr. Snow's ineffective assistance of counsel claims, and indeed the doctrine does not apply here.**

In denying Mr. Snow's ineffective assistance of counsel claims, this Court relied on the doctrine of *res judicata*. First, it determined that Mr. Snow's appeal did not set forth how his claims were not barred by *res judicata* in his briefs. However, it is the State's burden to identify how Mr. Snow's ineffective assistance of counsel claims are barred, as Mr. Snow argued to this Court. (Pet. Reply Br. at 13.) *Res judicata* is an affirmative defense, such that the party raising the issue bears the burden of showing how *res judicata* applies. *People v. Barker*, 403 Ill. App.3d 515, 523 (1st Dist. 2010). Neither in the court below, nor in its briefs to this Court, did the State ever articulate how *res judicata* barred Petitioner's claims, except to say that Mr. Snow had received a post-trial hearing in which it concluded his trial counsel was "prepared and not impaired and that their performance was 'excellent.'" (Resp. Br. at 28.) The court below, having heard no evidence from the State on this topic was not in a position to determine that *res judicata* applied.

Respectfully, the burden before this Court fell on Respondent, not Mr. Snow, to make a showing of *res judicata*, particularly since review before this Court is *de novo*. Respondent failed to articulate how any of these claims are barred by the doctrine, and as such, it was its arguments which were deficient before this Court. Mr. Snow had no reason to further develop this issue in his briefs because there was no claim by the State as to specifically how *res judicata* applied, and no indication from the lower court's opinion about how these claims had already been resolved. This is not a basis for this

Court to deny Mr. Snow's meritorious and serious claims about the performance of his counsel at trial. And this analysis improperly puts the burden on Mr. Snow to disprove an affirmative defense that the State never articulated.

Setting this aside, under the evidence and argument presented to this Court, *res judicata* clearly does not apply to these claims on the record before this Court. First, as Petitioner argued, and as the State did not address, People v. Coleman, 391 Ill. App.3d 963, 975 (4th Dist. 2009) and the cases cited therein explain that post-conviction proceedings are the best venue for addressing ineffective assistance of counsel issues that involve attorney performance. (Pet. Br. at 43.) Analysis of these claims requires an examination of evidence outside the record, as do all of Mr. Snow's ineffective assistance of counsel claims here. The State presented no evidence and failed to dispute that Mr. Snow's claims on their face concern evidence outside the record at post-trial motions or on direct appeal. Mr. Snow's ineffective assistance of counsel claim concerning Jeffery Pelo hinges on evidence and testimony from Mr. Pelo's affidavit and from other witnesses, evidence which is outside the record and could not have been developed earlier. (Pet. Br. at 15-16.) Evidence about what Thomas Sanders said at a separate proceeding was also outside the record and could not have been fully presented below. (Pet. Br. at 39.) Evidence about Steve Scheel's reasons for testifying falsely also comes from a new affidavit that was not available at post-trial proceedings. (Pet. Br. at 20.) Evidence about Randall Howard's information from the jury came from Howard's new affidavit, which was clearly not part of the record below. (Pet. Br. at 39.) Evidence

about counsel's failure to investigate Karen Strong comes from new affidavits. (Pet. Br. at 21.) Evidence about deals to witnesses came from newly-discovered evidence about deals those witnesses received. (Pet. Br. at 20, 21-22.) Evidence about Dawn Roberts' testimony comes from a new affidavit from the witness. (Pet. Br. at 39.) Evidence about the victim's mother contacting Danny Martinez came from a new affidavit. (Pet. Br. at 40.)

The State did allude to a post-trial hearing held on Mr. Snow's allegations of attorney ineffectiveness. As the State's brief citation indicates, however, the post-trial hearing, held on April 5, 2001, was a hearing on Mr. Snow's *pro se* motion to discharge his counsel. (R. Vol. XXXII, 41-141.) It was not a post-trial motion arguing he receive a new trial because of ineffective assistance of counsel. At the hearing, the trial judge inquired about various witnesses Mr. Snow argued his counsel should have called, Mr. Snow's trial counsel on the record explained their strategic reasons for not calling those witnesses, Mr. Snow made arguments as a *pro se* person on the record, and the court made a ruling based solely on that record as to whether Mr. Snow's counsel should be discharged. (*Id.*) The witnesses Mr. Snow claimed his counsel should have called were not the witnesses at issue in this post-conviction petition. This hearing was not a full and fair opportunity to litigate issues of ineffective assistance of counsel. It was not an opportunity for Mr. Snow to present affidavits or testimony from those witnesses. It came while Mr. Snow was in jail for this crime and had no opportunity to review the discovery, attempt to contact witnesses, or present any evidence to support his suspicions that his counsel had been inadequate. This was not a hearing at which Mr. Snow had the

opportunity to make the claims that he has made to the lower court and this Court about the assistance of his counsel. That he received such a cursory hearing from the lower court is not a basis to now deny his post-conviction claims.

The most critical aspect of Mr. Snow's ineffective assistance of counsel claim, the trial performance of his main attorney Frank Piel, is based on new evidence about Frank Piel's significant impairment that arose, as Mr. Snow explained, during Piel's 2006 felony conviction and disbarment. (Pet. Br. at 24.) During that hearing, which occurred well after Mr. Snow's trial, significant evidence of his counsel's impairment was presented, both from Mr. Piel himself, from medical experts, and from those who knew Mr. Piel. (Id. at 24-27.) That included specific evidence that Mr. Piel began treatment for depression in October of 2000, and that he was drinking heavily during this time period and suffered from diagnosed mental health problems. (Id. at 25.) This is clearly evidence which could not have been presented at trial because it was developed after Mr. Snow's direct appeal was concluded.

2. Mr. Snow is entitled to an evidentiary hearing on his actual innocence claim.

This Court indicated several grounds for denying Mr. Snow's actual innocence claim, but it also ruled globally that this claim failed because Mr. Snow had not shown that he exercised due diligence in presenting his claims, and because, "[o]n its face, most of defendant's supporting evidence would have been available at defendant's trial or direct appeal with the exercise of due diligence." *Snow*, 2012 IL App (4th) 110415 at ¶¶ 21-22. Respectfully, this is a misstatement of fact and of law.

The most important aspect of Mr. Snow's actual innocence claim where this is an issue is with respect to the affidavit of Jeff Pelo. This Court's conclusion about Mr. Pelo's affidavit is that it was available at trial because it is clear from discovery in the case that he never saw anyone leave the gas station, and that if called to testify he would have testified accordingly. This is a misstatement of Mr. Pelo's affidavit, and reflects a misunderstanding of the importance of his affidavit.

As Mr. Snow argued in his brief, at trial Mr. Pelo testified that he saw Danny Martinez in the gas station parking lot, and it is of course true that Mr. Pelo did not testify that he saw anyone else, much less Jamie Snow, come out of the gas station. However, the timeline of events presented at trial never definitively explained that Mr. Pelo would have necessarily seen the person coming out of the gas station. It left open the possibility that Mr. Martinez could have seen someone coming out without Mr. Pelo seeing that person. What Mr. Pelo's affidavit makes clear is that he had a clear view of the gas station at all times and never saw anyone come out. This is evidence not on the record that makes a critical difference, because it impeaches the Danny Martinez, the State's critical witness. (Pet. Br. at 32-33.) What is important about this evidence is not that Mr. Pelo never saw anyone leave, but that Danny Martinez absolutely could not have seen anyone leave. That is an important distinction that this Court's opinion ignores.

Further, though, the Court's analysis of Mr. Pelo's affidavit explains why its analysis of Mr. Snow's ineffective assistance of counsel claim with respect to Mr. Pelo's testimony is mistaken. Mr. Pelo's affidavit provides a new account of what he saw that night. It provides important new information. If this Court concludes that Mr. Snow's

counsel could have asked Mr. Pelo about this, then his counsel was ineffective for not doing so, as Mr. Snow argued in the alternative in making his ineffective assistance of counsel claim. (Pet. Br. at 38-39.) The two claims are two sides of the same coin. So even if this Court believes somehow Mr. Snow's actual innocence claim fails, then it should find that his ineffective assistance of counsel claim on this issue survives.

Mr. Snow argued that because some of the evidence of his actual innocence concerns recantation affidavits from trial witnesses – the affidavits of Dan Tanasz, Dawn Roberts, Ronnie Wright, and the affidavit from Larry Biela concerning Steve Scheel—such evidence is treated as newly-discovered under *People v. Barnslater*, 373 Ill.App.3d 512, 524, 869 N.E.2d 293, 304, (1st Dist. 2007). This Court's opinion held, citing *Barnslater*, that Mr. Snow had the obligation in his appellate brief to explain how the information in these affidavits – namely that these witnesses lied – could not have been discovered earlier through the exercise of due diligence. Respectfully, this is a misstatement of *Barnslater*. In that case, the petitioner pled guilty but later presented a recantation affidavit from the victim in the case. *Id.* at 513. The Court ruled that the affidavit was not newly discovered because the petitioner had not shown that, had he not gone to trial, he could not have presented other evidence demonstrating that the victim was lying. *Id.* at 524. In *Barnslater*, though, there was obvious evidence pointing to the victim having been lying – the testimony of his co-defendants who could have testified at a trial to that fact. *Id.* In Mr. Snow's case, there is no such evidence to refute. This Court would apply *Barnslater* to require Mr. Snow to dispute a vast negative, at the pleadings stage, about the affidavits of these witnesses and his opportunity to present

them earlier. This is an impossible task that *Barnslater* does not require, particularly at the motion to dismiss stage of proceedings.

And again, if this Court believes that counsel could have obtained these affidavits earlier, the only possible earlier period they could have been used would have been at trial. And if counsel did not use information that would have discredited these witnesses, then counsel was ineffective in doing so, which is also a claim that Mr. Snow made. (Pet. Br. at 39.) As with Mr. Pelo, these claims are alternatively pled by Mr. Snow, and determining which is true, and what the evidence of the discovery really is, requires an evidentiary hearing to resolve.

3. Mr. Snow deserves an evidentiary hearing on his Brady claim.

This Court should reconsider its ruling that Mr. Snow failed to adequately present his claims under *Brady v. Maryland*, specifically its ruling that Mr. Snow's counsel could have presented evidence of witnesses receiving a deal using publicly-available information from their sentencing. This Court's opinion also did not address evidence from Dennis Hendricks that Bill Moffit "got a time cut" in exchange for his testimony. (Pet. Br. at 19.) There is no evidence on the record that Mr. Snow had this evidence available to him.

Even setting that aside, this ruling misunderstands that this is evidence of such a deal, but not an admission from the State of such a deal, which is qualitatively different. Evidence from sentencing of these witnesses suggests that these witnesses were given a deal – they received lighter sentences than they otherwise would have received, they indicated on the record that they had been cooperating with the State, and third parties

averred that these witnesses later bragged about receiving deals. (Pet. Br. at 44-45.) While counsel could have used this evidence to try to impeach those witnesses, suggesting that a deal had been made, which is the subject of Mr. Snow's ineffective assistance of counsel claim that this Court dismissed (Pet. Br. at 39), that counsel could have searched public records to find impeaching suggestion of deal is different than the State admitting that something of value was given in exchange for a witness's testimony. For this reason, Mr. Snow made his *Brady* claim as best he could given the evidence he was able to find and requested discovery to be able to further prove his claims. (Pet. Reply Br. at 18.) Whether or not an actual deal existed should be the subject of an evidentiary hearing, and should be an issue that counsel is allowed further discovery to prove up, as counsel requested.

4. Mr. Snow is entitled to ballistics testing.

This Court denied Mr. Snow ballistics testing on the basis that his argument about how those results would be material was "speculative" and that because this was not a case in which ballistics evidence convicted him, such evidence would not be materially relevant to proving his innocence. Both of these rulings are a misstatement of the law on ballistics testing.

First, as Mr. Snow argued below, it is not the likelihood that testing will lead to meaningful results that matters under the statute, but merely the effect such results, if they are obtained, could have to his assertion of actual innocence. 725 ILCS 5/116-3(c)(1). Therefore, the statute does not require that Mr. Snow be able to show that he knows that ballistics testing will connect the gun used to kill Bill Little to another specific

crime. This Court's opinion in that regard places a heavier burden on Mr. Snow than the statute requires. Mr. Snow need only show that the testing he is seeking, running the ballistics in this case through the IBIS database to look for potential matches, could hit to a gun used in another case.

Further, Mr. Snow's case is not *Savory*. He is not the defendant, convicted of rape, who merely wants to argue that one tangential piece of evidence appearing to connect him to the crime does not do so, despite the other evidence against him. Instead, Mr. Snow wants to use the capabilities of the ballistics testing database to find the actual perpetrator of this crime. Unlike *Savory*, if he is successful in this endeavor this will not leave the rest of the evidence unchanged. Instead, it will point to critical additional evidence of the actual perpetrator of the crime and of Mr. Snow's innocence. Mr. Snow's case is precisely the kind of case the ballistics testing statute was designed to assist.

CONCLUSION

For the above reasons, Mr. Snow respectfully requests that this Court reconsider its ruling, overturn the lower court's decision dismissing Mr. Snow's petition, and remand this case back to the lower court for further proceedings.

Respectfully submitted,

_____

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CERTIFICATE OF COMPLIANCE

I, Tara Thompson, certify that this brief conforms to the requirements of Supreme Court Rules 341(a) and (b) and 367(a). The length of this brief, excluding the appendix is 12 pages.

Tara Thompson

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